

JUDICIAL COUNCIL OF CALIFORNIA

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INVITATION TO COMMENT

SP18-21

Title

Appellate Procedure: Appeals from Superior Court Decisions in Death Penalty–Related Habeas Corpus Proceedings

Action Requested

Review and submit comments by Monday, November 19, 2018

Proposed Rules, Forms, Standards, or Statutes
Adopt Cal. Rules of Court, rules 8.390 – 8.398; amend rule 8.388; and adopt form HC-200

Proposed Effective Date

April 25, 2019

Proposed by

Proposition 66 Rules Working Group
Hon. Dennis M. Perluss, Chair

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Executive Summary and Origin

The Proposition 66 Rules Working Group is proposing amendments to an existing rule relating to appeals from decisions in habeas corpus proceedings and the adoption of several new rules and a form specifically addressing appeals from superior court decisions on death penalty–related habeas corpus petitions. These proposed rules and the form are intended to partially fulfill the Judicial Council’s rule-making obligations under Proposition 66 by establishing procedures for this new type of appeal.

Background

Proposition 66

On November 8, 2016, the California electorate approved Proposition 66, the Death Penalty Reform and Savings Act of 2016. This act made a variety of changes to the statutes relating to review of death penalty (capital) cases in the California courts. Among other things, the act made several changes to the procedures for hearing death penalty–related habeas corpus petitions, including that such petitions are generally to be heard in the superior court. The act also provided for an appeal to the Court of Appeal by either party from a superior court decision in such a

The proposals have not been approved by the Judicial Council and are not intended to represent the views of the council, its Rules and Projects Committee, or its Policy Coordination and Liaison Committee. These proposals are circulated for comment purposes only.

habeas proceeding as the only mechanism for seeking relief from the such a decision. New [Penal Code section 1509.1](#) adopted as part of the act does the following, among other things:

- Authorizes either party to appeal the decision of a superior court on an initial habeas corpus petition in a capital case;
- Sets the time for filing the notice of appeal in these cases;
- Limits the issues that can be considered by the Court of Appeal in such an appeal to:
 - Claims raised in the superior court; and
 - Claims of ineffective assistance of trial counsel that were not raised in the habeas corpus petition.
- Authorizes the People to appeal a decision granting relief on a successive habeas corpus petition;
- Provides that the petitioner may only appeal a denial of relief on a successive habeas corpus petition if either the superior court or the Court of Appeal issues a certificate of appealability;
- Limits the circumstances in which a certificate of appealability may be issued to when the petitioner has shown both:
 - A substantial claim of relief; and
 - A substantial claim of actual innocence or ineligibility for the death penalty;
- Sets the time for the courts to grant or deny a certificate of appealability;
- Limits the claims that can be considered by the Court of Appeal in appeals by petitioners in successive petition cases to those identified in the certificate of appealability or added by the Court of Appeal by a specified deadline.

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

Preexisting law relating to appeals from superior court habeas corpus decisions

Prior to the enactment of Proposition 66, [Penal Code section 1506](#) authorized appeals by the People to the Court of Appeal of a superior court decision granting relief in a habeas corpus

proceeding. Section 1506 provided that in a capital case, the appeal must be made to the Supreme Court. No appeal was permitted when a habeas corpus petition was denied, but a petitioner could file another habeas corpus petition in a higher court. In *Briggs, supra*, 3 Cal.5th 808, the Supreme Court concluded that Proposition 66 implicitly repealed this provision in section 1506.

[Rule 8.388](#) addresses the procedures for People’s appeals of superior court decisions granting relief in non-capital habeas corpus proceedings under Penal Code section 1506. This rule generally provides that, with the exception of the contents of the record on appeal, the general rules relating to appeals in felony cases, rules 8.304–8.368, apply to these appeals of superior court habeas corpus decisions.

The Proposal

This proposal is intended to help fulfill the Judicial Council’s rule-making obligations under Proposition 66 by proposing rules and a form establishing procedures for appeals under new Penal Code section 1509.1 from superior court decisions on death penalty–related habeas corpus petitions. The proposed rules adopt the overall approach embodied in current rule 8.388, generally applying many of the rules applicable to felony appeals. However, the proposed rules also include many distinct provisions that reflect the unique requirements of Penal Code section 1509.1, including special requirements for appeals from decisions regarding successive habeas corpus petitions and appeals that include claims of ineffective assistance of trial counsel not raised in the superior court. While, as a general matter, the California Rules of Court typically do not repeat statutory provisions, in these proposed rules some statutory requirements are repeated to provide context for related rule provisions.

Within the proposed rules, there are drafters’ notes in blue text. These notes identify the source for some of the language in the proposed rules and provide other information relevant to the proposed rules. These notes are published with this proposal to help readers better understand the proposal and will not be included in any rules ultimately adopted by the Judicial Council.

Qualifications of counsel appointed by the Court of Appeal

Proposed new rule 8.391 would specify the qualifications of counsel appointed by the Court of Appeal to represent an indigent person not represented by the State Public Defender in an appeal under Penal Code section 1509.1. Because these appeals will involve considering issues raised and potentially not raised in a capital habeas corpus proceeding, the working group’s view is that it is important that such an attorney be fully conversant in capital habeas corpus representation. The working group is therefore proposing that an attorney must meet the minimum qualifications that the working group is proposing for attorneys appointed to represent a person in a death penalty–related habeas corpus proceeding (Please see proposed rule 8.652 as circulated for comment in <http://www.courts.ca.gov/documents/SP18-12.pdf>). The working group would particularly appreciate comments regarding whether these are the appropriate qualifications for appointed counsel in these appeals.

Notice of appeal

Penal Code section 1509.1 provides that an appeal from a superior court decision on an initial habeas corpus petition “shall be taken by filing a notice of appeal in the superior court within 30 days of the court’s decision granting or denying the habeas petition.” Similarly, this section provides that an appeal of a superior court decision on a successive habeas corpus petition “shall be taken by filing a notice of appeal in the superior court within 30 days of the court’s decision.” Proposed rule 8.393 implements these statutory provisions by providing that a notice of appeal must be filed within 30 days after the making of the order being appealed. This proposed rule would apply to appeals by both the petitioner and the People and, unlike under rule 8.308(b), the rule does not provide additional time for the filing of a cross-appeal because Penal Code section 1509.1 does not appear to permit such an extension of the time to appeal. The working group would appreciate comments on whether it would be helpful to include an advisory comment to this rule that highlights that all appeals must be filed within the 30-day time period.

Certificate of appealability

As noted above, Penal Code section 1509.1 provides that the petitioner may only appeal a denial of relief on a successive habeas corpus petition if either the superior court or the Court of Appeal issues a certificate of appealability. Subdivision (c) of this code section contains detailed requirements regarding these certificates, including that:

- The superior court must grant or deny a certificate of appealability concurrently with a decision denying relief on the petition.
- The Court of Appeal must grant or deny a request for a certificate of appealability within 10 days of an application for a certificate.
- If a certificate is issued, the substantial claim for relief must be indicated in the certificate; and
- The jurisdiction of the Court of Appeal is limited to the claims identified in the certificate and any additional claims added by the Court of Appeal within 60 days of the notice of appeal.

Proposed new rule 8.392(b) contains provisions designed to implement these requirements. Among other things, this provision requires that:

- The appellant’s notice of appeal from a superior court decision regarding a capital habeas corpus petition indicate:
 - If the appeal is from a superior court decision denying relief on a successive petition; and
 - Whether the superior court granted or denied a certificate of appealability.
- If the superior court denied a certificate of appealability, the petitioner must attach to the notice of appeal a request to the Court of Appeal for a certificate of appealability that

identifies the petitioner’s claim or claims for relief and explains how the requirements of Penal Code section 1509(d) have been met; and

- Any certificate of appealability issued by a court must identify the substantial claim for relief shown by the petitioner.

Proposed new *Petitioner's Notice of Appeal - Death Penalty–Related Habeas Corpus Decision* (form HC-200) is designed to help implement several of these requirements. This proposed form includes a notice that, if a certificate of appealability was not issued by the superior court, the appellant must submit a request to the Court of Appeal for a certificate. In addition, the second page of the form can be used to make such a request.

Record on appeal

Proposed new rule 8.395 addresses the record in these appeals.

Contents of the record

Subdivision (a) of proposed new rule 8.395 addresses the contents of the record on appeal. It is modeled in large part on rule 8.388(b), relating to the contents of the record in appeals by the People under Penal Code section 1506 from superior court decisions granting habeas corpus relief. The language from rule 8.388(b) has been modified to reflect the fact that, under Penal Code section 1509.1, appeals from superior court decisions on habeas corpus petitions in capital cases may be taken by either the People from orders granting relief or by the petitioner from orders denying relief, and that the denial being appealed may have occurred with or without issuance of an order to show cause. Thus, the proposal requires inclusion in the record of any order to show cause, return, denial, or traverse. In addition, the language from rule 8.388(b) has been modified to specifically require that the record include any informal response to the petition, any statement of decision required by Penal Code section 1509(f), the supporting documents accompanying the habeas corpus petition filed in the superior court, and any certificate of appealability required under Penal Code section 1509.1.

Stipulations for limited record

Subdivision (b) of proposed new rule 8.395 is modeled on rule 8.320(f), relating to stipulations for limited records in non-capital felony appeals. The working group would particularly appreciate comments about whether, as a practical matter, such stipulations are likely to be used or helpful in appeals under Penal Code section 1509.1, and thus whether to include this provision in the rule.

When record preparation begins

Subdivisions (c) and (d) of proposed new rule 8.395 are modeled on rule 8.336, relating to the preparation of the record in non-capital felony appeals. Similar to the way felony cases in which a certificate of probable cause is required are handled under rule 8.336, for appeals from a superior court decision denying relief on a successive habeas corpus petition when the superior court did not issue a certificate of appealability, the proposed rule would provide that preparation

of the transcripts would not begin unless and until the superior court clerk receives a copy of a certificate of appealability issued by the Court of Appeal. However, unlike under rule 8.336, the proposed rule would generally provide that in other appeals under Penal Code section 1509.1, the superior court would not begin preparing the record on appeal until after a notice of appeal has been filed. Under rule 8.336, in contrast, in felony cases where there is a trial on the merits, preparation of the record generally begins immediately after a verdict or finding of guilt of a felony is announced, the superior court does not wait for the filing of a notice of appeal. The working group considered that waiting until the notice of appeal is filed would provide time for the parties to consider whether to stipulate to a limited record on appeal. The working group would particularly appreciate comments on when record preparation should begin in these cases.

When record preparation must be completed

The timeframe for completion of the clerk's and reporter's transcripts in subdivisions (c) and (d) of proposed new rule 8.395 – within 20 days after the notice of appeal is filed – and the provision in subdivision (e) regarding extensions of this deadline are also modeled on rule 8.336. In addition, the draft of the proposed rule incorporates language from rule 8.616(d)(2), relating to preparation of the record for the automatic appeal in capital cases, presuming good cause for extension of time for the clerk and court reporters to prepare the initial trial record when the record is over 10,000 pages. The working group would particularly appreciate comments about whether this timeframe and the extension provision are appropriate in these appeals. The working group would also appreciate comments on whether extensions of the time for preparing the record should be automatically provided when the record is over 10,000 pages, similar to the automatic extensions for time for counsel to review the record in capital appeals under amendments to rules 8.619 and 8.622 approved by the Judicial Council in September 2018.

Briefs

Proposed rule 8.396 addresses briefs in these appeals. Among other things, the rule contains provisions addressing the limitations on the issues that can be raised under Penal Code section 1509.1 in appeals from decisions regarding successive petitions. The rule's provisions regarding the timeframes for filing briefs and their length are modeled on those in rule 8.630(b) and (c), relating to briefs in capital appeals in the Supreme Court. The working group would particularly appreciate input about whether these timeframes and length limits are appropriate for these appeals, including appeals that raise a claim of ineffective assistance of trial counsel that was not raised in the habeas corpus petition.

Claims of ineffective assistance of trial counsel not raised in the superior court

As noted above, Penal Code section 1509.1 provides that an appeal from a superior court decision on an initial capital habeas corpus petition may include a claim of ineffective assistance of trial counsel that was not raised in the habeas corpus petition. Proposed rule 8.397 would establish procedures for making and handling such claims. Among other things, this rule would require that such claims be placed in a separate part of the appellant's brief and be clearly identified as addressing a claim of ineffective assistance of trial counsel that was not raised in the habeas corpus petition.

Because these are claims that were not raised in the superior court proceedings, there will be no record of superior court filings, hearings, or action relating to these claims. The proposed rule would therefore require the appellant making such a claim and the respondent to provide the court with a proffer containing relevant material not in the record on appeal or of which the court has taken judicial notice. The working group would particularly appreciate comments about the content and format of this proposed proffer.

The rule also addresses the circumstances in which the Court of Appeal must order an evidentiary hearing on such a claim. The language of this provision is modeled on language from [rule 8.386\(f\)](#) relating to proceedings if the return in a non-capital habeas corpus proceeding is ordered to be filed in the reviewing court. The rule provides several options for how such an evidentiary hearing may take place, including through a limited remand to the superior court, as provided in Penal Code section 1509.1. The rule also permits, but does not require, that the Court of Appeal stay the proceedings on other claims raised in the appeal if it orders such a limited remand.

Alternatives Considered

The committee considered a number of alternative approaches to specific issues while it was developing these proposed rules and form.

Form for certificate of appealability

The working group considered whether to propose not only an application for a certificate of appealability, but also a form that the Court of Appeal could use to issue such a certificate. Some working group members thought that certificates of appealability would have to be so individualized to the case that a form might not be useful. It was also noted that there is no Judicial Council form for the parallel certificate of probable cause required in some non-capital felony appeals. Other members thought that a form might be helpful to remind the court of the elements that need to be addressed in any such certificate. The working group would particularly appreciate comments about whether a form for the certificate of appealability itself should be proposed.

Time for beginning preparation of the record on appeal

The working group considered whether to provide that preparation of the record should generally begin immediately upon decision by the superior court in a capital habeas corpus proceeding. The working group ultimately decided to propose that it begin when a notice of appeal is filed, in order to provide the parties with time to consider whether to stipulate to a limited record on appeal.

Access to habeas corpus counsel's file

The working group discussed the fact that counsel representing a person in an appeal under Penal Code section 1509.1 will need to review the file of counsel that represented the person in the habeas corpus proceeding in the superior court. The working group would appreciate comments

on whether the rules should require that habeas corpus consult transmit their file to appellate counsel when appellate counsel is appointed.

Transfer of appeals

The working group considered whether to propose a rule addressing possible transfer by the Supreme Court of an appeal of a superior court decision in habeas corpus proceeding in a capital case from one Court of Appeal district to another district. The working group ultimately concluded that rules on this topic were not necessary, as [Article 6, section 12](#) of the California Constitution and [Rule 10.1000](#) already address transfer by the Supreme Court from one Court of Appeal district to another.

Fiscal and Operational Impacts

The changes made by Proposition 66 to the procedures for review of death penalty cases, particularly making the superior courts generally responsible for hearing habeas corpus proceedings in these cases and providing for appeals by either party of superior court habeas corpus decisions, will likely have substantial costs, operational impacts, and implementation requirements for courts and justice system partners. These proposed rule changes and forms are likely to require some initial training for judicial officers and court staff.

Request for Specific Comments

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

- Does the proposal appropriately address the stated purpose?
- Are the minimum qualifications that the working group is proposing for attorneys appointed to represent a person in a death penalty–related habeas corpus proceeding in the superior court also the appropriate qualifications for counsel appointed to represent such person in appeals from superior court decisions in such proceedings under Penal Code section 1509.1?
- Should the Attorney General and/or district attorney receive notice if a request for a notice of appealability is denied by the Court of Appeal?
- Would be helpful to include an advisory comment to rule 8.393 highlighting that all appeals must be filed within the statutory 30-day time period?
- Are stipulations to a limited record on appeal likely to be used or helpful in these appeals and should the rules include a provision addressing such stipulations?
- When should preparation of the record begin for these appeals?
- Is 20 days from the filing of the notice of appeal an appropriate timeframe for completion of the clerk’s and reporter’s transcripts in these appeals?
- Is the proposed provision addressing extensions of time to complete the record appropriate in these appeals?

- Should the rules require that habeas corpus counsel transmit their file to appellate counsel when appellate counsel is appointed?
- Are the proposed timeframes for filing briefs in these appeals and the proposed limits on the length of the briefs in these appeals appropriate, including in appeals that raise a claim of ineffective assistance of trial counsel that was not raised in the habeas corpus petition?
- Are the proposed rule provisions relating to the content and format of a proffer in appeals that raise a claim of ineffective assistance of trial counsel that was not raised in the habeas corpus petition appropriate?

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

- Would the proposal provide cost savings? If so please quantify.
- What would the implementation requirements be for courts? For example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems.
- Would two months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?
- How well would this proposal work in courts of different sizes?

Attachments and Links

- Cal. Rules of Court, rules 8.388 and 8.390 – 8.398 at pages 10-29
- Form HC-200, at pages 30-31
- Link A: [Ballot description and arguments for and against Proposition 66 and text of proposition from November 2016 Official Voter Information Guide, beginning on pages 104 and 212, respectively, of linked document](#)

Rule 8.388 of the California Rules of Court would be amended, and rules 8.390–8.398 would be adopted, effective April 25, 2019, to read:

1 **Title 8. Appellate Rules**

2
3 **Division 1. Rules Relating to the Supreme Court and Courts of Appeal**

4
5 **Chapter 4. Habeas Corpus Appeals and Writs**

6
7 **DRAFTERS' NOTES ON ARTICLE HEADINGS AND RULE 8.388:** The proposed
8 addition of the Article 1 and Article 2 headings and the amendment to rule 8.388
9 are meant to clarify that current rules 8.380–8.388 do not apply to habeas corpus
10 proceedings related to a judgment of death.

11
12 **Article 1. Habeas Corpus Proceedings Not Related to Judgment of Death**

13
14 **Rule 8.380. Petition for writ of habeas corpus filed by petitioner not represented by**
15 **an attorney * * ***

16
17 **Rule 8.384. Petition for writ of habeas corpus filed by an attorney for a party * ****

18
19 **Rule 8.385. Proceedings after the petition is filed * * ***

20
21 **Rule 8.386. Proceedings if the return is ordered to be filed in the reviewing court**
22 *** * ***

23
24 **Rule 8.387. Decision in habeas corpus proceedings * * ***

25
26 **Rule 8.388. Appeal from order granting relief by writ of habeas corpus**

27
28 **(a) Application**

29
30 Except as otherwise provided in this rule, rules 8.304–8.368 and 8.508 govern
31 appeals under Penal Code section 1506 or 1507 from orders granting all or part of
32 the relief sought in a petition for writ of habeas corpus. This rule does not apply to
33 appeals under Penal Code section 1509.1 from superior court decisions in death
34 penalty–related habeas corpus proceedings.

35
36 **(b) * * ***

1 **Article 2. Appeals from Superior Court Decisions in Death Penalty–Related Habeas**
2 **Corpus Proceedings**

3 DRAFTERS' NOTES ON PROPOSED RULE 8.390: This proposed new rule is
4 modeled on [rule 8.388](#). As in 8.388, subdivision (b) would make some of the
5 rules relating to general felony appeals applicable to appeals from superior court
6 decisions in death penalty–related habeas corpus proceedings. However, this
7 proposed rule would make fewer of those felony appeal rules applicable. Not
8 made applicable are:

- 9 • [Rule 8.304. Filing the appeal; certificate of probable cause](#)
- 10 • [Rule 8.308. Time to appeal](#)
- 11 • [Rule 8.312. Stay of execution and release on appeal](#)
- 12 • [Rule 8.320. Normal record; exhibits](#)
- 13 • [Rule 8.324. Application in superior court for addition to normal record](#)
- 14 • [Rule 8.360. Briefs by parties and amici curiae](#)
- 15 • [Rule 8.361. Certificate of interested entities or persons](#)

16 What would be made applicable, either in whole or in part, and therefore that are
17 only partially addressed or not addressed at all in the proposed new rules below,
18 are:

- 19 • [Rule 8.300. Appointment of appellate counsel by the Court of Appeal, with the](#)
20 [exception that the qualifications for counsel are set by proposed rule 8.652,](#)
21 [rather than by the Appellate Indigent Defense Oversight Advisory Committee.](#)
- 22 • [Rule 8.316. Abandoning the appeal](#)
- 23 • [Rule 8.332. Juror-identifying information](#)
- 24 • [Rule 8.336. Preparing, certifying, and sending the record \(note that this topic](#)
25 [is partially addressed in proposed rule 8.394 below\)](#)
- 26 • [Rule 8.340. Augmenting or correcting the record in the Court of Appeal](#)
- 27 • [Rule 8.344. Agreed statement](#)
- 28 • [Rule 8.346. Settled statement](#)
- 29 • [Rule 8.366. Hearing and decision in the Court of Appeal](#)
- 30 • [Rule 8.368. Hearing and decision in the Supreme Court](#)

31
32 **Rule 8.390. Application**

33
34 **(a) Application**

35
36 The rules in this article apply only to appeals under Penal Code section 1509.1
37 from superior court decisions in death penalty–related habeas corpus proceedings.
38

39 **(b) General application of rules for criminal appeals**
40

1 Except as otherwise provided in this article, rules 8.300, 8.316, 8.332–8.346, and
2 8.366–8.368 govern appeals subject to the rules in this article.

3
4
5 DRAFTERS' NOTES ON PROPOSED NEW RULE 8.391: This proposed rule
6 would clarify that appointed counsel in appeals under this article must meet the
7 same minimum qualifications as counsel appointed to represent a petitioner in a
8 capital habeas corpus proceeding.

9
10 **Rule 8.391. Qualifications of counsel appointed by the Court of Appeal**

11
12 To be appointed by the Court of Appeal to represent an indigent person not represented
13 by the State Public Defender in an appeal under this article, an attorney must meet the
14 minimum qualifications established by rule 8.652 for attorneys to be appointed to
15 represent a person in a death penalty–related habeas corpus proceeding.

16
17
18 DRAFTERS' NOTES ON PROPOSED NEW RULE 8.392: This proposed new
19 rule addresses notices of appeal and certificates of appealability.

20
21 Subdivisions (a) and (c) of this proposed new rule are modeled on [rule 8.304\(a\)](#),
22 relating to the notice of appeal and notice to court reporters of the filing of an
23 appeal in non-capital felony appeals. Paragraph (c)(2) provides that if the
24 superior court did not issue a certificate of appealability, the clerk must not send
25 the notification of the filing of a notice of appeal to the court reporter or reporters
26 unless and until the clerk receives a copy of a certificate of appealability issued
27 by the Court of Appeal. As under [rule 8.304](#), this is designed to prevent the court
28 reporters from beginning preparation of the reporter's transcript until it is clear
29 that the appeal is moving forward.

30
31 Subdivision (b) is intended to implement the provisions of [Penal Code section](#)
32 [1509.1\(c\)](#) relating to certificates of appealability in petitioners' appeals from a
33 decision denying relief on a successive petition for a writ of habeas corpus.
34 Paragraph (b)(1) of the proposed rule restates the following language from this
35 statutory provision:

36
37 The petitioner may appeal the decision of the superior court denying relief
38 on a successive petition only if the superior court or the court of appeal
39 grants a certificate of appealability.

40
41 The provision in (b)(3) requiring that a petitioner's request for the Court of Appeal
42 to issue a certificate of appealability "must identify the petitioner's claim or claims
43 for relief and explain how the requirements of Penal Code section 1509(d) have

1 been met” is modeled in part on the requirement in [Penal Code section 1237.5](#)
2 that defendants seeking a certificate of probable cause to appeal from a felony
3 judgment file a statement “executed under oath or penalty of perjury showing
4 reasonable constitutional, jurisdictional, or other grounds” for the appeal.

5
6 Paragraph (b)(4) providing that the People must not file an answer to a request
7 for a certificate of appealability unless the court requests an answer is modeled
8 on [rule 8.268\(b\)\(2\)](#), relating to answers to petitions for rehearing.

9
10 The proposed requirement in paragraph (b)(5) that any certificate of appealability
11 issued by a court “must identify the substantial claim for relief shown by the
12 petitioner” is based on the following two provisions in [Penal Code section](#)
13 [1509.1\(c\)](#):

14
15 A certificate of appealability may issue under this subdivision only if the
16 petitioner has shown both a substantial claim for relief, which shall be
17 indicated in the certificate, . . .

18
19 The jurisdiction of the court of appeal is limited to the claims identified in the
20 certificate and any additional claims added by the court of appeal . . .

21
22 Both of these provisions indicate that the claims need to be in any certificate
23 issued by a court.

24
25 Paragraph (b)(6) is modeled on [rule 8.304\(b\)\(3\)](#), relating to the handling of a
26 notice of appeal in non-capital felony appeals when no certificate of probable
27 cause is issued.

28
29 The timeframe for notification by the clerk of the filing of an appeal in paragraph
30 (c)(1) is modeled on language from rule [8.616\(a\)\(1\)](#), relating to clerk’s notices to
31 court reporters to begin preparation of transcripts in capital cases.

32
33 **Rule 8.392. Filing the appeal; certificate of appealability**

34
35 **(a) Notice of appeal**

36
37 To appeal from a superior court decision in a death penalty–related habeas corpus
38 proceeding, the petitioner or the People must serve and file a notice of appeal in
39 that superior court. To appeal a decision denying relief on a successive habeas
40 corpus petition, the petitioner must also comply with (b).

41
42 **(b) Appeal of decision denying relief on a successive habeas corpus petition**

- 1 (1) The petitioner may appeal the decision of the superior court denying relief on
2 a successive death penalty–related habeas corpus petition only if the superior
3 court or the Court of Appeal grants a certificate of appealability under Penal
4 Code section 1509.1(c).
5
6 (2) The petitioner must identify in the notice of appeal that the appeal is from a
7 superior court decision denying relief on a successive petition and indicate
8 whether the superior court granted or denied a certificate of appealability.
9
10 (3) If the superior court denied a certificate of appealability, the petitioner must
11 attach to the notice of appeal a request to the Court of Appeal for a certificate
12 of appealability. The request must identify the petitioner’s claim or claims for
13 relief and explain how the requirements of Penal Code section 1509(d) have
14 been met.
15
16 (4) The People must not file an answer to a request for a certificate of
17 appealability unless the court requests an answer. The clerk must promptly
18 send to the parties copies of any order requesting an answer and immediately
19 notify the parties by telephone or another expeditious method. Any answer
20 must be served and filed within five days after the order is filed unless the
21 court orders otherwise.
22
23 (5) If the Court of Appeal grants a certificate of appealability, the certificate must
24 identify the substantial claim(s) for relief shown by the petitioner. The Court
25 of Appeal clerk must send a copy of the certificate to the attorney for the
26 petitioner or, if unrepresented, to the petitioner, and to the district appellate
27 project, the Attorney General, the district attorney, the superior court clerk,
28 and the Supreme Court clerk.
29
30 (6) If both the superior court and the Court of Appeal deny a certificate of
31 appealability, the Court of Appeal clerk must mark the notice of appeal
32 “Inoperative,” notify the petitioner, and send a copy of the marked notice of
33 appeal to the superior court clerk, the Supreme Court clerk, and the district
34 appellate project.

35
36 **(c) Notification of the appeal**
37

- 38 (1) Except as provided in (2), when a notice of appeal is filed, the superior court
39 clerk must promptly—and no later than five days after the notice of appeal is
40 filed—send a notification of the filing to the attorney for the petitioner, the
41 Attorney General, the district attorney, the reviewing court clerk, the district
42 appellate project, the Supreme Court clerk, each court reporter, and any
43 primary reporter or reporting supervisor.

- 1
2 (2) If the petitioner is appealing from a superior court decision denying relief on
3 a successive petition and the superior court did not issue a certificate of
4 appealability, the clerk must not send the notification of the filing of a notice
5 of appeal to the court reporter or reporters unless and until the clerk receives
6 a copy of a certificate of appealability issued by the Court of Appeal under
7 (b)(5).
8
9 (3) The notification must show the date it was sent, the number and title of the
10 case, and the dates the notice of appeal was filed and any certificate of
11 appealability was issued. If the information is available, the notification must
12 also include:
13
14 (A) The name, address, telephone number, e-mail address, and California
15 State Bar number of each attorney of record in the case; and
16
17 (B) The name of the party each attorney represented in the superior court.
18
19 (4) The notification to the reviewing court clerk must also include a copy of the
20 notice of appeal, any certificate of appealability or denial of a certificate of
21 appealability issued by the superior court, and the sequential list of reporters
22 made under rule 2.950.
23
24 (5) A copy of the notice of appeal is sufficient notification under (1) if the
25 required information is on the copy or is added by the superior court clerk.
26
27 (6) The sending of a notification under (1) is a sufficient performance of the
28 clerk’s duty despite the discharge, disqualification, suspension, disbarment,
29 or death of the attorney.
30
31 (7) Failure to comply with any provision of this subdivision does not affect the
32 validity of the notice of appeal.
33

34 **Advisory Committee Comment**

35
36 **Subdivision (b).** This subdivision addresses issuance of a certificate of appealability by the Court
37 of Appeal. Rule 4.576(b) addresses issuance of a certificate of appealability by the superior court.
38

39
40 **DRAFTERS’ NOTES ON PROPOSED NEW RULE 8.393:** This rule is modeled
41 on rule 8.308, relating to notices of appeal in non-capital felony cases, but the
42 time to appeal has been changed to correspond to the requirement in Penal
43 Code section 1509.1(a) that, “An appeal shall be taken by filing a notice of

1 appeal in the superior court within 30 days of the court’s decision granting or
2 denying the habeas petition.” In addition, unlike [rule 8.308](#), it does not address
3 cross-appeals because [Penal Code section 1509.1\(a\)](#) appears to set the
4 timeframe for filing any appeal.

5
6 **Rule 8.393. Time to appeal**

7
8 A notice of appeal under this article must be filed within 30 days after the making of the
9 order being appealed.

10
11
12 DRAFTERS’ NOTES ON PROPOSED NEW RULE 8.394: This proposed new
13 rule is modeled, in part, on [rule 8.312](#), relating to stays in non-capital felony
14 appeals. However, this draft rule intentionally leaves out any discussion of the
15 showing needed to grant a stay.

16
17 **Rule 8.394. Stay of execution on appeal**

18
19 **(a) Application**

20
21 Pending appeal under this article, the petitioner may apply to the reviewing court
22 for a stay of execution of the death penalty. The application must be served on the
23 People.

24
25 **(b) Interim relief**

26
27 Pending its ruling on the application, the reviewing court may grant the relief
28 requested. The reviewing court must notify the superior court under rule 8.489 of
29 any stay that it grants. Notification must also be sent to the Supreme Court clerk.

30
31
32 DRAFTERS’ NOTES ON PROPOSED NEW RULE 8.395: This proposed new
33 rule addresses the record on appeal.

34
35 Subdivision (a) of this proposed new rule is modeled on rule [8.388\(b\)](#), relating to
36 the content of the record in appeals by the People from superior court decisions
37 granting habeas corpus relief. It has been modified to reflect the fact that, under
38 [Penal Code section 1509.1](#), appeals from superior court decisions on habeas
39 corpus petitions in capital cases may be not only from orders granting relief, but
40 also from orders denying relief either with or without issuance of an order to show
41 cause. The proposed rule requires that the record include “any” order to show
42 cause, return, and traverse. In addition, the language from rule [8.388\(b\)](#) has
43 been modified to specifically require that the record include:

- 1 • Any informal response to the petition;
- 2 • Any statement of decision required by [Penal Code section 1509\(f\)](#);
- 3 • The supporting documents identified under proposed rule 4.571 (see
- 4 accompanying invitation to comment on the proposed rules for trial court
- 5 habeas corpus proceedings in capital cases); and
- 6 • Any certificate of appealability issued by the superior court or the Court of
- 7 Appeal (note that the superior court would receive a copy of a certificate of
- 8 appealability issued by the Court of Appeal under proposed rule 8.392(b)(5)
- 9 above).

10
11 Subdivision (b) is modeled on [rule 8.320\(f\)](#), relating to stipulations for limited
12 records in non-capital felony appeals.

13
14 Subdivisions (c) and (d) are modeled on [rule 8.336](#), relating to the preparation of
15 the record in non-capital felony appeals, but establish different triggers for the
16 preparation of the record. Under [rule 8.336](#), in felony cases where there is a trial
17 on the merits, preparation of the record generally begins immediately after a
18 verdict or finding of guilt of a felony is announced; the trial court does not wait for
19 the filing of a notice of appeal. In appeals after a plea of guilty or nolo contendere
20 or after an admission of probation violation, [rule 8.336](#) provides that record
21 preparation does not begin until the court files a certificate of probable cause. In
22 contrast, the proposed draft below would provide that preparation in most
23 appeals from superior court decisions on capital habeas corpus petitions would
24 begin upon the filing of a notice of appeal. For appeals from a superior court
25 decision denying relief on a successive petition when the superior court did not
26 issue a certificate of appealability, however, somewhat like felony cases in which
27 a certificate of probable cause is required, the proposed rule would provide that
28 preparation of the transcripts would not begin unless and until the trial court clerk
29 receives a copy of a certificate of appealability issued by the Court of Appeal.

30
31 Subdivision (e) is modeled on [rule 8.336\(e\)](#), but the 60-day limit on the length of
32 the extensions of time permitted has been eliminated. In addition, the draft of the
33 proposed rule incorporates language from [rule 8.616\(d\)\(2\)](#), relating to
34 preparation of the record for the automatic appeal in capital cases, presuming
35 good cause for extension of time for the clerk and court reporters to prepare the
36 initial trial record when the record is over 10,000 pages. Note that, under the
37 amendments to rule 8.619 approved by the Judicial Council at its September
38 2018 meeting, which will take effect on April 25, 2019, the deadlines for counsel
39 to review and the court to certify the record for the automatic appeal for
40 completeness would automatically be extended by t days for each 1,000 pages
41 of combined transcript over 10,000 pages and, under the proposed amendments
42 to rule 8.622, the deadlines for counsel to review and the court to certify the
43 record for the automatic appeal for accuracy would automatically be extended by

1 15 days for each 1,000 pages of combined transcript over 10,000 pages (see the
2 report to the Judicial Council at:
3 [https://jcc.legistar.com/View.ashx?M=F&ID=6613532&GUID=4A5A5D1E-8061-](https://jcc.legistar.com/View.ashx?M=F&ID=6613532&GUID=4A5A5D1E-8061-4339-AD6A-461BC0F34938)
4 [4339-AD6A-461BC0F34938](https://jcc.legistar.com/View.ashx?M=F&ID=6613532&GUID=4A5A5D1E-8061-4339-AD6A-461BC0F34938)).

5
6 Paragraph (f)(1) is modeled on language that will be added to rule 8.619(f)(2),
7 relating to the preparation of the record for the automatic appeal in a death
8 penalty case, effective April 25, 2019 (see the report to the Judicial Council at:
9 [https://jcc.legistar.com/View.ashx?M=F&ID=6613532&GUID=4A5A5D1E-8061-](https://jcc.legistar.com/View.ashx?M=F&ID=6613532&GUID=4A5A5D1E-8061-4339-AD6A-461BC0F34938)
10 [4339-AD6A-461BC0F34938](https://jcc.legistar.com/View.ashx?M=F&ID=6613532&GUID=4A5A5D1E-8061-4339-AD6A-461BC0F34938)). Paragraph (f)(2) is modeled on [rule 8.336](#) (f),
11 relating to the form of the record in non-capital felony appeals.

12
13 Subdivision (g) is modeled on [rule 8.336](#)(g), relating to the sending of the record
14 in non-capital felony appeals. However, the proposal specifies that a copy of the
15 transcripts will be sent to the Governor. Note that in cases in which a death
16 sentence is imposed, Penal Code section 1218 specifically requires that the
17 Governor be sent “a complete transcript of all the testimony given at the trial
18 including any arguments made by respective counsel and a copy of the clerk’s
19 transcript.”

20
21 Paragraph (i) is modeled on [rule 8.386](#)(e), relating to judicial notice in habeas
22 corpus proceedings in which the return is heard in the Court of Appeal. Under
23 [rule 8.252](#), which is cross-referenced, to obtain judicial notice by a reviewing
24 court under [Evidence Code section 459](#), a party must serve and file a motion in
25 the reviewing court.

26 27 **Rule 8.395. Record on appeal**

28 29 **(a) Contents**

30
31 In an appeal under this rule article, the record must contain:

- 32
33 (1) The petition;
34
35 (2) Any informal response to the petition and any reply to the informal response;
36
37 (3) Any order to show cause;
38
39 (4) Any reply, return, answer, denial, or traverse;
40
41 (5) All supporting documents under rule 4.571 and any other documents and
42 exhibits submitted to the court;
43

- 1 (6) The reporter’s transcript of any oral proceedings;
2
3 (7) All court minutes;
4
5 (8) Any statement of decision required by Penal Code section 1509(f) or other
6 written decision of the court;
7
8 (9) The order appealed from;
9
10 (10) The notice of appeal; and
11
12 (11) Any certificate of appealability issued by the superior court or the Court of
13 Appeal.
14

15 **(b) Stipulation for partial transcript**

16
17 If counsel for the petitioner and the People stipulate in writing before the record is
18 certified that any part of the record is not required for proper determination of the
19 appeal, that part must not be prepared or sent to the reviewing court.
20

21 **(c) Preparation of clerk’s transcript**

- 22
23 (1) Except as provided in (2), the clerk must begin preparing the clerk’s
24 transcript immediately after the notice of appeal is filed.
25
26 (2) If the petitioner is appealing from a superior court decision denying relief on
27 a successive petition and the superior court did not issue a certificate of
28 appealability, the clerk must not begin preparing the clerk’s transcript unless
29 and until the clerk receives a copy of a certificate of appealability issued by
30 the Court of Appeal under rule 8.391(b)(5).
31
32 (3) Within 20 days after the clerk is required to begin preparing the transcript
33 under (1) or (2), the clerk must complete preparation of an original and three
34 copies of the clerk’s transcript.
35
36 (4) On request, the clerk must prepare an extra copy for the district attorney or
37 the Attorney General, whichever is not counsel for the People on appeal.
38
39 (5) The clerk must certify as correct the original and all copies of the clerk’s
40 transcript.
41
42

1 **(d) Preparation of reporter's transcript**

- 2
- 3 (1) The reporter must begin preparing the reporter's transcript immediately on
- 4 being notified by the clerk under rule 8.392(c) that the notice of appeal has
- 5 been filed.
- 6
- 7 (2) The reporter must prepare an original and the same number of copies of the
- 8 reporter's transcript as (c) requires of the clerk's transcript, and must certify
- 9 each as correct.
- 10
- 11 (3) The reporter must deliver the original and all copies to the superior court
- 12 clerk as soon as they are certified, but no later than 20 days after notice of the
- 13 filing of the notice of appeal is sent to the reporter.
- 14

15 **(e) Extension of time**

- 16
- 17 (1) The superior court may not extend the time for preparing the record.
- 18
- 19 (2) The reviewing court may order one or more extensions of time for preparing
- 20 the record, including a reporter's transcript, on receipt of:
- 21
- 22 (A) A declaration showing good cause. The court may presume good cause
- 23 if the clerk's and reporter's transcripts combined will likely exceed
- 24 10,000 pages, not including the supporting documents submitted with
- 25 the petition, any informal response, reply to the informal response,
- 26 return, answer, or traverse; and
- 27
- 28 (B) In the case of a reporter's transcript, certification by the superior court
- 29 presiding judge, or a court administrator designated by the presiding
- 30 judge, that an extension is reasonable and necessary in light of the
- 31 workload of all reporters in the court.
- 32

33 **(f) Form of record**

- 34
- 35 (1) The reporter's transcript must be in electronic form. The clerk is encouraged
- 36 to send the clerk's transcript in electronic form if the court is able to do so.
- 37
- 38 (2) The clerk's and reporter's transcripts must comply with rules 8.45–8.47,
- 39 relating to sealed and confidential records, and rule 8.144.
- 40
- 41

1 **(g) Sending the transcripts**

2
3 (1) When the clerk’s and reporter’s transcripts are certified as correct, the clerk
4 must promptly send:

5
6 (A) The original transcripts to the reviewing court, noting the sending date
7 on each original;

8
9 (B) One copy of each transcript to appellate counsel for the petitioner and
10 to the Attorney General or the district attorney, whichever is counsel
11 for the People on appeal;

12
13 (C) One copy of each transcript to the district attorney or Attorney General
14 if requested under (c)(4), and

15
16 (D) One copy of each transcript to the Governor.

17
18 (2) If the petitioner is not represented by appellate counsel when the transcripts
19 are certified as correct, the clerk must send that petitioner’s counsel’s copy of
20 the transcripts to the district appellate project.

21
22 **(h) Augmenting or correcting the record in the Court of Appeal**

23
24 Rule 8.340 governs augmenting or correcting the record in the Court of Appeal,
25 except that copies of augmented or corrected records must be sent to those listed in
26 (g).

27
28 **(i) Judicial notice**

29
30 Rule 8.252(a) governs judicial notice in the reviewing court.

31
32
33 **DRAFTERS’ NOTES ON PROPOSED NEW RULE 8.396:** This proposed new
34 rule addresses briefs.

35
36 Paragraph (a)(1) in this proposed new rule is modeled on language that appears
37 in both [rule 8.360\(a\)](#), relating to briefs in general felony appeals in the Court of
38 Appeal, and [rule 8.630\(a\)](#), relating to briefs in capital appeals in the Supreme
39 Court.

40
41 Paragraph (a)(2), in conjunction with proposed new rule 8.397 below, is designed
42 to help implement the requirement in [Penal Code section 1509.1\(b\)](#) allowing

1 petitioners to raise ineffective assistance of counsel claims in the appeal that
2 were not raised in the habeas corpus proceeding in the trial court.

3
4 Paragraph (a)(3) and the accompanying advisory committee comment are
5 designed to alert rule users about the provision in Penal Code section 1509.1(c)
6 limiting the claims that can be heard by the Court of Appeal in appeals of the
7 denial of relief on a successive habeas corpus petition.

8
9 The brief length limits in subdivision (b) are modeled on those in rule 8.630 (b),
10 relating to briefs in capital appeals in the Supreme Court. The limits in rule
11 8.360(b), relating to briefs in general felony appeals in the Court of Appeal, are
12 considerably shorter - 25,500 words or 75 pages for all party briefs.

13
14 The timeframes for filing briefs in subdivision (c) are modeled on those in rule
15 8.630(c), relating to briefs in capital appeals in the Supreme Court. The time
16 limits in rule 8.360(c), relating to briefs for general non-capital felony appeals in
17 the Court of Appeal, are considerably shorter – 40 days after the record is filed in
18 the reviewing court for the filing of the appellant’s opening brief, 30 days after the
19 filing of the appellant’s opening brief for the respondent’s brief, and 20 days after
20 the filing of the respondent’s brief for the reply brief.

21
22 Paragraphs (c)(5) – (7) and subdivisions (d) – (f) are modeled on rule 8.360
23 (c)(4) – (6) and subdivisions (d) – (f), relating to briefs in general felony cases,
24 with a few small changes, including:

- 25 • Changing references from “defendant” to “petitioner;” and
- 26 • Changing the timeframe for filing a request to file an amicus brief to reflect the
27 proposed briefing schedule in subdivision (c).

28 29 **Rule 8.396. Briefs by parties and amici curiae**

30 31 **(a) Contents and form**

- 32
33 (1) Except as provided in this rule, briefs in appeals governed by the rules in this
34 article must comply as nearly as possible with rules 8.200 and 8.204.
- 35
36 (2) If, as permitted by Penal Code section 1509.1(b), the petitioner wishes to
37 raise a claim in the appeal of ineffective assistance of trial counsel that was
38 not raised in the superior court habeas corpus proceedings, that claim must be
39 raised in the first brief filed by the petitioner. A brief containing such a claim
40 must comply with the additional requirements in rule 8.397.
- 41
42 (3) If the petitioner is appealing from a decision of the superior court denying
43 relief on a successive death penalty–related habeas corpus petition, the

1 petitioner may only raise claims in the briefs that were identified in the
2 certificate of appealability that was issued and any additional claims added by
3 the Court of Appeal as provided in Penal Code section 1509.1(c).
4

5 **(b) Length**

6
7 (1) A brief produced on a computer must not exceed the following limits,
8 including footnotes:

9
10 (A) Appellant’s opening brief: 102,000 words.

11
12 (B) Respondent’s brief: 102,000 words. If the presiding justice permits the
13 appellant to file an opening brief that exceeds the limit set in (1)(A) or
14 (3)(A), respondent’s brief may not exceed the length of appellant’s
15 opening brief approved by the presiding justice.

16
17 (C) Reply brief: 47,600 words.

18
19 (2) A brief under (1) must include a certificate by appellate counsel stating the
20 number of words in the brief; counsel may rely on the word count of the
21 computer program used to prepare the brief.

22
23 (3) A typewritten brief must not exceed the following limits:

24
25 (A) Appellant’s opening brief: 300 pages.

26
27 (B) Respondent’s brief: 300 pages. If the presiding justice permits the
28 appellant to file an opening brief that exceeds the limit set in (1)(A) or
29 (3)(A), respondent’s brief may not exceed the length of appellant’s
30 opening brief approved by the presiding justice.

31
32 (C) Reply brief: 140 pages.

33
34 (4) The tables required under rule 8.204(a)(1), the cover information required
35 under rule 8.204(b)(10), a certificate under (2), any signature block, and any
36 attachment permitted under rule 8.204(d) are excluded from the limits stated
37 in (1) and (3).

38
39 (5) A combined brief in an appeal governed by (e) must not exceed double the
40 limit stated in (1) or (3).

41
42 (6) On application, the presiding justice may permit a longer brief for good
43 cause.

1
2 **(c) Time to file**
3

- 4 (1) The appellant's opening brief must be served and filed within 210 days after
5 the record is filed.
6
7 (2) The respondent's brief must be served and filed within 120 days after the
8 appellant's opening brief is filed.
9
10 (3) The appellant must serve and file a reply brief, if any, within 60 days after the
11 respondent files its brief.
12
13 (4) The time to serve and file a brief may not be extended by stipulation, but only
14 by order of the presiding justice under rule 8.60.
15
16 (5) If a party fails to timely file an appellant's opening brief or a respondent's
17 brief, the reviewing court clerk must promptly notify the party in writing that
18 the brief must be filed within 30 days after the notice is sent, and that failure
19 to comply may result in sanctions specified in the notice.
20

21 **(d) Service**
22

- 23 (1) The petitioner's appellate counsel must serve each brief for the petitioner on
24 the People and the district attorney, and must send a copy of each to the
25 petitioner personally unless the petitioner requests otherwise.
26
27 (2) The proof of service under (1) must state that a copy of the petitioner's brief
28 was sent to the petitioner, or counsel must file a signed statement that the
29 petitioner requested in writing that no copy be sent.
30
31 (3) The People must serve each of their briefs on the appellate counsel for the
32 petitioner and on the district appellate project. If the district attorney is
33 representing the People, one copy of the district attorney's brief must be
34 served on the Attorney General.
35
36 (4) A copy of each brief must be served on the superior court clerk for delivery
37 to the superior judge who issued the order being appealed.
38

39 **(e) When the petitioner and the People appeal**
40

41 When both the petitioner and the People appeal, the petitioner must file the first
42 opening brief unless the reviewing court orders otherwise, and rule 8.216(b)
43 governs the contents of the briefs.

1
2 **(f) Amicus curiae briefs**

3
4 Amicus curiae briefs may be filed as provided in rule 8.200(c), except that an
5 application for permission of the presiding justice to file an amicus curiae brief
6 must be filed within 14 days after the last appellant's reply brief is filed or could
7 have been filed under (c), whichever is earlier.

8
9 **Advisory Committee Comment**

10
11 **Subdivision (a)(3).** This subdivision is intended to implement the sentence in Penal Code section
12 1509.1(c) providing that “[t]he jurisdiction of the court of appeal is limited to the claims
13 identified in the certificate [of appealability] and any additional claims added by the court of
14 appeal within 60 days of the notice of appeal.”

15
16 **Subdivision (b)(4).** This subdivision specifies certain items that are not counted toward the
17 maximum brief length. Signature blocks referred to in this provision include not only the
18 signatures, but also the printed names, titles, and affiliations of any attorneys filing or joining in
19 the brief, which may accompany the signature.

20
21
22 **DRAFTERS’ NOTES ON PROPOSED NEW RULE 8.397:** This proposed new
23 rule establishes procedures for presenting and handling claims in appeals under
24 Penal Code section 1509.1 of ineffective assistance of counsel that were not
25 raised in the habeas corpus proceeding in the superior court.

26
27 Subdivision (b) would require ineffective assistance of counsel claims to be
28 addressed in a separate portion of the briefs. This is to make this section easier
29 to find for the court and because this portion of the brief will include citations to
30 the proposed proffer authorized by subsection (c).

31
32 Paragraph (b)(3) is modeled in part on [rule 8.204\(a\)\(1\)\(B\)](#).

33
34 Paragraph (b)(4) is modeled in part on [rule 8.204\(a\)\(1\)\(C\)](#), but the sources that
35 can be referred to have been broadened to include the proffer and items of which
36 the court has taken judicial notice.

37
38 Subdivision (c) addresses the proffer of evidence not in the record and not
39 subject to judicial notice. It would require a proffer from either side when
40 evidence outside the record or matters subject to judicial notice are being relied
41 on either to make or respond to a claim. Paragraphs (c)(1)(A), (2) and (3) are
42 modeled in part on [rule 8.384\(b\)](#), which addresses the supporting documents to a
43 petition for a writ of habeas corpus. The language in (c)(1)(B) is modeled in part

1 on language in [rule 8.386\(f\)](#), relating to proceedings if the return in a non-capital
2 habeas corpus proceeding is ordered to be filed in the reviewing court, which
3 refers to what the court may consider before ordering an evidentiary hearing.

4
5 Subdivision (d) addresses evidentiary hearings. The initial language in (d)
6 regarding when the reviewing court must order an evidentiary hearing is modeled
7 in part on language in [rule 8.386\(f\)](#), relating to proceedings if the return in a non-
8 capital habeas corpus proceeding is ordered to be filed in the reviewing court.
9 The language in (d)(1) regarding limited remand is intended to implement the
10 provision in Penal Code section 1509.1 providing for limited remand. The
11 language regarding vesting jurisdiction in the superior court is modeled on
12 language from [rule 8.385](#), which addresses what happens when the return in a
13 habeas corpus proceeding in a reviewing court is ordered to be made in the
14 superior court. The language in (d)(2) is modeled in part on language in [rule](#)
15 [8.386\(f\)](#). The language in (d)(3) is modeled in part on language in [rule 8.252\(c\)](#)
16 regarding the reviewing court taking evidence.

17
18 Subdivision (e) addresses what happens with respect to the appeal when a
19 limited remand is ordered. Paragraph (1) would permit, but not require, the
20 reviewing court to stay the remainder of the appeal pending the decision on
21 remand. Paragraph (2) would make clear that a new notice of appeal would need
22 to be filed if a party wanted to challenge the superior court's decision on remand.
23 Paragraph (3) would allow the reviewing court to consolidate such an appeal with
24 the pending appeal of the habeas corpus decision.

25 26 **8.397. Claim of ineffective assistance of trial counsel not raised in the superior court**

27 28 **(a) Application**

29
30 This rule governs claims under Penal Code section 1509.1(b) of ineffective
31 assistance of trial counsel not raised in the superior court habeas corpus proceeding
32 giving rise to an appeal under this article.

33 34 **(b) Discussion of claim in briefs**

35
36 (1) A claim subject to this rule must be raised in the first brief filed by the
37 petitioner.

38
39 (2) All discussion of claims subject to this rule must be addressed in a separate
40 part of briefs under a heading identifying this part as addressing claims of
41 ineffective assistance of trial counsel that were not raised in a superior court
42 habeas corpus proceeding.

43

1 (3) Discussion of each claim within this part of the brief must be under a separate
2 subheading identifying the claim. Petitioner’s brief must include a summary
3 of the claim under the subheading, and each claim must be supported by
4 argument and, if possible, by citation of authority.

5
6 (4) This part of the brief may include references to matters in:

7
8 (A) The record on appeal prepared under rule 8.395. Any reference to a
9 matter in the record must be supported by a citation to the volume and
10 page number of the record where the matter appears.

11
12 (B) Matters of which the court has taken judicial notice.

13
14 (C) A proffer required under (c). Any reference to a matter in a proffer
15 must be supported by a citation to its index number or letter and page.

16
17 **(c) Proffer**

18
19 (1) A brief raising a claim under Penal Code section 1509.1(b) of ineffective
20 assistance of trial counsel not raised in a superior court habeas corpus
21 proceeding must be accompanied by a proffer of any reasonably available
22 documentary evidence supporting the claim that is not in either the record on
23 appeal prepared under rule 8.395 or matters of which the court has taken
24 judicial notice. A brief responding to such a claim must be accompanied by a
25 proffer of any reasonably available documentary evidence the People are
26 relying on that is not in the petitioner’s proffer, the record on appeal prepared
27 under rule 8.395, or matters of which the court has taken judicial notice.

28
29 (A) If a brief raises a claim that was the subject of an evidentiary hearing,
30 the proffer must include a certified transcript of that hearing.

31
32 (B) Other evidence may be in the form of affidavits or declarations under
33 penalty of perjury.

34
35 (2) The proffer must comply with the following formatting requirements:

36
37 (A) The pages must be consecutively numbered.

38
39 (B) It must begin with a table of contents listing each document by its title
40 and its index number or letter. If a document has attachments, the table
41 of contents must give the title of each attachment and a brief
42 description of its contents.

1 (C) If submitted in paper form:

2
3 (i) It must be bound together at the end of the brief or in separate
4 volumes not exceeding 300 pages each.

5
6 (ii) It must be index-tabbed by number or letter.

7
8 (3) The clerk must file any proffer not complying with (2), but the court may
9 notify the filer that it may strike the proffer and the portions of the brief
10 referring to the proffer if the documents are not brought into compliance
11 within a stated reasonable time of not less than five days.

12
13 (4) If any documents in the proffer are sealed or confidential records, rules 8.45–
14 8.47 govern these documents.

15
16 **(d) Evidentiary hearing**

17
18 An evidentiary hearing is required if, after considering the briefs, the proffer, and
19 matters of which judicial notice may be taken, the court finds there is a reasonable
20 likelihood that the petitioner may be entitled to relief and the petitioner's
21 entitlement to relief depends on the resolution of an issue of fact. The reviewing
22 court may take one of the following actions:

23
24 (1) Order a limited remand to the superior court to consider the claim under
25 Penal Code section 1509.1(b). The order for limited remand vests jurisdiction
26 over the claim in the superior court, which must proceed under the rules for
27 habeas corpus proceedings in capital cases in the superior court. The Court of
28 Appeal clerk must send a copy of any such order to the Supreme Court clerk.

29
30 (2) Appoint a referee to conduct the hearing and make recommended findings of
31 fact.

32
33 (3) Conduct the hearing itself or designate a justice of the court to conduct the
34 hearing.

35
36 **(e) Procedures following limited remand**

37
38 (1) If the reviewing court orders a limited remand to the superior court to
39 consider a claim under Penal Code section 1509.1(b), it may stay the
40 proceedings on the remainder of the appeal pending the decision of the
41 superior court on remand. The Court of Appeal clerk must send a copy of any
42 such stay to the Supreme Court clerk.

1 (2) If any party wishes to appeal from the superior court decision on remand, the
2 party must file a notice of appeal as provided in rule 8.392.

3
4 (3) If an appeal is filed from the superior court decision on remand, the
5 reviewing court may consolidate this appeal with any pending appeal under
6 Penal Code section 1509.1 from the superior court's decisions in the same
7 habeas corpus proceeding. A copy of any consolidation order must be
8 promptly sent to the superior court clerk. The superior court clerk must then
9 augment the record on appeal to include all items listed in rule 8.395(a) from
10 the remanded proceedings.

11
12
13 DRAFTERS' NOTES ON PROPOSED NEW RULE 8.398: This proposed new
14 rule is intended to clarify that denials of requests for certificates of appealability
15 are final immediately.

16
17 **8.398. Finality**

18
19 **(a) General rule**

20
21 Except as otherwise provided in this rule, rule 8.366(b) governs the finality of
22 Court of Appeal decisions in a proceeding under this article.

23
24 **(b) Denial of certificate of appealability**

25
26 The Court of Appeal's denial of an application for a certificate of appealability in a
27 proceeding under this article is final in that court on filing.

SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	<i>FOR COURT USE ONLY</i> DRAFT 09/27/18 Not approved by the Judicial Council
In re _____ on Habeas Corpus (NAME OF PETITIONER)	
PETITIONER'S NOTICE OF APPEAL Death Penalty-Related Habeas Corpus Decision (Pen. Code, § 1509.1; Cal. Rules of Court, rule 8.391)	CASE NUMBER:

NOTICE


- **You must file this form in the SUPERIOR COURT WITHIN 30 DAYS** after the court rendered the judgment or made the order you are appealing.
- **IMPORTANT:** If you are appealing the decision of a superior court denying relief on a successive habeas corpus petition related to a sentence of death, and the superior court did not grant you a certificate of appealability, you must complete the Request for Certificate of Appealability on page 2 of this form.

1. Petitioner appeals from a judgment rendered or an order made by the superior court in a death penalty-related habeas corpus proceeding.

NAME of petitioner:
 DATE of the order or judgment:

2. This is an appeal from the decision of a superior court denying relief on a successive habeas corpus petition related to a sentence of death. *(If you check this box, you must check a or b)*
- a. The superior court granted a certificate of appealability.
- b. The superior court did not grant a certificate of appealability. *(You must complete the Request for Certificate of Appealability on page 2 of this form.)*

Date: _____

_____  _____
 (TYPE OR PRINT NAME) (SIGNATURE OF PETITIONER OR ATTORNEY)

In re _____ on Habeas Corpus (NAME OF PETITIONER)	CASE NUMBER:
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REQUEST FOR CERTIFICATE OF APPEALABILITY

Penal Code section 1509.1(c) provides that a certificate of appealability may be issued only if the petitioner has shown both "a substantial claim for relief" and "a substantial claim that the requirements of subdivision (d) of Section 1509 have been met."

Penal Code section 1509(d) provides, in full:

(d) An initial petition which is untimely under subdivision (c) or a successive petition whenever filed shall be dismissed unless the court finds, by the preponderance of all available evidence, whether or not admissible at trial, that the defendant is actually innocent of the crime of which he or she was convicted or is ineligible for the sentence. A stay of execution shall not be granted for the purpose of considering a successive or untimely petition unless the court finds that the petitioner has a substantial claim of actual innocence or ineligibility. "Ineligible for the sentence of death" means that circumstances exist placing that sentence outside the range of the sentencer's discretion. 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 a claim 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 actual innocence or ineligibility for the purpose of this section.

1. I request that the Court of Appeal issue a certificate of appealability. My claims for relief are:

2. My claim that the requirements of Penal Code section 1509(d) have been met is:

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

Date:

(TYPE OR PRINT NAME)



(SIGNATURE OF PETITIONER OR ATTORNEY)