In the Supreme Court of the State of California

MICHAEL EUGENE MAAS,

Petitioner,

v.

SUPERIOR COURT OF SAN DIEGO COUNTY,

Respondent.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Real Party in Interest.

Case No. S225109

Fourth Appellate District, Case No. D064639
San Diego County Superior Court, Case Nos. SCE 185960 and 188460
The Honorable John M. Thompson, Judge

ANSWERING BRIEF ON THE MERITS

KAMALA D. HARRIS
Attorney General of California
EDWARD C. DUMONT
Solicitor General
GERALD A. ENGLER
Chief Assistant Attorney General
LISE S. JACOBSON
Deputy Attorney General
STEVE OETTING
Deputy Solicitor General
State Bar No. 142868
600 West Broadway, Suite 1800
San Diego, CA 92101
P.O. Box 85266
San Diego, CA 92186-5266
Telephone: (619) 645-2206
Fax: (619) 645-2012
Email: Steve.Oetting@doj.ca.gov
Attorneys for Respondent

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INTRODUCTION

In 1998, petitioner Michael Eugene Maas was convicted of several theft-related offenses in two separate cases. Because he had previously suffered two prior strikes, the trial courts sentenced him to a total consecutive term of 50 years to life. Maas unsuccessfully appealed his sentence, but then waited until 2013 before bringing a petition for writ of habeas corpus in the San Diego Superior Court challenging the performance of his trial and appellate attorneys. When Judge John M. Thompson summarily denied the petition, Maas brought a habeas petition in the Court of Appeal, adding the allegation that if he had known Judge Thompson was assigned to the case, Maas would have peremptorily challenged him under Code of Civil Procedure section 170.6 (section 170.6). Based on this representation, the Court of Appeal remanded the matter to a different superior court judge to reconsider Maas's petition.

The Court of Appeal erred in so ruling. Challenges under section 170.6 may be raised only in matters involving either a trial or a contested issue of law or fact. A habeas proceeding, at least prior to the issuance of a writ or an order to show cause (OSC), is neither. The judge must simply determine whether the petition states a prima facie case, or whether instead it should be summarily denied. At this stage, the court's role is most analogous to a ruling on a demurrer, a motion that does not give rise to the right to make a peremptory challenge.

STATEMENT OF THE CASE

On April 6, 1998, after a trial presided over by Superior Court Judge Allan J. Preckel, a San Diego County jury found Maas guilty of grand theft automobile (Pen. Code, § 487, subd. (d)) and unlawful taking or driving of a vehicle (Veh. Code, § 10851, subd. (a)). The court later found true that Maas had suffered two prior strikes (Pen. Code, §§ 667, subds. (b)-(i),

1170.12) and sentenced him to serve 25 years to life in prison. (San Diego County Superior Court August 7, 2013 order in case no. EHC 942 at 2 [describing procedural history in case no. SCE 185960] (case no. EHC 942 order); case no. EHC 942 pet. at 2.)

On August 21, 1998, after a separate trial presided over by Superior Court Judge Larrie R. Brainard, a San Diego County jury found Maas guilty of burglary (Pen. Code, § 459) and forgery of a fictitious check (Pen. Code, § 470, subd. (a)). Once again, the court found that Maas had suffered two prior strike convictions and sentenced him to serve 25 years to life in prison consecutive to his other term. (Case no. EHC 942 order at 2 [describing procedural history in case no. SCE 188460]; case no. EHC 942 pet. at 2.)

Maas appealed both convictions and the Court of Appeal denied both appeals. (Case no. EHC 942 order at 2.)

On November 26, 2012, Maas filed a petition for recall of sentence and resentencing pursuant to Penal Code section 1170.126 in both cases. After appointing counsel to represent Maas, the superior court denied the petition on January 14, 2013, finding that Maas was disqualified from relief because one of his prior strikes was for attempted murder. (Case no. EHC 942 order at 2.)

Fifteen years after he was first sentenced, on July 13, 2013, Maas filed a petition for writ of habeas corpus in the San Diego County Superior Court alleging he received ineffective assistance of counsel because his trial attorneys failed to properly challenge the prior serious felony convictions. (Case no. EHC 942 pet. at 1-6.)

On August 7, 2013, San Diego Superior Court Judge John M. Thompson issued a written order summarily denying the petition. Judge Thompson concluded the petition failed to justify the substantial delay, and also failed to establish good cause to relitigate the underlying challenge to

the strike priors, which was previously raised both at sentencing and on direct appeal. (Case no. EHC 942 order at 4.)

Maas filed a petition for writ of habeas corpus in the Court of Appeal, Fourth Appellate District, Division One, alleging he received ineffective assistance of counsel in his two trials and later on direct appeal. As part of this claim, Maas maintained that had he been advised the case was assigned to Judge Thompson, Maas would have made a peremptory challenge under section 170.6. He further asserted that the failure to notify him of Judge Thompson's assignment violated his equal protection rights, and that his petition should be remanded to be reassigned and reheard. (Case no. D064639 pet. at 2.) As exhibits to his petition, Maas included, among other things, a July 19, 2013 letter he sent to the San Diego County Superior Court, in which he requested notification of the date his petition was filed, the case number, and the judge to whom it was assigned. (Case no. D064639 pet. exh. B.) He also included an August 4, 2013 letter, in which he again wrote to the court, explaining that although he had previously requested to be notified of the judge assigned to his case, all he received in return was a file-stamped copy of the first page of the petition, which also noted the case number. (Case no. D064639, pet. ex. D; see also exh. C [filed-stamped petition].) This letter was dated three days before Judge Thompson's August 7th order denying the petition. Finally, Maas included a declaration in which he averred under penalty of perjury that had he been advised that Judge Thompson was assigned to the case, Maas would have followed the advice of his brother and requested another judge under section 170.6. (Case no. D064639 pet. exh. G.)

After first requesting and receiving an informal response from respondent, the Court of Appeal issued an order to show cause and appointed counsel for Maas. Maas's appointed counsel filed a supplemental petition for writ of habeas corpus. (D064639 slip opn. at 3-4.)

In a published decision, the Court of Appeal thereafter held that where a habeas petitioner collaterally attacks his or her criminal conviction and the "matter" is assigned to a judge other than the original trial judge, the petitioner may assert a peremptory challenge under section 170.6 to the judge assigned to the petition. (D064639 slip opn. at 2.) In reaching this holding, the Court of Appeal concluded that section 170.6 applies in "any" civil or criminal action or special proceeding of "any kind or character." (*Id.* at p. 4.) The court reasoned that Maas was improperly denied his right to assert a section 170.6 challenge to Judge Thompson; therefore, the Court of Appeal issued a writ of mandate ordering the superior court to vacate its order denying the petition for writ of habeas corpus and to reassign the petition to a different judge. (*Id.* at pp. 6-7.)

This court granted review on its own motion and designated Maas as the petitioning party.

ARGUMENT

I. UNTIL A COURT HAS ISSUED A WRIT OF HABEAS CORPUS OR AN ORDER TO SHOW CAUSE, THERE IS NO RIGHT TO A SECTION 170.6 PEREMPTORY CHALLENGE IN A HABEAS PROCEEDING

As the express language of section 170.6 reveals, that provision grants a limited right that allows for peremptory challenges only where there is a trial or a contested issue of law or fact.[1] Until a court issues a writ of habeas

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[1] In the proceedings below, respondent did not specifically argue that section 170.6 does not apply to habeas petitions before an OSC has issued. Nevertheless, this court may decide the issue because it gave the parties reasonable notice and opportunity to brief and argue it. (Cal. Rules of Court, rule 8.516(b)(2).) The Court of Appeal's published decision in this case created a rule of state-wide importance that stands to affect superior courts and habeas corpus petitioners throughout the state. Accordingly, because this court has granted review on its own motion and the parties

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corpus or an OSC, there is neither a trial nor a contested issue of law or fact. Moreover, habeas corpus petitions do not fall within any recognized exception, such as the all-purpose assignment or master calendar rules. The Court of Appeal re-drafted the unambiguous statutory language to omit any requirement of a trial or a contested issue of law or fact, instead expanding the provision to encompass any type of civil, criminal, or special proceeding. This was error.

Maas does not attempt to defend the Court of Appeal's statutory expansion. Instead, he focuses on cases holding that where an action is, in essence, a continuation of another related case, a party may use a peremptory challenge if, and only if, the judge in the new matter is different than the original trial judge. Maas notes that when the second matter involves a new judge, there is little risk of "judge shopping" to remove the jurist most familiar with the facts. (ABOM 10-18.) He urges that failure to allow an opportunity to disqualify a judge with a perceived bias would undermine the substantial rights afforded by section 170.6 and that providing this right to habeas petitioners at the time a petition is filed would be easy to administer and would not waste judicial resources. (ABOM 19-22.)

Maas's argument fails for the simple reason that the limited right to disqualify a judge under section 170.6 does not accrue until there is a trial or a contested issue of law or fact. Established law reveals the mere filing of a habeas petition does not by itself create a cause; rather, habeas proceedings are not instituted until a writ or OSC has issued. This interpretation comports with the policies behind both section 170.6 and

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have briefed the issue, it is appropriate for this court to decide the issue presented.

habeas corpus writs in general. And while case law has treated a habeas proceeding as a continuation of the underlying trial in order to avoid abusing section 170.6, the practical considerations giving rise to this rule apply only after a cause has been created by the issuance of an OSC or a writ.

A. The Express Language of Section 170.6, Subdivision (a)(1), Grants a Right to a Peremptory Challenge Only Where There Is a Trial or a Contested Issue of Law or Fact

A judge may be disqualified for cause if, among other reasons, the judge has knowledge of disputed facts, served as a lawyer in the proceeding, has a financial stake in the litigation, is related to one of the parties, or for any reason believes recusal would further the interests of justice or there is a substantial doubt as to his or her capacity to be impartial. (Code Civ. Pro., § 170.1.)

But even where a party cannot make the showing necessary to disqualify a judge for cause under section 170.1, section 170.6 allows a party to peremptorily challenge a judicial officer whom the party believes to be prejudiced against either the party, the party's attorney, or the interests of either, such that the party cannot receive a fair and impartial trial or hearing. (§ 170.6, subds. (a)(1) & (2).) Unlike section 170.1, if the section 170.6 motion is timely filed and supported by an affidavit of prejudice, the judge must be recused without further proof and the cause must be reassigned to another judge. (*McCarney v. Commission on Judicial Qualifications* (1974) 12 Cal.3d 512, 531 [right under § 170.6 is "'automatic' in the sense that a good faith belief in prejudice is alone sufficient, proof of facts showing actual prejudice not being required."], overruled on other grounds in *Spruance v. Commission on Judicial Qualifications* (1975) 13 Cal.3d 778, 799, fn. 18; *Brown v. Swickard* (1985) 163 Cal.App.3d 820, 824.) "'The right to exercise a so-called peremptory

challenge against a judge is a creation of statute—it did not exist in the common law predating enactment of section 170.6.'" (*Orion Communications, Inc. v. Superior Court* (2014) 226 Cal.App.4th 152, 157.)

However, "[s]ection 170.6 provides only a limited right and is not a vehicle for disqualifying judges in all situations in which there is the potential for bias." (*Mathews v. Superior Court* (1995) 36 Cal.App.4th 592, 598.) "The possibility that the section may be abused by parties seeking to delay trial or to obtain a favorable judge was a matter to be balanced by the Legislature against the desirability of the objective of the statute." (*Johnson v. Superior Court* (1958) 50 Cal.2d 693, 697.) Indeed, "[t]he intent of the Legislature to provide a limited right to a peremptory challenge is clear in the legislative history as well as the language of the statute." (*Grant v. Superior Court* (2001) 90 Cal.App.4th 518, 525.) For instance, section 170.6 allows for only one challenge per action per side, even when there are multiple parties on a side. (§ 170.6, subd. (a)(4).) Further, section 170.6, subdivision (a)(1), specifies it applies solely to safeguard the right to fair trials and matters "therein" that involve "a contested issue of law or fact":

> A judge, court commissioner, or referee of a superior court of the State of California shall not try a civil or criminal action or special proceeding of any kind or character nor hear any matter therein that involves *a contested issue of law or fact* when it is established as provided in this section that the judge or court commissioner is prejudiced against a party or attorney or the interest of a party or attorney appearing in the action or proceeding.

(§ 170.6, subd. (a)(1), emphasis added.)

Thus, for example, a peremptory challenge cannot be used to disqualify a judge from presiding over a settlement or case management conference, because neither such conference involves a trial or a hearing involving a contested issue of fact or law. (*Grant v. Superior Court*, *supra*, 90 Cal.App.4th at pp. 526, 528; *Mezzetti v. Superior Court* (1979) 94

Cal.App.3d 987, 991.) As discussed further below, this requirement of a contested issue of law or fact is dispositive of the question presented here.

B. The Timeliness Rules of Subdivision (a)(2) Do Not Obviate the Requirement of a Contested Issue of Law or Fact

Although subdivision (a)(1) speaks to the types of proceedings in which a peremptory challenge may be used, frequently courts also discuss which proceedings are covered by section 170.6 when addressing whether a peremptory challenge was timely filed under subdivision (a)(2). That subdivision provides a lengthy list of rules relating to when a motion must be raised in order to be considered timely.[2] In general, a peremptory

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[2] Section 1706, subdivision (a)(2), provides as follows:

"A party to, or an attorney appearing in, an action or proceeding may establish this prejudice by an oral or written motion without prior notice supported by affidavit or declaration under penalty of perjury, or an oral statement under oath, that the judge, court commissioner, or referee before whom the action or proceeding is pending, or to whom it is assigned, is prejudiced against a party or attorney, or the interest of the party or attorney, so that the party or attorney cannot, or believes that he or she cannot, have a fair and impartial trial or hearing before the judge, court commissioner, or referee. If the judge, other than a judge assigned to the case for all purposes, court commissioner, or referee assigned to, or who is scheduled to try, the cause or hear the matter is known at least 10 days before the date set for trial or hearing, the motion shall be made at least 5 days before that date. If directed to the trial of a cause with a master calendar, the motion shall be made to the judge supervising the master calendar not later than the time the cause is assigned for trial. If directed to the trial of a criminal cause that has been assigned to a judge for all purposes, the motion shall be made to the assigned judge or to the presiding judge by a party within 10 days after notice of the all purpose assignment, or if the party has not yet appeared in the action, then within 10 days after the appearance. If directed to the trial of a civil cause that has been assigned to a judge for all purposes, the motion shall be made to the assigned judge or to the presiding judge by a party within 15 days after notice of the all purpose assignment, or if the party has not yet appeared in the action, then within 15 days after the appearance. If the court in which the action is

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challenge is permitted any time before the commencement of a trial or hearing. (*People v. Superior Court* (*Lavi*) (1993) 4 Cal.4th 1164, 1171.) Subdivision (a)(2) recognizes exceptions to this general rule where, among other things, there have been prior proceedings on the merits, an "all-

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pending is authorized to have no more than one judge, and the motion claims that the duly elected or appointed judge of that court is prejudiced, the motion shall be made before the expiration of 30 days from the date of the first appearance in the action of the party who is making the motion or whose attorney is making the motion. In no event shall a judge, court commissioner, or referee entertain the motion if it is made after the drawing of the name of the first juror, or if there is no jury, after the making of an opening statement by counsel for plaintiff, or if there is no opening statement by counsel for plaintiff, then after swearing in the first witness or the giving of any evidence or after trial of the cause has otherwise commenced. If the motion is directed to a hearing, other than the trial of a cause, the motion shall be made not later than the commencement of the hearing. In the case of trials or hearings not specifically provided for in this paragraph, the procedure specified herein shall be followed as nearly as possible. The fact that a judge, court commissioner, or referee has presided at, or acted in connection with, a pretrial conference or other hearing, proceeding, or motion prior to trial, and not involving a determination of contested fact issues relating to the merits, shall not preclude the later making of the motion provided for in this paragraph at the time and in the manner herein provided.

"A motion under this paragraph may be made following reversal on appeal of a trial court's decision, or following reversal on appeal of a trial court's final judgment, if the trial judge in the prior proceeding is assigned to conduct a new trial on the matter. Notwithstanding paragraph (4), the party who filed the appeal that resulted in the reversal of a final judgment of a trial court may make a motion under this section regardless of whether that party or side has previously done so. The motion shall be made within 60 days after the party or the party's attorney has been notified of the assignment."

purpose assignment," or a trial assignment by a master calendar department. (See generally, *Lavi*, *supra*, 4 Cal.4th at p. 1171.)

1. Prior proceedings on the merits

Even if a peremptory challenge is otherwise timely, it "must be denied if the judge has presided at an earlier hearing which involved a determination of contested factual issues relating to the merits." (*Grant*, *supra*, 90 Cal.App.4th at p. 525.) As section 170.6, subdivision (a)(2), alternatively expresses in the negative: "The fact that a judge, court commissioner, or referee has presided at, or acted in connection with, a pretrial conference or other hearing, proceeding, or motion prior to trial, and not involving a determination of contested fact issues relating to the merits, shall not preclude the later making of the motion provided for in this paragraph at the time and in the manner herein provided." So expressed, this rule is simply a compliment to the requirement of subdivision (a)(1) that a peremptory challenge is available only where there is a contested issue of law or fact.

Courts interpreting this provision have concluded that initial court rulings on a variety of pretrial motions do not prevent a subsequent peremptory challenge. (See *Guardado v. Superior Court* (2008) 163 Cal.App.4th 91, 97, fn. 5 [listing examples]; *School District of Okaloosa County v. Superior Court* (1997) 58 Cal.App.4th 1126, 1133-1134 ["Most pretrial motions are decided without a determination of contested facts related to the merits of the case."].) Most notably, several courts have concluded that an earlier demurrer does not involve "contested fact issues" so as to prevent a later challenge in the same cause. (See, e.g., *Fight for the Rams v. Superior Court* (1996) 41 Cal.App.4th 953, 957; *Zdonek v. Superior Court* (1974) 38 Cal.App.3d 849, 852-853, abandoned on other grounds *Woodman v. Superior Court* (1987) 196 Cal.App.3d 407, 410; cf. *Hospital Council of Northern Cal. v. Superior Court* (1973) 30 Cal.App.3d

331, 337 [motion for judgment on the pleadings].) Other courts have reached a similar conclusion in the context of a prior ruling on a motion for summary judgment. (See, e.g., *Bambula v. Superior Court* (1985) 174 Cal.App.3d 653, 655, 657; cf. *Kohn v. Superior Court* (1966) 239 Cal.App.2d 428, 430-431 [motion to dismiss pursuant to Pen. Code, § 995].)

On the other hand, a pretrial motion to suppress a confession has been held to be a contested adjudication on the merits because such a hearing necessarily involves an "adjudication that is of consequence to the determination of the legal guilt or innocence of the accused." (*In re Abdul Y.* (1982) 130 Cal.App.3d 847, 859-860; see also *Briggs v. Superior Court* (2001) 87 Cal.App.4th 312, 317 [ruling on motion to exclude a report and testimony from probable cause hearing]; *California Fed. Sav. & Loan Assn. v. Superior Court* (1987) 189 Cal.App.3d 267, 270-271 [motion for summary judgment on a "make or break" issue considered a merits determination].)

Section 170.6 did not always draw this dichotomy between matters heard on the merits and those that are not. Half a century ago, a party forfeited the right to exercise a peremptory challenge by failing to challenge a judge prior to a hearing on a demurrer. (See, e.g., *Swartzman v. Superior Court* (1964) 231 Cal.App.2d 195, 200; *Ball v. City Council* (1967) 252 Cal.App.2d 136, 145-147.) In 1965, however, the Legislature added the above-noted language in subdivision (a)(2) excepting matters not involving "contested fact issues relating to the merits."[3] The State Bar of California

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[3] The amended language provided: "The fact that a judge . . . has presided at or acted in connection with a pretrial conference or other hearing, proceeding, or motion prior to trial and not involving a determination of contested fact issues relating to the merits shall not

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drafted and sponsored the legislation "to permit the litigant to exercise his peremptory right to disqualify a judge prior to trial 'notwithstanding that the judge had earlier heard demurrers and motions without challenge.'" (*Abdul Y., supra*, 130 Cal.App.3d at p. 858, quoting *Zdonek v. Superior Court, supra*, 38 Cal.App.3d at p. 852; see also *In re Jose S.* (1978) 78 Cal.App.3d 619, 626.) As the State Bar explained, in contrast to a preliminary injunction hearing, "'hearings on demurrers, pleadings and other matters before trial are comparatively routine and should not result in waiver.'" (*Abdul Y., supra*, 130 Cal.App.3d at p. 858, quoting Report of the Committee on Administration of Justice (1964) 39 State Bar J. 496, 498.) The State Bar outlined four specific benefits that the amendment would bring:

> "The committee believes that the suggested change in Section 170.6, if enacted into law, will (1) conserve judicial manpower on the smaller counties; (2) reduce the number of disqualification motions statewide; (3) preserve the motion for the important situation where fact determinations are involved, such as trials; (4) recognize that preliminary motions and matters are often handled in routine fashion by an attorney other than the one who will try the case, without the presence of the client (whose views and information are important on a disqualification motion)."

(*Ibid.*)

2. All-purpose assignments

In addition to trials and contested issues of law or fact, at least one court has concluded that section 170.6 also applies when a case involves an all-purpose assignment to a specific judge. (*Grant v. Superior Court, supra*, 90 Cal.App.4th at p. 522 ["The limited right of section 170.6 does not. . .

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preclude the later making of the motion provided for herein at the time and in the manner hereinbefore provided." (Stats. 1965, ch. 1442, § 1, p. 3375.)

permit a peremptory challenge to be filed or accepted absent a pending trial, a pending hearing involving a contested issue of fact or law, or an all purpose assignment."]; see generally *Lavi*, *supra*, 4 Cal.4th at pp. 1172, 1178-1182 ["for any given factual scenario, it must be determined whether any of section 170.6, subdivision (2)'s pertinent exceptions (the 10-day/5-day rule, the master calendar rule, or the all purpose assignment rule) are applicable, or whether the general rule (the commencement of trial rule) should apply."]; cf. *Woodman v. Superior Court* (1987) 196 Cal.App.3d 407, 421 [creating judicial all-purpose exception prior to amendment of § 170.6, subd. (a)(2)].)

The all-purpose assignment language is not found in subdivision (a)(1), which generally defines the applicability of the statute. Instead, it is first referenced in subdivision (a)(2), which addresses the timing of such challenges and which states in relevant part:

> If the judge, other than a judge assigned to the case for all purposes, court commissioner, or referee assigned to, or who is scheduled to try, the cause or hear the matter is known at least 10 days before the date set for trial or hearing, the motion shall be made at least 5 days before that date. . . . If directed *to the trial of a criminal cause* that has been assigned to a judge for all purposes, the motion shall be made to the assigned judge or to the presiding judge by a party within 10 days after notice of the all purpose assignment, or if the party has not yet appeared in the action, then within 10 days after the appearance. If directed to the *trial of a civil cause* that has been assigned to a judge for all purposes, the motion shall be made to the assigned judge or to the presiding judge by a party within 15 days after notice of the all purpose assignment, or if the party has not yet appeared in the action, then within 15 days after the appearance.

(§ 170.6, subd. (a)(2), italics added.)

It is unclear from this language that the all-purpose assignment creates a third category of cases in which a peremptory challenge may be made. Given the context of subdivision (a)(2), it seems that this provision relates

to the timing of the challenge, rather than the criteria for bringing the challenge, which are given in subdivision (a)(1). The language of subdivision (a)(2) reveals the all-purpose assignment is concerned with the "trial" of either a civil or criminal "cause." Thus, rather than create a third category of applicable cases, the all-purpose assignment rule is arguably simply a subset of the requirement of a trial in subdivision (a)(1). As discussed further below, however, it is unnecessary to decide this somewhat metaphysical question in order to resolve this case, which does not involve an all-purpose assignment.

3. The master calendar rule

The master calendar rule applies when a trial-ready case is assigned to a trial-ready courtroom by a master calendar department. (*Lavi*, *supra*, 4 Cal.4th at pp. 1175, 1177.) Because the case must be trial ready before the assignment is made, this exception to the timeliness rule does not alter the requirement of subdivision (a)(1) that peremptory challenges are available for trials and matters "therein." In any event, there is no suggestion that this rule would apply in the present context where there is no evidence of an assignment by a master calendar department, let alone an assignment to a trial ready department.

C. The Court of Appeal's Expansion of Section 170.6

In the present case, the Court of Appeal expanded the reach of section 170.6 well beyond the statutory language. It concluded that "by its terms" this section applies "in any 'civil or criminal action or *special proceeding of any kind or character*.'" (Slip opn. at 4, quoting § 170.6, subd. (a)(1), italics added by Court of Appeal.) Because habeas corpus is generally regarded as a special proceeding, the court reasoned that "a petitioner seeking a writ of habeas corpus may assert a challenge to the judge assigned to the petition." (Slip opn. at 4.) But section 170.6 does not say

that it applies in "any" civil or criminal action or special proceeding; instead, it states that a judicial officer shall not "try" such a proceeding or hear any matter therein that involves a "contested issue of law or fact" when a party believes the judicial officer is prejudiced. (§ 170.6, subd. (a)(1).) The Court of Appeal's substitution of the word "any" for "try" was dramatic. As drafted by the Legislature, the first clause of section 170.6, subdivision (a)(1), applies solely to matters that are *tried*, that is, *trials*. The Court of Appeal eliminated this requirement and made the peremptory challenge provision applicable without limitation.

The court compounded this oversight by ignoring the second alternative provision of subdivision (a)(1) relating to "contested issues of law or fact" and thereby rendered that clause a nullity. Namely, if peremptory challenges are available without restriction in any civil or criminal action or special proceeding of any kind, and are not limited to only trials of those actions or proceedings, then it would not make sense for the Legislature alternatively to prohibit a court from hearing "any matter therein that involves a contested issue of law or fact." Such contested matters would already be included within the Court of Appeal's definition of "any" civil or criminal action or special proceeding of "any kind or character" and would therefore be mere surplusage. (See *Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086, 1104 [because construction would transform statutory language into meaningless surplusage, it is one court "'should avoid.'"].)

"The fundamental task of statutory construction is to 'ascertain the intent of the lawmakers so as to effectuate the purpose of the law. [Citations.] In order to determine this intent, we begin by examining the language of the statute.'" (*People v. Cruz* (1996) 13 Cal.4th 764, 774-775, quoting *People v. Pieters* (1991) 52 Cal.3d 894, 898.) Here, the language is unambiguous: the right to file a peremptory challenge does not extend to

any proceeding; to the contrary, section 170.6 specifically limits the types of proceedings to which it applies. To the extent there is any ambiguity in the statute, it extends only to whether an all-purpose assignment under subdivision (a)(2) creates a third class of applicable proceeding, or whether it simply further defines the categories of trials and contested matters of law and fact.

Hence, the question before this court is not whether a habeas proceeding constitutes a special proceeding; it does. (*People v. Villa* (2009) 45 Cal.4th 1063, 1069.) Instead, the question is whether the mere filing of a habeas petition satisfies the requirement of either *a trial or a hearing on a contested issue of law or fact*, and potentially the further question of whether the judge assigned to decide the petition constitutes an all-purpose assignment. To answer these questions, it is necessary to discuss the nature of habeas corpus proceedings as well as all-purpose assignments.

D. The Mere Filing of a Habeas Petition Does Not Establish a Right to Trial or Give Rise to Contested Issues of Law or Fact

A habeas corpus proceeding is a collateral attack upon a criminal judgment, which is presumed to be valid because of societal interest in the finality of judgments. (*In re Sanders* (1999) 21 Cal.4th 697, 703; *People v. Duvall* (1995) 9 Cal.4th 464, 474 (*Duvall*); *In re Clark* (1993) 5 Cal.4th 750, 764 (*Clark*); *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1260 (*Gonzalez*).) "Because a petition for writ of habeas corpus seeks to collaterally attack a presumptively final criminal judgment, the petitioner bears a heavy burden initially to *plead* sufficient ground for relief, and then later to *prove* them." (*Duvall*, *supra*, 9 Cal.4th at p. 474.)

"A habeas corpus proceeding begins with the filing of a verified petition for a writ of habeas corpus." (*People v. Romero* (1994) 8 Cal.4th 728, 737 (*Romero*).) But the filing of the petition is only the beginning; it is

simply the means that initiates the process: "[T]he petition serves primarily to launch the judicial inquiry into the legality of the retrain on the petitioner's liberty. . . ." (*Id.* at p. 738.) "When presented with a petition for a writ of habeas corpus, a court must first determine whether the petition states a prima facie case for relief—that is, whether it states facts that, if true, entitle the petitioner to relief-and also whether the stated claims are for any reason procedurally barred." (*Id.* at p. 737; *Clark*, *supra*, 5 Cal.4th at p. 769, fn. 9.)

"If the court determines that the petition does not state a prima facie case for relief or that the claims are all procedurally barred, the court will deny the petition outright, such dispositions being commonly referred to as 'summary denials.'" (*Romero*, *supra*, 8 Cal.4th at p. 737; *In re Clark*, *supra*, 5 Cal.4th 750, 769, fn. 9, 781). When, on the other hand, a habeas corpus petition is sufficient on its face, the court must issue a writ of habeas corpus "without delay." (Pen. Code, § 1476; *Romero*, *supra*, 8 Cal.4th at pp. 737-738; *Duvall*, *supra*, 9 Cal.4th at p. 475.)[4]

"The function of the writ or order [to show cause] is to 'institute a proceeding in which issues of fact are to be framed and decided.'" (*Romero*, *supra*, 8 Cal.4th at p. 740, quoting *In re Hochberg* (1970) 2 Cal.3d 870, 876, fn. 4.) The petition itself creates no cause or proceeding that would confer jurisdiction. (*People v. Gonzalez, supra,* 51 Cal.3d at p. 1258). "The issuance of either the writ of habeas corpus or the order to show cause creates a "cause," thereby triggering the state constitutional requirement that the cause be resolved 'in writing with reasons stated'

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[4] As an alternative to requiring the custodian to bring the prisoner physically before the court, courts sometimes use the substitute of an order to show cause why relief should not be granted instead of granting the writ. (*Romero*, *supra*, 8 Cal.4th at p. 738.)

[citations]." (*Romero*, *supra*, 8 Cal.4th at p. 740.) "As the means by which a judicial proceeding is instituted, the issuance of the writ (or order to show cause) is mandatory, not optional." (*Romero*, *supra*, 8 Cal.4th at p. 740.) A court cannot grant relief without first issuing the writ (or order). (*Id.* at p. 734.) Yet, issuance of the writ or an OSC indicates nothing more than the "court's *preliminary assessment* that the petitioner would be entitled to relief if his factual allegations are proved." (*Duvall*, *supra*, 9 Cal.4th at p. 475.) It is only the first step.

Once a writ or order to show cause has been issued, the person having custody over the petitioner must file a return, which must allege facts establishing the legality of the petitioner's custody. (*Romero*, *supra*, 8 Cal.4th at p. 738; Pen. Code, § 1480.) The return becomes the "'principal pleading'"; it is "'analogous to the complaint in a civil proceeding,'" and "'is an essential part of the scheme' by which relief is granted in a habeas corpus proceeding." (*Romero*, *supra*, 8 Cal.4th at p. 739; *Duvall*, *supra*, 9 Cal.4th at p. 477, fn. 4.) It is for this reason that a return containing only general denials is deficient because it fails to narrow the facts and issues to those that are in dispute. (*Duvall*, *supra*, 9 Cal.4th at p. 480.)

The petitioner, in turn, must file a traverse. While the traverse may incorporate allegations from the petition, any allegation of the return not controverted by the traverse is deemed admitted. (*Romero*, *supra*, 8 Cal.4th at p. 739; *In re Lewallen* (1979) 23 Cal.3d 274, 277 (*Lewallen*).) The traverse is therefore analogous to the answer in a civil proceeding. (*Duvall*, *supra*, 9 Cal.4th at p. 478, fn. 4; *Romero*, *supra*, 8 Cal.4th at p. 739; *In re Saunders* (1970) 2 Cal.3d 1033, 1037.) "In this relatively uncomplicated manner both factual and legal issues are joined for review." (*Lewallen*, *supra*, 23 Cal.3d at p. 278; see also *Duvall*, *supra*, 9 Cal.4th at p. 477 ["interplay" between return and traverse "frames the factual issues that the court must decide"].) If the factual allegations in the return are so

inadequate that the petitioner cannot answer them, the petitioner may "except" (Pen. Code, § 1484) to the sufficiency of the return "'in a procedure analogous to demurrer.'" (*Duvall*, *supra*, 9 Cal.4th at p. 477, quoting *In re Saunders*, *supra*, 2 Cal.3d at p. 1048.)

While the court may request an informal response from the petitioner's custodian or the real party in interest to assist the court in determining the sufficiency of the petition before issuing an OSC, the purpose of such an informal response is decidedly different from a return. (*Romero*, *supra*, 8 Cal.4th at p. 737.) Even though the informal response performs a screening function and may involve the citation to legal authority or even submission of factual materials, unlike the return, an informal response is not a pleading; it does not frame or join issues and does not establish a cause. (*Id.* at p. 741-742.) It is for this reason that a court may grant a habeas corpus petitioner relief only after issuance of an order to show cause or a writ of habeas corpus. (*Romero*, *supra*, 8 Cal.4th at p. 744.)

It follows that until a court grants the writ or issues an OSC, there are no contested issues of law of fact within the meaning of section 170.6. Until that time, there is no "cause" (*Romero*, *supra*, 8 Cal.4th at p. 740), and, therefore, there can be no contested issues. Indeed, the People may choose not to contest the petition at all. (*Saunders*, *supra*, 2 Cal.3d at p. 1048 ["When the return effectively acknowledges or 'admits' allegations in the petition and traverse which, if true, justify the relief sought, such relief may be granted without a hearing on the other factual issues joined by the pleadings."]) Even when the People file an informal response, that document is most analogous to a demurrer, and as previously noted, for the past half century courts have interpreted section 170.6 as not applying to demurrers. (*Fight for the Rams v. Superior Court, supra,* 41 Cal.App.4th at p. 957; *Zdonek v. Superior Court, supra,* 38 Cal.App.3d at pp. 852-853.)

This must certainly also be the case at an earlier stage where the petitioner has simply filed his petition and the People have not responded in any fashion. In deciding whether a habeas petition states a prima facie case, "the judge does not pass upon or determine issues of fact but rather decides whether a triable issue of fact exists." (*Bambula v. Superior Court*, *supra*, 174 Cal.App.3d at p. 657 [motion for summary judgment is not a determination of contested fact issues].) Hence, in the context of a habeas petition, there can be no contested issue of fact or law for purposes of section 170.6 until after the court has issued the writ or an OSC.

Maas asserts that the decision as to whether a petition states a prima facie case involves contested issues of law and fact. (ABOM 16-17.) But he does not support this naked assertion with any authority. He fails to recognize that at this stage the judge must accept the allegations of the petition as true, and therefore there is no more a contested issue of law or fact than in the case of a demurrer.

For similar reasons, the determination of whether a habeas petition states a prima facie case obviously does not involve a trial. Notably, Maas does not contend otherwise. Only after the issues have been joined through the issuance of the writ and the filing of a return and traverse does the court determine whether an evidentiary hearing is needed. (*Romero*, *supra*, 8 Cal.4th at p. 739; Pen. Code, § 1484.) A court may grant or deny relief without the need to conduct such a hearing, where, for instance, a party's admissions or the matters of record are dispositive. (*Romero*, *supra*, 8 Cal.4th at p. 739.) "[I]f the return and traverse reveal that the petitioner's entitlement to relief hinges on the resolution of factual disputes, then the court should order an evidentiary hearing." (*Id.* at pp. 739-740.) Simply deciding whether a petition states a prima facie case is not a trial of any kind.

Thus, the mere filing of a habeas petition, without more, does not satisfy either of the conditions under section 170.6, subdivision (a)(1). The petition simply initiates the habeas proceeding. There is no contested cause until the court determines the petition is not subject to summary denial and issues a writ or OSC, which requires the parties to file formal pleadings. Under section 170.6, subdivision (a)(1), a petitioner therefore has no right to challenge the judge who determines whether the petitioner has stated a prima facie case for relief. The Court of Appeal's rule improperly expanded the reach of section 170.6 to include any "matter" even when it is not a contested cause.

E. Habeas Petitions Are Not Assigned to a Judge for All Purposes, At Least Before the Issuance of a Writ Or OSC

Although Maas does not contend otherwise, for purposes of completeness it is worth noting that to the extent the all-purpose rule in subdivision (a)(2) establishes a third category of cases subject to peremptory challenge, it too does not apply in the context of habeas proceeding before the issuance of a writ. Section 170.6, subdivision (a)(2), "does not explain when an assignment to a judge may be deemed one for all purposes." (*Lavi*, *supra*, 4 Cal.4th at p. 1179.) The purpose of such an assignment is "'the pragmatic value of having all matters arising in a complicated and potentially long drawn-out case to be heard by one judge, so that the time of litigants, counsel and the superior court need not be wasted in the repetitive education of successive judges in the intricacies of that kind of case.'" (*Ibid.*, quoting *Zdonek v. Superior Court, supra,* 38 Cal.App.3d at p. 856.) This court has established two minimum prerequisites for a case assignment to be considered an all purpose one: (i) "the method of assigning cases must 'instantly pinpoint' the judge whom the parties can expect to ultimately preside at trial"; and (ii) "that same

judge must be expected to process the case 'in its totality' [citation], from the time of the assignment, thereby 'acquiring an expertise regarding the factual and legal issues involved, which will accelerate the legal process.'" (*Lavi*, *supra*, 4 Cal.4th at p. 1180, fns. omitted.)

At least prior to the issuance of a writ or OSC, a habeas matter does not qualify as an all-purpose assignment. First, a contrary conclusion would be at odds with rules of habeas procedure this court has previously established. In *Griggs v. Superior Court* (1976) 16 Cal.3d 341, this court adopted a series of rules to be followed by superior courts in exercising their unlimited jurisdiction in habeas corpus cases. As an initial matter, when a court is presented with a habeas petition, the court must determine whether the petition states a prima facie case. "If the petition states a prima facie case for relief, *then the court must determine whether it will hear the matter on the merits*." (*Id.* at p. 347, italics added.) Hence, this court has already anticipated that the court that initially determines whether a petition states a prima facie case will not inevitably be the same court that retains the matter for all further proceedings. Notably, "[i]f the challenge is to a particular judgment or sentence, the petition should be transferred to the court which rendered judgment if that court is a different court from the court wherein the petition was filed. . . ." (*Ibid.*) Alternatively, "[i]f the challenge is to conditions of the inmate's confinement, then the petition should be transferred to the superior court of the county where the inmate is confined if that court is a different court from the court wherein the petition was filed." (*Ibid.*) As a general rule, a court may also properly transfer a case where an evidentiary hearing is necessary and the persons who would participate in that hearing are more efficiently available to another court or another court is better suited to conduct the hearing. (*Ibid.*) Hence, according to the rules already set forth in *Griggs*, it cannot be said that the

same judge would be "expected" to process the case in its totality from the time of the assignment. (*Lavi*, *supra*, 4 Cal.4th at p. 1180.)

Second, even aside from the conflict between the rules of habeas procedure and the definition of an all-purpose assignment, a habeas proceeding simply does not fit within the policies that motivate such all-purpose assignments. Habeas matters as a whole are not uniquely complicated or drawn-out. This is especially true at the initial pleading stage where many petitioners file in pro per and the petitions are routinely denied. Such petitions stand in sharp contrast to complex litigation, for instance, that involves "'multiple related cases, extensive pretrial activity, extended trial times, difficult or novel issues, and postjudgment judicial supervision'" and which therefore "typically 'should be assigned to one judge for all purposes.'" (*Lavi*, *supra*, 4 Cal.4th at p. 1180, quoting Cal. Stds. Jud. Admin, § 19, subds. (c), (d) [23 West's Cal. Codes Ann. Rules, pt. 2 (1992 supp.)] p. 392.)

Finally, the all-purpose assignment provisions in section 170.6, subdivision (a)(2), anticipate a challenge directed to a "trial" of either a civil or criminal "cause." But at least before the issuance of an OSC or a writ, a habeas proceeding is not a cause (*Romero*, *supra*, 8 Cal.4th at p. 740; *People v. Gonzalez*, *supra*, 51 Cal.3d at p. 1258), and as noted above, it does not involve a trial.

Accordingly, assuming section 170.6 applies to all-purpose assignments that do not otherwise satisfy subdivision (a)(1) of that section, a habeas case would still not qualify before an OSC or writ has issued. Notably, Maas does not claim his petition constituted an all-purpose assignment.

F. Case Law Interpreting Section 170.6 in the Habeas Context Comports With the Requirement That a Peremptory Challenge May Be Made Only After a Writ or OSC Has Issued

Although section 170.6 was first codified over a half century ago (Stats. 1957, ch. 1055, § 1, p. 2288), Maas cites no other case, and respondent is not aware of any, that has permitted a peremptory challenge before the issuance of a writ or OSC.

At least one court, however, has held that *after* the Court of Appeal issues an OSC returnable to the superior court, the habeas proceeding is properly considered a continuation of the underlying criminal action, and as such the petitioner's challenge to the original trial judge would be untimely, because it was not made before the earlier trial commenced. (*Yokley v. Superior Court* (1980) 108 Cal.App.3d 622, 624 (*Yokley*).) The *Yokley* court reasoned that, like a contempt proceeding or a revocation of probation, an order to show cause in a habeas matter involves """"substantially the same issues" as the original action'" and should therefore be considered a continuation of that original action. (*Id.* at p. 626.) Analogizing to situations in which the Court of Appeal remands a matter to the superior court for further proceedings, such as to decide the voluntariness of a confession or the fairness of a photo lineup, the *Yokley* court concluded that a peremptory challenge under section 170.6 should also not be available in the habeas context. (*Id.* at p. 627.) While the court recognized there may be some dissimilarities with such remands (because a habeas OSC can be returnable before any superior court judge or even a referee), the court reasoned that "[a]bsent a disqualification for cause, . . . , there is no judge better suited for making a determination of the issues raised in petitioner's petition than the original trial judge." (*Id.* at p. 628.) Hence, the court in essence concluded that the habeas OSC should not be treated as a new proceeding, because, as a practical matter, to do so would

allow the defendant to avoid the trial judge who was most familiar with the underlying facts and best situated to rule on the petition.

In dictum, the *Yokley* court suggested that in other situations involving various types of remand, if a judge who had not previously participated in the matter was assigned, courts had allowed the parties to exercise a peremptory challenge against the new judge. (*Id.* at p. 627, citing *People v. Smith* (1962) 196 Cal.App.2d 854 and *Lyons v. Superior Court* (1977) 73 Cal.App.3d 625.) However, because the same trial judge had been assigned to hear the habeas petition, this potential rule did not apply in that case. (*Ibid.*)

Seeking to capitalize on the *Yokley* dictum, Maas notes that beginning with *Jacobs v. Superior Court* (1959) 53 Cal.2d 187, this court first recognized the general rule that when a proceeding is in essence a continuation of an earlier related proceeding, a party may not disqualify the trial judge because the motion would be untimely. (*Id.* at p. 190.) This court reasoned that a contrary rule would allow the party to disqualify the judge most familiar with the facts in the hope of obtaining a more favorable judgment. (*Id.* at p. 191.) As the *Yokley* court noted, the Court of Appeal in *Smith* seized upon the reason for the *Jacobs* rule to distinguish that case and permit motions under section 170.6 where the related proceedings involved different judges. (*People v. Smith*, *supra*, 196 Cal.App.2d at pp. 859-860 [probation hearing by judge with no prior connection to case].) Maas argues that this court should likewise apply a similar rule here, because there is no risk that he was trying to judge shop or cause undue delays. (ABOM 15.)

Yokley does not assist Maas for several reasons. Above all else, that case involved habeas proceedings after an OSC had been issued. That distinction is critical because without a cause, there are no contested issues of law or fact. The mere fact that habeas proceedings are related to the underlying criminal action does not obviate these unambiguous statutory

requirements of section 170.6, subdivision (a)(1). As previously discussed, Maas's contention that a pre-cause decision as to whether a habeas petition states a prima facie case also involves contested issues of law and fact (ABOM 16) is simply unsupported.

Consequently, it is unnecessary for this court to decide the merit of *Yokley's* dictum that a peremptory challenge would be available if the habeas proceeding involved a different judge. That rule would only apply, if ever, once there is a cause. Nevertheless, it is worth noting that the express language of section 170.6, subdivision (a)(2), provides that "[i]n no event" shall the motion be considered timely "after trial of the cause has otherwise commenced." Hence, if the habeas proceeding is seen as a continuation of the underlying criminal trial, then the motion would be untimely. There is no reason for this court to go beyond the statutory language to examine the supposed purposes behind the rule. However, as discussed further below, to the extent this court chooses to do so, policy considerations establish that a section 170.6 challenge should not be permitted before a writ or order to show cause has issued.

G. Policy Considerations Militate Against Allowing a Section 170.6 Challenge Before an OSC or Writ Has Issued

Setting aside the explicit requirements of section 170.6, policy considerations disfavor permitting a peremptory challenge until after a order to show cause has issued. The initial goal of reviewing a petition even before the People have made an appearance is to enable the superior court to cull out those petitions that are subject to summary denial from those that have potential merit. The need to expedite this initial review and avoid unnecessary delay is self-evident. (See Pen. Code, § 1476 [a court must issue the writ "without delay."].) It is equally clear that entitling habeas petitioners to file peremptory challenges at this initial stage would only

serve to undermine these goals. (Cf. *Fry v. Superior Court* (2013) 222 Cal.App.4th 475, 483 [noting that "fast-moving departments" such as writs and receivers often process cases in days rather than weeks and may expend substantial judicial resources while an undirected peremptory challenge works its way through the clerk's office].)

Indeed, like the policy concerns that motivated the 1965 amendments to section 170.6, construing that provision as applying to habeas proceedings only after a writ or OSC has issued would conserve judicial resources in the smaller counties, reduce the number of disqualification motions statewide, and preserve the motion for situations in which important fact determinations are involved, such as trials. (See *Abdul Y.*, *supra*, 130 Cal.App.3d at p. 858, citing Report of the Committee on Administration of Justice (1964) 39 State Bar J. 496, 498.)

In order to comply with the Court of Appeal's rule in the present case, a superior court would first have to determine who the original trial judge was—a matter that could be made more complicated if there was more than one judge, for instance at sentencing. If that judge is different than the judge assigned to the habeas petition, then it would be necessary to determine further whether the petitioner previously executed a peremptory challenge in the underlying criminal matter. Because the habeas proceeding is a continuation of the original criminal matter (*Yokley*, *supra*, 108 Cal.App.3d at pp. 626-628), the petitioner would not be able to challenge a new judge if the petitioner or a co-defendant had previously exercised a challenge in the criminal case. (§ 170.6, subd. (a)(4)) ["Except as provided in this section, no party or attorney shall be permitted to make more than one such motion in any one action or special proceeding pursuant to this section."]; see *Pappa v. Superior Court* (1960) 54 Cal.2d 350, 353 [no additional challenges could be made on retrial because both sides had made section 170.6 challenges in the first trial].) But at this stage of the collateral

proceedings, it may not be clear whether the petitioner made a prior challenge. Unless the habeas petitioner happens to volunteer such information (and it is not required on the standardized habeas form), a court clerk or a presiding judge would have no way of knowing whether a petitioner has an available peremptory challenge without searching the court records from the criminal matter. As the facts of the present case suggest, where there was a 15-year hiatus between the criminal sentencing and the filing of the petition, this determination may be no easy task.

Assuming it could be determined that the petitioner had not previously executed a peremptory challenge, the court would be unable to act on the petition while it sends notice of the assignment to the petitioner and waits some amount of time for the petitioner to respond. Just how long that waiting period would be, remains unclear. As previously noted, section 170.6, subdivision (a)(2), provides a lengthy list of times in which the challenge must be made depending upon the type of proceeding. Habeas corpus proceedings are not listed, let alone proceedings before an OSC. But regardless of which time deadline would apply, presumably the court would have to add an additional period to account for the time it would take to mail the notice to the petitioner and provide an opportunity to receive a response. Thus, the Court of Appeal's rule would necessarily delay the initial determination of whether further proceedings are necessary, or whether instead the petition should be summarily denied.

Nor would the Court of Appeal's rule benefit habeas petitioners as a whole. A habeas petitioner stands little to gain by challenging the judge assigned to determine whether his or her petition states a prima facie case. Maas points out that if the petition is denied in the superior court, then he could not re-file the same petition in that court. (ABOM 19.) But if the petitioner believed the superior court judge wrongfully denied the petition as a result of bias, the petitioner could always seek relief in either the Court

of Appeal or this court. (Cal. Const., art. VI, § 10 [granting Supreme Court, courts of appeal and superior court original jurisdiction in habeas matters]; *Romero, supra*, 8 Cal.4th at p. 737; *In re Crow* (1971) 4 Cal.3d 613, 621, fn. 8.) Because the determination of whether the petition states a prima facie case is a question of law, the reviewing court would not be bound by the prior ruling of the superior court. (See *In re Serrano* (1995) 10 Cal.4th 447, 457; *In re Rosenkrantz* (2002) 29 Cal.4th 616, 677; cf. *In re Stevenson* (2013) 213 Cal.App.4th 841, 857 ["'When a superior court grants relief on a petition for habeas corpus without an evidentiary hearing, ... the question presented on appeal is a question of law, which the appellate court reviews de novo.'"]; *In re Borlik* (2011) 194 Cal.App.4th 30, 35 ["when the lower court reaches a decision based on the pleadings and attached exhibits, . . . , we independently review the record."].)

On the other hand, the Court of Appeal's rule is not without detriment to the petitioner. Granting habeas petitioners the right to file a peremptory challenge before a court has even issued an OSC would mean that petitioners not only can raise such a challenge, but also that they *must* do so or otherwise forfeit that right. (See *Gant v. Superior Court, supra*, 90 Cal.App.4th at p. 525 [an otherwise timely peremptory challenge must be denied if the judge has presided at an earlier hearing which involved a determination of contested factual issues relating to the merits].) And if the petitioner uses the peremptory challenge at this early stage, he or she would generally be precluded from making any additional challenge should the proceedings continue under a different assigned judge. (§ 170.6, subd. (a)(4).) Considering the fact that many, if not most, habeas petitioners do not have the advantage of counsel before an OSC or writ has issued, either the use or forfeiture of the right would likely occur before the petitioner has received legal advice. In the present case, for instance, the Court of Appeal appointed counsel only after it issued an OSC. Thus, as a general matter,

petitioners would receive greater benefit by being able to wait until after the writ or OSC has issued.

Maas urges that there would be no danger of forum shopping in his case, because the judge who ruled on the habeas petition was different than the judges who presided at trial. (ABOM 18.) But at most this simply points to the absence of one potential reason for not allowing the challenge; it would not provide an affirmative reason for permitting it. As discussed above, even if Maas could escape the clear language of the statute, there are many other policy reasons for not permitting a challenge prior to the issuance of an OSC.

Positing that in the vast majority of cases the trial judge in the original criminal trial would also rule on the habeas matter, Maas asserts that the Court of Appeal's rule would not be difficult to implement and would also not waste judicial resources. (ABOM 20.) But Maas simply begs the question. As previously discussed, it does not follow that the court that entered judgment, and which should ordinarily hear the matter once a cause has issued, will inevitably be the same court that determines whether a prima facie case has been stated. (See *Griggs v. Superior Court*, *supra*, 16 Cal.3d at p. 347.) Further, as for judicial resources, Maas apparently discounts the costs of determining who the original trial judges were and whether the petitioner had previously executed a peremptory challenge in any of the prior proceedings, not to mention the additional delay in notifying the petitioner as to the assigned judge.

Accordingly, allowing a peremptory challenge before the issuance of an OSC or writ would be contrary to the plain language of section 170.6, the procedural rules governing habeas corpus proceedings, and the public policies behind both.

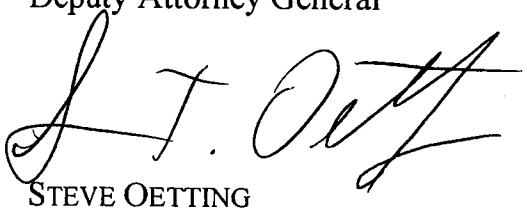
CONCLUSION

For the reasons stated above, respondent respectfully requests this court reverse the judgment of the Court of Appeal granting the writ of mandate and remand the matter to allow the Court of Appeal to address the merits of the petition for writ of habeas corpus.

Dated: September 25, 2015

Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California
EDWARD C. DUMONT
Solicitor General
GERALD A. ENGLER
Chief Assistant Attorney General
LISE S. JACOBSON
Deputy Attorney General



STEVE OETTING
Deputy Solicitor General
Attorneys for Respondent

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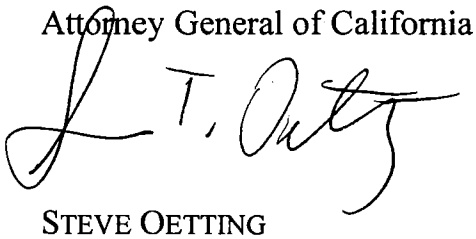
CERTIFICATE OF COMPLIANCE

I certify that the attached **ANSWERING BRIEF ON THE MERITS** uses a 13 point Times New Roman font and contains 9,227 words.

Dated: September 25, 2015

KAMALA D. HARRIS
Attorney General of California



STEVE OETTING
Supervising Deputy Attorney General
Attorneys for Respondent

DECLARATION OF SERVICE BY U.S. MAIL & ELECTRONIC SERVICE

Case Name: **In re MICHAEL EUGENE MAAS on Habeas Corpus** No.: **S225109**

I declare: I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business. The Office of the Attorney General's eService address is AGSD.DAService@doj.ca.gov.

On September 28, 2015, I served the attached: **ANSWERING BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 600 West Broadway, Suite 1800, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

Hon. John M. Thompson
c/o Clerk of the Court
San Diego County Superior Court
250 E. Main Street
El Cajon, CA 92020

Fourth Appellate District, Division One
Court of Appeal of the State of California
Symphony Towers
750 B Street, Suite 300
San Diego, CA 92101

and, furthermore I declare, in compliance with California Rules of Court, rules 2.251(i)(1)(A)-(D) and 8.71(f)(1)(A)-(D), I electronically served a copy of the above document on September 28, 2015, by 5:00 p.m., on the close of business day to the following.

eservice-criminal@adi-sandiego.com
Appellate Defenders, Inc.'s

da.appellate@sdcda.org
San Diego District Attorney's Office

russbab@gmail.com
Appellant's Attorney

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on September 28, 2015, at San Diego, California.

O. de la Cruz
Declarant

O. de la Cruz
Signature

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