December 9, 2015

Hon. Kamala D. Harris
Attorney General
1300 I Street, 17th Floor
Sacramento, California 95814

Attention: Ms. Ashley Johansson
Initiative Coordinator

Dear Attorney General Harris:

Pursuant to Elections Code Section 9005, we have reviewed the proposed statutory initiative related to the death penalty (A.G. File No. 15-0096).

BACKGROUND

Murder and the Death Penalty

First degree murder is generally defined as the unlawful killing of a human being that (1) is deliberate and premeditated or (2) takes place at the same time as certain other crimes, such as kidnapping. It is punishable by a life sentence in state prison with the possibility of being released by the state parole board after a minimum of 25 years. However, current state law makes first degree murder punishable by death or life imprisonment without the possibility of parole when specified "special circumstances" of the crime have been charged and proven in court. Existing state law identifies a number of special circumstances that can be charged, such as in cases when the murder was carried out for financial gain, was especially cruel, or was committed while the defendant was engaged in other specified criminal activities. Murder trials where the death penalty is sought are divided into two phases. The first phase involves determining whether the defendant is guilty of murder and any charged special circumstances, while the second phase involves determining whether the death penalty should be imposed. A jury generally determines which penalty is to be applied when special circumstances have been charged and proven.

Post-Conviction Proceedings

Direct Appeals. Upon the conclusion of the murder trial, defendants who are found guilty and receive a sentence of death are entitled to a series of post-conviction proceedings. Under existing state law, death penalty verdicts are automatically appealed to the California Supreme Court. (Individuals who have been convicted of crimes but are not sentenced to death are entitled to appeal their conviction initially to the Courts of Appeal.) In these "direct appeals," the

defendants' attorneys argue that violations of state law or federal constitutional law took place during the trial, such as evidence improperly being included or excluded from the trial. These direct appeals focus on the records of every court proceeding that resulted in the defendant receiving a death sentence. If the California Supreme Court confirms the conviction and death sentence, the defendant can ask the U.S. Supreme Court to review the decision.

Habeas Corpus Petitions. In addition to direct appeals, death penalty cases ordinarily involve extensive legal challenges—first in the California Supreme Court and then in federal courts. These challenges, which are commonly referred to as "habeas corpus" petitions, involve factors of the case that would not be evident in records documenting the case (which are considered in direct appeal proceedings). Examples of such factors include claims that the defendant's counsel was ineffective or that had the jury been aware of additional information (such as biological, psychological, or social factors faced by the defendant) it would not have sentenced the defendant to death. Finally, inmates who have received a sentence of death may also request that the Governor reduce their sentence.

Appointment of Counsel in Direct Appeals and Habeas Corpus Proceedings. In direct appeal and habeas corpus proceedings, the California Supreme Court appoints legal counsel to individuals who have been sentenced to death but cannot afford legal representation. These attorneys must meet minimum qualifications established by the Supreme Court. Some of these attorneys are employed by state agencies—specifically, the Office of State Public Defender (OSPD) or the Habeas Corpus Resource Center (HCRC). The remainder of court-appointed attorneys are private counsel—meaning sole practitioners or members of private law firms—who are compensated by the Supreme Court. Different attorneys are generally appointed to represent individuals in direct appeals and habeas corpus petition proceedings. Currently, defendants can spend significant amounts of time waiting for the Supreme Court to appoint counsel for their direct appeal or habeas corpus proceedings. As of September 2015, 57 individuals were awaiting appointment of counsel in direct appeals and 358 individuals were awaiting appointment of counsel in habeas corpus proceedings.

Costs to the State for Post-Conviction Proceedings. The above proceedings can take more than a couple of decades to complete in California. As of September 2015, an estimated 344 direct appeals and 251 state habeas corpus petitions were pending in the California Supreme Court. The state incurs costs for the Supreme Court to hear such cases and for court-appointed counsel to provide legal representation to condemned individuals. The state also incurs costs for attorneys employed by the state Department of Justice to uphold death sentences in the appeals process. The state currently spends about $50 million annually on direct appeals and habeas corpus proceedings.

Enforcement of the Death Penalty

Since the current death penalty law was enacted in California in 1978, over 900 individuals have received a death sentence. As of November 2015, 15 have been executed, 102 have died prior to being executed, 747 are in state prison with death sentences, and the remainder have had their sentences reduced by the courts. Most of the offenders who are in prison with death sentences are at various stages of the direct appeal or habeas corpus petition process. Condemned

male inmates generally are housed by the California Department of Corrections and Rehabilitation (CDCR) at San Quentin State Prison (on death row), while condemned female inmates are housed by CDCR at the Central California Women's Facility in Chowchilla. The state currently has various security regulations and procedures that result in increased security costs for these inmates. For example, inmates under a death sentence generally are handcuffed and escorted at all times by one or two officers while outside of their cells. In addition, these offenders are currently required to be placed in separate cells, whereas most other inmates share cells.

In 2006, California halted executions of death sentences after the federal courts ruled that the state's lethal injection protocol could cause inmates to suffer unconstitutional levels of pain while being executed. Accordingly, CDCR began in 2007 to revise its regulations related to execution procedures. While CDCR completed this process in 2010, the state courts ruled that CDCR did not appropriately follow the procedures outlined in the state's Administrative Procedures Act, which requires state agencies to engage in certain activities to provide the public with a meaningful opportunity to participate in the adoption of state regulations and to ensure that such regulations are clear, necessary, and legally valid. Consequently, the courts ordered the department to continue its halt on executions until it created regulations in accordance with these guidelines. In June 2015, as part of a legal settlement, CDCR agreed to draft new lethal injection regulations for review through the procedures laid out in the Administrative Procedures Act. Draft regulations were subsequently published in November 2015 and are currently undergoing public comment.

PROPOSAL

This measure amends state law in an attempt to speed up the judicial review of death penalty cases. Specifically, it (1) shifts initial jurisdiction for habeas corpus petitions, (2) imposes time frames and limitations on direct appeal and habeas corpus proceedings, (3) changes the process for the appointment of counsel in direct appeals and habeas corpus petition proceedings, and (4) makes various other changes.

Jurisdiction for Post-Conviction Proceedings

The measure shifts initial jurisdiction for habeas corpus proceedings from the California Supreme Court to the trial courts. (The Supreme Court would continue to retain initial jurisdiction over direct appeals.) Specifically, the habeas corpus petitions would be assigned to the judge who presided over the original trial unless good cause is shown for the petition to be heard by another judge or another court. The measure requires trial courts to issue a statement explaining the basis for their rulings in habeas corpus petitions, which could then be appealed to the Courts of Appeal. The decisions made by the Courts of Appeal could then be appealed to the Supreme Court. The measure allows the Supreme Court to transfer any habeas corpus petitions pending before it to the trial courts.

Time Limits on Death Penalty Process

The measure imposes a series of time limits for the completion of parts of the death penalty process. These time limits would apply to various aspects of the direct appeal and habeas corpus proceedings.

Completion of Direct Appeal and Initial Habeas Corpus Petition Within Five Years. First, the measure requires that the direct appeal and the initial state habeas corpus processes be completed within five years of the sentence of death unless "extraordinary and compelling" reasons justify the delay. In cases where such a delay is not justified and the five-year time limit is exceeded, victims, the defendant's counsel, or the attorneys seeking to uphold the death sentence could request a court order to expedite the process. Under the measure, the original death sentence would remain valid and neither the direct appeal nor the habeas corpus petition would be dismissed in cases where the five-year time limit is exceeded. The measure requires the Judicial Council—the governing and policymaking body of the judicial branch—to revise its rules and standards related to the processing of direct appeals and habeas corpus petitions to ensure that the five-year time limit is met.

Filing of Habeas Corpus Petitions Within One Year of Counsel Appointment. The measure requires that habeas corpus petitions be filed within one year of appointment of counsel. The trial court would then have no more than two years to issue its decision on the petition. If a petition is not filed within this time period, the court must dismiss the petition unless it determines that the defendant is likely either innocent or ineligible for the death sentence.

Limitations on Proceedings. In order to help meet the above time frames, the measure imposes a series of limitations on direct appeals and habeas corpus proceedings. For example, in direct appeal proceedings, extensions of time may only be granted for compelling or extraordinary circumstances. The measure also prohibits additional habeas corpus petitions from being filed after the court rules on the initial habeas corpus petition, except in those cases where the court finds that the defendant is likely either innocent or ineligible for the death sentence.

Appointment of Counsel

The measure shifts the authority to appoint counsel for habeas corpus proceedings to the trial courts. The measure also directs the Judicial Council and the California Supreme Court to reevaluate and amend the qualifications that attorneys must meet prior to appointment in direct appeal or habeas corpus proceedings. According to the measure, these standards should (1) ensure competent representation, (2) expand the pool of attorneys eligible to ensure that cases are heard in a timely manner and, (3) allow the state to qualify for expedited review of capital cases in federal courts.

In addition, the measure changes the process for appointing counsel from direct appeal cases under certain circumstances. Currently, the Supreme Court appoints attorneys from a list it maintains. Under the measure, attorneys could also be appointed from the lists of attorneys maintained by the Courts of Appeal that are deemed competent to represent individuals who cannot afford representation in appeals for noncapital cases. Specifically, those attorneys who are (1) qualified for appointment to the most serious noncapital appeals and (2) meet the qualification standards adopted by the Judicial Council for capital cases would be required to

accept appointment to direct appeals to death penalty convictions if they want to remain on the Courts of Appeal's appointment lists.

Other Provisions

HCRC. The measure eliminates the HCRC's five-member board of directors and shifts responsibility for overseeing the operations of the HCRC to the California Supreme Court. The measure also (1) lowers the compensation of HCRC attorneys to the same level as OSPD attorneys, (2) requires annual reporting on the status of all cases in which the center provides representation, (3) limits HCRC representation to state habeas corpus petitions, and (4) limits HCRC representation in federal habeas corpus proceedings to only those activities that are fully reimbursed by the federal courts.

Inmate Work Requirement. Current state law generally requires that inmates work while they are in prison. California statutes and CDCR regulations allow for some exceptions to these requirements, such as for inmates who pose too great a security risk to participate in work programs. The CDCR also monitors inmates' wage and trust accounts and deducts 50 percent of any deposit in cases where the inmate owes victim restitution. This measure specifies that every person under a sentence of death in CDCR must work while in state prison, generally subject to the existing state laws and regulations. The measure also requires that 70 percent of condemned inmates' wage and trust accounts be deducted if the inmate owes victim restitution.

Enforcement of Death Sentence. The measure authorizes CDCR to house inmates under a sentence of death in any prison. The measure also exempts CDCR execution standards, procedures, and regulations from the state's Administrative Procedures Act. In addition, the measure makes various changes regarding the method of execution employed by the state. For example, legal challenges to the method could only be heard in the court that imposed the death sentence. In addition, if such challenges were successful, the measure requires the trial court to order a valid method of execution. In cases where federal court orders prevent the state from using a given method of execution, CDCR would be required to develop a method of execution that meets federal requirements within 90 days. Finally, the measure exempts various health care professionals that assist CDCR with executions from certain state laws and disciplinary actions by licensing agencies, if those actions are imposed as a result of assisting CDCR with executions.

FISCAL EFFECTS

The provisions of this measure would affect various state costs. The magnitude of these effects would depend on how certain provisions in the measure are interpreted and implemented. For example, it is uncertain what the courts would consider as compelling and extraordinary circumstances when considering time extensions for direct appeals and habeas corpus petitions and how often the courts would grant such extensions. Thus, the fiscal effects of the measure described below are subject to considerable uncertainty.

Direct Appeals and Habeas Corpus Proceedings. The measure would increase workload for trial courts, Courts of Appeal, and the California Supreme Court related to direct appeals and habeas corpus proceedings in the short run. The fiscal impact of this additional workload on state

courts would depend in part on how the courts addressed the increased death penalty workload, as well as non-death penalty workload. For example, in the first several years, state courts would likely need to address the hundreds of cases currently pending in the state judicial system within the various time limits specified in the measure. Such additional workload could require significant staffing increases in the trial courts and the Courts of Appeal in the short run if the Supreme Court transferred the habeas corpus cases currently pending before it to the lower courts. Similarly, the Supreme Court would also likely require additional staffing to comply with the time frames specified in the measure. It is also possible that in order to address the increased death penalty related workload, state courts could delay other case types.

Additionally, in the short run, the measure would likely require a significant increase in the number of attorneys appointed to represent condemned individuals within the specified time limits. This could require the recruitment and training of qualified attorneys to represent those individuals currently awaiting appointment of counsel. The courts might also determine that more than one attorney should be appointed to handle either the direct appeal or habeas corpus proceedings to meet the time limits established by the measure. In total, the extent of the increase in state costs in the short run is unknown and would depend on how courts addressed the increased workload, but could potentially be in the tens of millions of dollars annually for several years.

The fiscal impact of the measure on the cost of direct appeals and habeas corpus proceedings in the longer run is less certain. On the one hand, to the extent the measure resulted in a reduction in the number of cases currently pending and the amount of time each case takes, the measure would eventually allow the state to reduce its expenditures on these proceedings. On the other hand, the trial courts, the Courts of Appeal, and the Supreme Court would need to maintain a certain level of staffing at all times to handle such cases. Additionally, the measure could result in a net long-term increase in the cost of direct appeals and habeas corpus petitions under certain circumstances. For example, the additional layers of review required for habeas corpus petitions could add to the time and cost of each case. Moreover, if the measure resulted in the state appointing separate counsel for habeas corpus petitions before the trial courts and the Courts of Appeal, the cost of each case could also increase.

State Corrections. To the extent that CDCR changes the way it houses condemned inmates, the measure could result in state prison savings. For example, if CDCR no longer held male condemned inmates in single cells at San Quentin, and instead transferred these inmates to other prisons, it could reduce the cost of housing and supervising these inmates. In addition, to the extent the measure resulted in additional executions that reduced the number of condemned inmates, the state would also experience additional savings. In total, such savings could potentially reach the tens of millions of dollars annually.

Other Fiscal Effects. To the extent that the changes in this measure have an effect on the incidence of murder in California or the frequency with which death penalty sentences are sought by local prosecutors in murder trials, the measure could affect state and local government expenditures. The resulting fiscal impact, if any, is unknown and cannot be estimated.

Summary of Fiscal Effects. We estimate that this measure would have the following major fiscal effects, which could vary considerably depending on how certain provisions in the measure are interpreted and implemented:

- Increased state costs that could be in the tens of millions of dollars annually for several years related to direct appeals and habeas corpus proceedings, with the fiscal impact on such costs being unknown in the longer run.
- Potential state correctional savings that could be in the tens of millions of dollars annually.

Sincerely,

_____

Mac Taylor
Legislative Analyst

_____

Michael Cohen
Director of Finance