JUDICIAL COUNCIL OF CALIFORNIA

770 L Street, Suite 1240 • Sacramento, California 95814-3368
Telephone 916-323-3121 • Fax 916-323-4347 • TDD 415-865-4272

TANI G. CANTIL-SAKAUYE
Chief Justice of California
Chair of the Judicial Council

MARTIN HOSHINO
Administrative Director

CORY T. JASPERSON
Director, Governmental Affairs

May 21, 2015

Hon. Mark Leno
Member of the Senate
State Capitol, Room 5100
Sacramento, California 95814

Subject: SB 694 (Leno), as introduced – Oppose and Fiscal Impact Statement

Dear Senator Leno:

The Judicial Council, while recognizing that establishing the standard of review for writs of habeas corpus as contemplated by SB 694 is within the purview of the legislature, the council regrets to inform you of its opposition to SB 694 for significant procedural reasons that impact the administration of justice, and to share with you the potential workload considerations and costs associated with the bill should it be signed into law.

SB 694 would allow a writ of habeas corpus to be prosecuted on the basis of new evidence which would raise a reasonable probability of a different outcome if a new trial were granted.

Workload and other grounds for opposition

The council believes that changing the standard of review for writs of habeas corpus alleging new exculpatory evidence from the current standard of "undermines the prosecution case and points unerringly to innocence" to "raises a reasonable possibility of a different outcome if a new trial were granted", will substantially increase the workload of criminal courts, Courts of Appeal, and the Supreme Court. We are particularly concerned about the potential new burdens on the

superior courts because they are already overburdened with workload from the recent passage of Proposition 47 (November 2014).

Currently there is no codified standard of proof for a writ of habeas corpus brought on the basis of new evidence. The current standard is based on case law. *In re Lawley* found that newly discovered evidence "must undermine the entire prosecution case and point unerringly to innocence or reduced culpability;" ((2008) 42 Cal. 4th 1231, 1239) and "if 'a reasonable jury could have rejected' the evidence presented, a petition has not satisfied his burden." *(Id.)*

In the last fiscal year for which numbers are available from the Judicial Council (2012–13), the courts received a high number of habeas corpus petitions. The filings for the various levels of court were as follows: 2,918 in the California Supreme Court[1]; approximately 5,005 in the California Courts of Appeal[2]; and 8,411 in the Superior Court. California courts already deal with a high volume of habeas petitions, and lowering the standard for granting relief could increase the number of filings even more.

In addition, the council believes that lowering the standard for relief will also substantially increase the number of evidentiary hearings that are held in the superior courts, and thereby increase costs. Habeas petitioners have the burden to plead facts that, if true, would entitle them to relief. (*People v. Romero* (1994) 8 Cal.4th 728, 737.) Where they do plead such facts, they generally must prove them at an evidentiary hearing in superior court. (See *id.* at pp. 739-740; *People v. Duvall* (1995) 9 Cal.4th 464, 476, fn. 3.) Such evidentiary hearings will generally require the appointment of counsel (*In re Clark* (1993) 5 Cal.4th 750, 780), involve the calling of witnesses (Pen. Code, § 1484), and require the transportation of the petitioner from state prison to court for the hearing (Cal. Rules of Court, rule 4.551(f)).

In order to have an evidentiary hearing on the grounds that there is new evidence, the defendant must prove a prima facie case in his or her pleadings. If the standard for relief is lowered, then habeas petitioner's pleadings it will make it easier to make the prima facie showing. As a result, more defendants will be entitled to evidentiary hearings, which could substantially increase the workload burden on the superior courts. Appeals of writs of habeas corpus may be filed with the appellate courts and Supreme Court, with all such writs in capital cases going directly to the Supreme Court. When reviewing a writ of habeas corpus, if the appellate court grants review, the court will remand the case to superior court for an evidentiary hearing. Once a hearing is ordered, the petitioner is entitled to counsel. The appellate court will then review the record and

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[1] This includes both habeas petitions for review and original habeas petitions.

[2] This number is the total of criminal "original proceedings," which includes petitions for writ of mandate or prohibition, but these latter filings constitute a small percentage of the total.

make its decision. To the extent that the lower standard set by SB 694 results in more writ orders granting new trials, the bill would place additional workload burdens on trial court.

Additionally an inmate who has already filed a writ of habeas corpus on the grounds that the inmate has new exculpatory evidence and the standard established by *Lawley*, may file a new writ on the basis that the exculpatory evidence meets the lower standard established by SB 694. While SB 694 is silent on the issue of retroactivity, courts may find that the bill is retroactive because the lower standard ultimately relates to whether the defendant is innocent based on new exculpatory evidence.

Another concern the council has is that the new standard undermines the conviction process as it appears to question the integrity of proceedings. In *Lawley*, the California Supreme Court reasoned:

> The rationale for our applying a different, higher standard to actual innocence habeas corpus claims is readily explained. Generally, of course, habeas corpus claims must surmount the presumption of correctness we accord criminal judgments rendered after procedurally fair trials. " 'For purposes of collateral attack, all presumptions favor the truth, accuracy, and fairness of the conviction and sentence; *defendant* thus must undertake the burden of overturning them. Society's interest in the finality of criminal proceedings so demands, and due process is not thereby offended.' " (*People v. Duvall* (1995) 9 Cal.4th 464, 474 [37 Cal. Rptr. 2d 259, 886 P.2d 1252], quoting juror, or defense counsel misconduct, however, actual innocence claims based on either newly discovered or nonperjured false evidence do not attack the procedural fairness of the trial. They *concede* the procedural fairness of the trial, but nevertheless attack the accuracy of the verdict rendered and seek a reexamination of the very question the jury or court has already answered: Is the defendant guilty of the charges presented? A conviction obtained after a constitutionally adequate trial is entitled to great weight. Accordingly, a higher standard properly applies to challenges to a judgment whose procedural fairness is conceded than to one whose procedural fairness is challenged. (See *Strickland v. Washington* (1984) 466 U.S. 668, 694 [80 L. Ed. 2d 674, 104 S. Ct. 2052] [motions for new trial based on newly discovered evidence are subject to a higher standard than ineffective assistance of counsel claims because they challenge a presumptively fair trial]; *In re Johnson, supra*, 18 Cal.4th at p. 462 [rejecting the assertion that a lower standard should apply to an actual innocence claim in the of proof the trial was infected by procedural errors of constitutional dimension].) Metaphorically, an actual innocence claim based on newly discovered evidence seeks a second bite at the apple, but unlike an ineffective assistance of counsel claim, for example, it does not contend the first bite was rotten. (*Lawley,* supra, at pp. 1241-1242).

Finally, the language of SB 694 allowing a writ of habeas corpus on the basis of new evidence that would raise a reasonable probability of a "different outcome" is unclear. For example would a "different outcome" include a conviction for a lesser included offense? If the purpose of the legislation is to provide relief to defendants in custody that should reasonably not be in custody, a changed outcome that still results in incarceration does meet this standard.

Costs associated with SB 694

There are two likely bases for additional costs to the appellate courts in California should SB 694 be signed into law. First, the time required to review writs of habeas corpus based on new evidence will increase because the standard of review will be lower. The lower standard will require additional review by the court to determine whether or not the new evidence "would raise a reasonable probability of a different outcome." Second, it will be a change in the law that would presumably be retroactive.

Currently, most habeas petitions that include a claim of new evidence are actually petitions that raise claims of ineffective assistance of counsel[3] asserting that trial counsel unreasonably failed to investigate and present evidence relating to innocence. Nearly all habeas petitions raise claims of ineffective assistance of counsel. The new standard of review would eliminate the need to establish counsel's lack of diligence in failing to discover the evidence, making it presumably easier to obtain an evidentiary hearing, and perhaps a new trial. The review of habeas petitions asserting claims of new evidence at the proposed reduced standard would likely result in more appellate review resources to determine whether or not the new evidence would raise a reasonable probability of a different outcome (as compared to the current review which requires that the new evidence point unerringly to innocence). Even if there is an increase of only one hour of review per petition, the cost to California's courts could be in excess of $1.5 million[4]. Note that this estimate does not include costs associated with the increase in evidentiary hearings that likely would stem from the reduced standard of review.

The more burdensome issue in terms of cost is the potential for SB 694 to be applied retroactively. In fact, there is a presumption in favor of retroactivity. (See *In re Johnson* (1970) 3 Cal.3d 404, 413 [changes in case law that "preclude the conviction of innocent persons" are likely to be applied retroactively to defendants whose cases are final].) Since arguably the new evidence could lead to a change of conviction, it is possible that SB 694 will be applied

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[3] There are habeas petitions based on new evidence, but the appellate courts estimate that those represent only about ten percent of the habeas petitions filed annually, and, according to at least one court, "they are invariably turned down because there is no showing that there is truly new evidence."

[4] There are two costs included in this total figure. First is the cost of one hour of time for the appellate attorney who will spend the additional review time on the petition ($85/hour x 7,923 habeas corpus petitions filed at the courts of appeal and supreme court = $673,455). Second is the cost of the superior court judicial officer who will undertake the additional one-hour review of the file ($107 x 8,411 habeas petitions filed in the superior court =$899,977).

retroactively. That means that any inmate who *previously* filed a petition can file it again, and it would not be barred as successive. (See *In re Clark* (1995) 5 Cal.4th 750, 775 [inmate may file successive petition only in limited circumstances, such as retroactive change in the law].) And because the standard is lower, inmates will have an incentive to have the courts review their claims again. Thus, numerous inmates who have already raised claims of new evidence may *re-*file, resulting in a high volume of new petitions. There is no way to estimate the cost to California's courts if SB 694 must be applied retroactively. The courts are already saturated with habeas petitions—16,334 were filed in 2013. Any measurable increase in this level of appeals without filling appellate court vacancies could slow the appellate process in California and potentially deny incarcerated defendants appropriate due process in reviewing their habeas corpus petitions. A single appellate court justice, including staff attorneys and a judicial assistant, would cost $930,565. Based on the current appellate judicial needs assessments, there currently is a need for two new appellate justices, both for the Fourth Appellate District. Any measurable increase in appellate filings, such as might be expected under the authority of SB 694, could require the addition of a third new appellate justice to be located in the Third Appellate District. At a minimum, then, the likely retroactive application of SB 694 may require three new appellate justice positions at a cost of $2.8 million. All of California's appellate districts could be negatively impacted by SB 694, potentially slowing the review of habeas petitions or requiring additional appellate justice positions in these and the other districts.

For these reasons, the Judicial Council opposes SB 694.

Sincerely,

Sharon Reilly
Senior Attorney

SR/yc-s
cc: Hon. Ricardo Lara, Chair, Senate Appropriations Committee
Members, Senate Appropriations Committee
Ms. Jolie Onodera, Consultant, Senate Appropriations Committee
Mr. Matt Osterli, Fiscal Consultant, Senate Republican Fiscal Office
Ms. Mary Kennedy, Counsel, Senate Public Safety Committee
Mr. Eric Csizmar, Consultant, Senate Republican Office of Policy
Ms. June Clark, Deputy Legislative Affairs Secretary, Office of the Governor
Ms. Tiffany Garcia, Budget Analyst, Department of Finance
Mr. Martin Hoshino, Administrative Director, Judicial Council of California

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GOVERNMENTAL AFFAIRS

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TANI G. CANTIL-SAKAUYE
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MARTIN HOSHINO
Administrative Director

CORY T. JASPERSON
Director, Governmental Affairs

July 7, 2015

Hon. Bill Quirk, Chair
Assembly Public Safety Committee
State Capitol, Room 2163
Sacramento, California 95814

Subject: SB 694 (Leno), as amended July 2, 2015 - Oppose
Hearing: Assembly Public Safety Committee – July 14, 2015

Dear Assembly Member Quirk:

The Judicial Council, while recognizing that establishing the standard of review for writs of habeas corpus as contemplated by SB 694 is within the purview of the Legislature, the council regretfully opposes SB 694 for significant procedural reasons that impact the administration of justice and because the council has significant concerns about the potential workload and costs associated with the bill should it be signed into law.

Currently there is no codified standard of proof for a writ of habeas corpus brought on the basis of new evidence and the current standard is based on case law. The Supreme Court, in *In re Lawley*, held that for newly discovered evidence to be used to overturn a conviction it "must undermine the entire prosecution case and point unerringly to innocence or reduced culpability;" ((2008) 42 Cal. 4th 1231, 1239). Further the court stated "if 'a reasonable jury could have rejected' the evidence presented, a petitioner has not satisfied his burden." *(Id.)* SB 694 would lower the current judicially established standard of review for a writ of habeas corpus based on new evidence from "undermines the prosecution of the case and points unerring to innocence" to a standard of "raises a reasonable probability of a different outcome if a new trial were granted."

The council believes that changing the standard of review for writs of habeas corpus in this manner will substantially increase the workload of trial courts and appellate courts, including the Supreme Court, in at least three instances. First, the council believes that SB 694's standard of review would substantially increase the number of writs of habeas corpus filed in trial courts and appellate courts. Second, the council believes that the standard will substantially increase the number of evidentiary hearings and new trials. Third, under certain circumstances, including writs of habeas corpus in capital cases, the costs of appointed counsel for petitioners are paid by the courts. An increase in habeas petitions will therefore lead to an increase in costs to courts. Additionally, the council is concerned that the new lower standard undermines the conviction process as it has the appearance of questioning the integrity of trial court proceedings. As a result, numerous subsequent writs could be filed based on newly discovered evidence.

In the last fiscal year for which numbers are available from the Judicial Council (2012–13), the courts received a high number of habeas corpus petitions. The filings for the various levels of court were as follows: 2,918 in the California Supreme Court[1]; approximately 5,005 in the California Courts of Appeal[2]; and 8,411 in the Superior Court. The council anticipates that lowering the standard for granting relief would substantially increase that volume. In addition, the council believes that lowering the standard for relief will substantially increase the number of evidentiary hearings that are held in the superior courts, and thereby increase costs. Habeas petitioners have the burden to plead facts that, if true, would entitle them to relief. (*People v. Romero* (1994) 8 Cal.4th 728, 737.) Where they do plead such facts, they generally must prove them at an evidentiary hearing in superior court. (See *id.* at pp. 739-740; *People v. Duvall* (1995) 9 Cal.4th 464, 476, fn. 3.) Such evidentiary hearings will generally require the appointment of counsel (*In re Clark* (1993) 5 Cal.4th 750, 780), involve the calling of witnesses (Pen. Code, § 1484), and require the transportation of the petitioner from state prison to court for the hearing (Cal. Rules of Court, rule 4.551(f)).

To have an evidentiary hearing on the grounds that there is new evidence, the defendant must prove a prima facie case in his or her pleadings. If the standard for relief is lowered, it will make it easier to make the prima facie showing. As a result, more defendants will be entitled to evidentiary hearings, which could substantially increase the workload burden on the superior courts. Appeals of writs of habeas corpus may be filed with the appellate courts and Supreme Court, with all such writs in capital cases going directly to the Supreme Court. When reviewing a writ of habeas corpus, if the appellate court grants review, the court will remand the case to superior court for an evidentiary hearing. The appellate court will then review the record and

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[1] This includes both habeas petitions for review and original habeas petitions.

[2] This number is the total of criminal "original proceedings," which includes petitions for writ of mandate or prohibition, but these latter filings constitute a small percentage of the total.

make its decision. To the extent that the lower standard set by SB 694 results in more evidentiary hearings and orders granting new trials, the bill would place additional workload burdens on trial courts. With regard to burdens that SB 694 would place on the Supreme Court, the council notes that all capital habeas corpus cases go directly to the Supreme Court and the petitioner is entitled to representation by counsel paid for from funds available to the Supreme Court (see Gov. Code § 68662; Supreme Court Policies Regarding Cases Arising from Judgments of Death, Policy 3). The council believes that it is highly likely that writs of habeas corpus for virtually all existing capital cases will be filed with the Supreme Court, which would have a tremendous impact on the resources of the Supreme Court, not to mention the increased delay that will likely be experienced by habeas petitioners seeking review by the Court.

It is worth noting that the branch as a whole is already managing a severely increased with workload from the recent passage of Proposition 47 (November 2014). To date, courts have received over 150,000 petitions under Proposition 47. While the Budget Act of 2015 appropriates funds to the Judicial Branch to help offset the costs of Proposition 47, SB 694 does not address the how the substantial new burdens placed on courts by SB 694 would be funded if enacted.

In addition to the concerns listed above, the council is concerned about the workload impact of SB 694 in terms of applying retroactively. An inmate who has already filed a writ of habeas corpus on the grounds that the inmate has new exculpatory evidence that meets the standard established by *Lawley*, may file a new writ on the basis that the exculpatory evidence meets the lower standard established by SB 694. While SB 694 is silent on the issue of retroactivity, courts will likely find that the bill is retroactive because the lower standard ultimately relates to whether the defendant is innocent based on new exculpatory evidence for which there is a presumption in favor of retroactivity. (See *In re Johnson* (1970) 3 Cal.3d 404, 413 [changes in case law that "preclude the conviction of innocent persons" are likely to be applied retroactively to defendants whose cases are final].) Since arguably the new evidence could lead to a change of conviction, it is possible that SB 694 will be applied retroactively. That means that any inmate who *previously* filed a petition can file it again, and it would not be barred as successive. (See *In re Clark* (1995) 5 Cal.4th 750, 775 [inmate may file successive petition only in limited circumstances, such as retroactive change in the law].)

Finally, the council is concerned that the new standard undermines the conviction process as it appears to question the integrity of trial court proceedings. In fact, the "reasonable probability of a different outcome" standard is less demanding than that the "substantial evidence" standard currently required for appeals, which precludes the weighing of evidence and requires the reviewing court to consider only the evidence that supports the judgment. As a result, the standard to set aside a final judgment under SB 694 would be *less* onerous than the standard applied to review the sufficiency of evidence in the direct appeal. Thus, the council is concerned

that reducing and minimizing the burden imposed on the party who challenges a judgment undermines the rule that final judgments are presumed to be correct.

In *Lawley*, the California Supreme Court found that a higher standard is appropriate for actual innocence habeas corpus claims and reasoned:

> The rationale for our applying a different, higher standard to actual innocence habeas corpus claims is readily explained. Generally, of course, habeas corpus claims must surmount the presumption of correctness we accord criminal judgments rendered after procedurally fair trials. " 'For purposes of collateral attack, all presumptions favor the truth, accuracy, and fairness of the conviction and sentence; *defendant* thus must undertake the burden of overturning them. Society's interest in the finality of criminal proceedings so demands, and due process is not thereby offended.' " (*People v. Duvall* (1995) 9 Cal.4th 464, 474 [37 Cal. Rptr. 2d 259, 886 P.2d 1252], quoting juror, or defense counsel misconduct, however, actual innocence claims based on either newly discovered or nonperjured false evidence do not attack the procedural fairness of the trial. They *concede* the procedural fairness of the trial, but nevertheless attack the accuracy of the verdict rendered and seek a reexamination of the very question the jury or court has already answered: Is the defendant guilty of the charges presented? A conviction obtained after a constitutionally adequate trial is entitled to great weight. Accordingly, a higher standard properly applies to challenges to a judgment whose procedural fairness is conceded than to one whose procedural fairness is challenged. (See *Strickland v. Washington* (1984) 466 U.S. 668, 694 [80 L. Ed. 2d 674, 104 S. Ct. 2052] [motions for new trial based on newly discovered evidence are subject to a higher standard than ineffective assistance of counsel claims because they challenge a presumptively fair trial]; *In re Johnson, supra*, 18 Cal.4th at p. 462 [rejecting the assertion that a lower standard should apply to an actual innocence claim in the of proof the trial was infected by procedural errors of constitutional dimension].) Metaphorically, an actual innocence claim based on newly discovered evidence seeks a second bite at the apple, but unlike an ineffective assistance of counsel claim, for example, it does not contend the first bite was rotten. (*Lawley,* supra, at pp. 1241-1242).

With regard to the potential fiscal impact of SB 694, there are three likely bases for additional costs to the appellate courts in California. First, the time required to review writs of habeas corpus based on new evidence will increase because (a) there will likely be more writs submitted and (b) the standard used to review each writ will be lower, thus requiring more time to consider and make a determination on the writ. Specifically, the lower standard will require additional review by the court to determine whether or not the new evidence "would raise a reasonable probability of a different outcome." Additionally, SB 694 will presumably be a change in the law that is retroactive. And finally, under certain circumstances, including writs of habeas corpus in capital cases, the costs of appointed counsel are paid by the courts.

Currently, most habeas petitions that include a claim of new evidence are actually petitions that raise claims of ineffective assistance of counsel,[3] asserting that trial counsel unreasonably failed to investigate and present evidence relating to innocence. Nearly all habeas petitions raise claims of ineffective assistance of counsel. The new standard of review would eliminate the need to establish counsel's lack of diligence in failing to discover the evidence, making it presumably easier to obtain an evidentiary hearing, and perhaps a new trial. The review of habeas petitions asserting claims of new evidence at the proposed reduced standard would likely result in more appellate review resources to determine whether or not the new evidence would raise a reasonable probability of a different outcome. Even if there is an increase of only one hour of review per petition, the cost to California's courts could be in excess of $1.5 million[4]. Note that this estimate does not include costs associated with the increase in evidentiary hearings that likely would stem from the reduced standard of review or costs associated with appointment of counsel to the petitioners.

The more burdensome issue in terms of cost is the potential for SB 694 to be applied retroactively. Because the standard is lower, inmates will have an incentive to petition the courts to once again review their claims. Thus, numerous inmates who have already raised claims of new evidence may *re*-file, resulting in a high volume of new petitions.

The courts are already saturated with habeas petitions—16,334 were filed in 2013. Any measurable increase in this level of appeals without, at a minimum, filling appellate court vacancies (let alone increasing the operations budgets for the courts of appeals and the Supreme Court) could slow the appellate process in California, potentially denying incarcerated defendants appropriate due process in reviewing their habeas corpus petitions. A single appellate court justice, including staff attorneys and a judicial assistant, would cost $930,565. Based on the current appellate judicial needs assessments, there *currently* is a need for two new appellate justices, both for the Fourth Appellate District. Any measurable increase in post-conviction habeas corpus filings, as the council believes will result from SB 694, could necessitate the addition of other appellate court justices. At a minimum, the retroactive application of SB 694 will require two new appellate justice positions at a cost of $1.9 million. However, should SB 694 be signed into law, all of California's appellate districts could be negatively impacted by

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[3] There are habeas petitions based on new evidence, but the appellate courts estimate that those represent only about ten percent of the habeas petitions filed annually, and, according to at least one court, "they are invariably turned down because there is no showing that there is truly new evidence."

[4] There are two costs included in this total figure. First is the cost of one hour of time for the appellate attorney who will spend the additional review time on the petition ($85/hour x 7,923 habeas corpus petitions filed at the courts of appeal and supreme court = $673,455). Second is the cost of the superior court judicial officer who will undertake the additional one-hour review of the file ($107 x 8,411 habeas petitions filed in the superior court =$899,977).

SB 694, potentially slowing the review of habeas petitions and requiring additional appellate justice positions in these and the other districts.

For these reasons, the Judicial Council is opposed to SB 694.

Sincerely,

Sharon Reilly
Senior Attorney

SR/yc-s
cc: Members, Assembly Public Safety Committee
Hon. Mark Leno, Member of the Senate
Mr. Gabriel Caswell, Counsel, Assembly Public Safety Committee
Mr. Gary Olson, Consultant, Assembly Republican Office of Policy
Ms. June Clark, Deputy Legislative Affairs Secretary, Office of the Governor
Mr. Martin Hoshino, Administrative Director, Judicial Council of California

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Chief Justice of California
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MARTIN HOSHINO
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Director, Governmental Affairs

August 13, 2015

Hon. Jimmy Gomez, Chair
Assembly Appropriations Committee
State Capitol, Room 2114
Sacramento, California 95814

Subject: SB 694 (Leno), as amended July 16, 2015 – Fiscal Impact Statement
Hearing: Assembly Appropriations Committee – August 19, 2015

Dear Assembly Member Gomez:

We respectfully present this fiscal analysis for SB 694. While the Judicial Council cannot predict the number of new petitions for writs of habeas corpus that will be filed under the authority of the bill, we believe it is probable that the courts will experience a spike in such filings over the next several years based on an assumption that the law may potentially apply retroactively. This surge in filings would then be followed by a leveling out at a slightly higher than current rate of petitions for writs of habeas corpus.

The range of costs presented here, representing a spike in filings for just a single year anticipated by the enactment of SB 694, is $12.9 million to $21.6 million in costs to California's trial courts, Courts of Appeal and Supreme Court. At $12.9 million, the costs assume, conservatively, a 15% increase in habeas corpus petitions filed, 10% of which will require additional review based on the issuance of an order to show cause (OSC). At the $21.6 million cost, we have estimated, still conservatively, a 25% increase in habeas petitions filed, 10% of which would result in an OSC. The surge in filings could exceed the 15 to 25% estimates, and last several years.

SB 694, if signed into law, would change the standard of review for habeas corpus petitions alleging new evidence to evidence "that is credible, material, and of such decisive force and value that it would have more likely than not changed the outcome at trial." This proposed standard is lower than the current standard which, for a reversal from a conviction, requires that new evidence "undermine the entire prosecution case and point unerringly to innocence or reduced culpability." (*In re Lawley* (2008) 42 Cal. 4th 1231, 1239)

Habeas corpus procedure[1]

Generally, the habeas corpus writ procedure begins at the trial court, and proceeds as follows:

- Filing clerks accept the petitions, and distribute them to the writ judge (or presiding judge in small courts). The petitions are then assigned to the appropriate writ attorneys at the superior courts for review. This includes a careful review of the original trial court file, as well as any appeals or previous habeas corpus writs that were filed, to determine whether or not the petitioner sufficiently alleges evidence that is new, and whether or not the petition makes a prima facie showing that the new evidence, if true, warrants relief from the judgment. In smaller courts where there are not writ attorneys, this function is performed by a trial court judge.

- The writ attorney prepares and a judge reviews a memo containing the recommendations of the writ attorney; the judge issues a decision. If the writ is summarily denied, the petitioner can file a new writ in the court of appeal.

- If the writ states a prima facie case for relief, an order to show cause (OSC) is issued. The prosecutor may then file a return (a response) to the petition. Once the return is filed, the petitioner may then file a traverse (reply) to the return. Once both the return and traverse are filed, an evidentiary hearing (akin to a new trial but without a jury) is calendared. Since the new evidence will be reviewed in the context of the evidence previously introduced at trial, it is common to estimate the time of the evidentiary hearing as the same amount of time as the evidentiary portion of the original trial.

- If the petitioner loses in this new hearing, he/she may file a new writ of habeas corpus alleging new evidence at the court of appeal, and the entire review process described above starts over, with the writ attorney reviewing the original record and the recently denied writ of habeas corpus including the evidentiary hearing transcript.

[1] The process described here is for the vast majority of habeas corpus petitions, but note that habeas corpus petitions challenging the validity of a death judgment may be filed only in the California Supreme Court.

- In some appellate districts, if the writ attorney recommends and the three-justice appellate panel agrees to issue an OSC, the court will refer the case to the superior court for an(other) evidentiary hearing to review the new evidence. In such cases, the costs would be the same as when the petition previously was filed in the trial court. In other districts, the courts of appeal would appoint counsel to represent the petitioner, and a special master to hear and decide upon the merits of the new evidence under the new standard.

- Should the petitioner lose at the court of appeal, he/she may file a petition for a writ of habeas corpus with the Supreme Court, and the entire process, including cost, time, and effort of review are repeated.

Fiscal impacts

Assuming a 15% increase in habeas corpus petition filings next year if SB 694 is enacted:

Court	Estimated Petitions x Cost per Petition	= Total
Trial Courts	1,262[2] x $550	= $694,100
Courts of Appeal	751[3] x $1,306	= $980,806
Supreme Court (non-cap)	325[4] x $3,798	= $1,234,350
Supreme Court (capital)	113[5] x $40,904	= $4,622,152
SUBTOTAL	2,451	= $7,531,408

In addition to these increased filings, some percentage is likely to result in orders to show cause (OSC), which require greater staff resources for review. Assuming 10% of the additionally filed petitions receive OSC orders:

Court	Estimated OSC x Cost per Petition	= Total
Trial Courts	126 x $17,088	= $2,153,088
Courts of Appeal	75 x $10,764	= $807,300
Supreme Court (non-cap)	33 x $37,715	= $1,244,595
Supreme Court (capital)	11 x $111,360	= $1,224,960
SUBTOTAL	245 OSC petitions	= $5,429,943

[2] Based on 2014 *Court Statistics Report* total superior court habeas filings of 8,411
[3] Based on 2014 *Court Statistics Report* total Court of Appeal habeas filings of 5,005
[4] Based on 2014 *Court Statistics Report* total habeas filings of 2,918, although 751 of those are capital cases and have been deducted from this number, for a revised total of 2,167
[5] Based on current figures of capital inmates of 751

Based on the above calculations (10% OSC orders of 15% increase in habeas petitions):

Court	Cost of New Petitions + Cost of OSC	= Total
Trial Courts	$694,100 + $2,153,088	= $2,847,188
Courts of Appeal	$980,806 + $807,300	= $1,788,106
Supreme Court (non-cap)	$1,234,350 + $1,244,595	= $2,478,945
Supreme Court (cap)	$4,622,152 + $1,224,960	= $5,847,112
TOTAL		= $12,961,351

If the percentage of habeas petitions filed under the authority of SB 694 increases to 25% and the rate at which orders to show cause remains at 10%, the costs change as follows:

Trial Court:	$4,745,130
Courts of Appeal:	$2,979,306
CA Supreme Court:	$13,900,918
TOTAL	$21,625,354

Additional factors considered in this fiscal analysis:

- These costs are based on conservative estimated increases in petitions for writs of habeas corpus. The predicted increases, and therefore costs, could endure for several years before the surge of previously denied petitioners filing new petitions under the new standard wanes.
- The capital habeas corpus petition process[6], while procedurally similar to the non-capital habeas writ process described above, is more costly to the Supreme Court per review for a number of reasons, including the following: court appointed counsel in capital cases are paid from the outset of the procedure to investigate potential claims and prepare the habeas corpus petitions on behalf of the inmates; they may also recover investigative expenses; appointed counsel in capital cases are paid at higher rates than appointed counsel in noncapital cases; capital cases tend to require review of much larger and more extensive case files, many having record transcripts of 10,000 pages or more; and, significantly more briefing is involved in capital habeas corpus cases.
- The calculations included in this analysis do not include the costs of new trials; only the costs associated with an increase in petitions filed and OSC issued are included. If any of the orders to show cause results in the granting of a writ, a new trial may be required, involving jury selection and all evidence, experts, testimony, cross examination, exhibits, etc.
- There are approximately 136,000 people in state prison; all of these people, as well as the people in custody in county jails, are eligible to file habeas corpus petitions.

[6] A distinction must be made in terms of costs associated with the habeas corpus petitions submitted by those defendants sentenced to death because they are significantly higher.

Based on the calculations presented here, the Judicial Council believes that the costs to the trial courts, Courts of Appeal, and the Supreme Court associated with the enactment of SB 694, should it be enacted, must be considered in analyzing this legislation.

Please note that the information contained in this analysis does not constitute a position in favor of, or against, the proposed legislation by the Judicial Council, and sets forth only the considerations related to the fiscal impacts on the courts should the bill be enacted into law.

Please contact me if you have questions about the information contained in this analysis.

Sincerely,

Andi Liebenbaum
Senior Governmental Affairs Analyst

AL/yc-s
cc: Hon. Jimmy Gomez, Chair, Assembly Appropriations Committee
Members, Assembly Appropriations Committee
Mr. Pedro Reyes, Chief Consultant, Assembly Appropriations Committee
Mr. Allan Cooper, Fiscal Consultant, Assembly Republican Fiscal Office
Mr. Gabriel Caswell, Counsel, Assembly Public Safety Committee
Mr. Gary Olson, Consultant, Assembly Republican Office of Policy
Ms. June Clark, Deputy Legislative Affairs Secretary, Office of the Governor
Ms. Tiffany Garcia, Budget Analyst, Department of Finance
Mr. Martin Hoshino, Administrative Director, Judicial Council of California

JUDICIAL COUNCIL OF CALIFORNIA

770 L Street, Suite 1240 • Sacramento, California 95814-3368
Telephone 916-323-3121 • Fax 916-323-4347 • TDD 415-865-4272

TANI G. CANTIL-SAKAUYE
Chief Justice of California
Chair of the Judicial Council

MARTIN HOSHINO
Administrative Director

CORY T. JASPERSON
Director, Governmental Affairs

August 18, 2015

Hon. Mark Leno
Member of the Senate
State Capitol, Room 5100
Sacramento, California 95814

Subject: SB 694 (Leno), as amended July 16, 2015 – Neutral if funded
Hearing: Assembly Appropriations Committee – August 19, 2015

Dear Senator Leno:

I am pleased to inform you that the Judicial Council has withdrawn its opposition to SB 694, and instead has adopted a position of neutral, if funded. SB 694 allows a writ of habeas corpus to be prosecuted on the basis of new evidence that is credible, material, and of such decisive force and value that it would have more likely than not changed the outcome at trial. SB 694 defines "new evidence" as "evidence that has been discovered after trial, that could not have been discovered prior to trial by the exercise of due diligence, and is admissible and not merely cumulative, corroborative, collateral, or impeaching." Further, it is the council's understanding that SB 694 will be amended further to state that writ based on new evidence be "presented without substantial delay. The council appreciates these amendments and on that basis is withdrawing its opposition to SB 694.

However, the council continues to have significant concerns about the fiscal and operational impacts that the new standard of review for writs of habeas corpus based on new evidence will have on the courts, which is the reason for the neutral if funded position.

The council remains concerned that the new standard would likely increase costs for the courts both as a result of the larger number of evidentiary hearings and because individuals who have previously had writs of habeas corpus based on new evidence denied may submit new petitions under the standard set by SB 694. The standard of review for writs of habeas corpus proposed by SB 694 is lower than the current standard which, for a reversal from a conviction, requires that new evidence "undermine the entire prosecution case and point unerringly to innocence or reduced culpability." (*In re Lawley* (2008) 42 Cal. 4th 1231, 1239.) Under this new lower standard, we believe it is probable that the courts will experience a spike in filings of petitions for habeas corpus over the next several years based on an assumption that the law may potentially apply retroactively. This surge in filings would then be followed by a leveling out at a slightly higher than current rate of petitions for writs of habeas corpus.

The range of costs presented in our fiscal impact analysis (sent under separate cover), showing a spike in filings for just a single year anticipated by the enactment of SB 694, is $12.9 million to $21.6 million in costs to California's trial courts, Courts of Appeal and Supreme Court. At $12.9 million, the costs assume, conservatively, a 15% increase in habeas corpus petitions filed, 10% of which will require additional review based on the issuance of an order to show cause (OSC). At the $21.6 million cost, we have estimated, still conservatively, a 25% increase in habeas petitions filed, 10% of which would result in an OSC. The surge in filings could exceed the 15 to 25% estimates, and last several years.

A review of the habeas corpus writ procedure is instructive to understanding these costs. Generally the writ process begins at the trial court[1] and proceeds as follows:

- Filing clerks accept the petitions, and distribute them to the writ judge (or presiding judge in small courts). The petitions are then assigned to the appropriate writ attorneys at the superior courts for review. This includes a careful review of the original trial court file, as well as any appeals or previous habeas corpus writs that were filed, to determine whether or not the petitioner sufficiently alleges evidence that is new, and whether or not the petition makes a prima facie showing that the new evidence, if true, warrants relief from the judgment. In smaller courts where there are not writ attorneys, this function is performed by a trial court judge.

- The writ attorney prepares and a judge reviews a memo containing the recommendations of the writ attorney; the judge issues a decision. If the writ is summarily denied, the petitioner can file a new writ in the court of appeal.

- If the writ states a prima facie case for relief, an order to show cause (OSC) is issued. The prosecutor may then file a return (a response) to the petition. Once the return is filed, the petitioner may then file a traverse (reply) to the return. Once both the return and traverse

[1] The process described here is for the vast majority of habeas corpus petitions, but note that habeas corpus petitions challenging the validity of a death judgment may be filed only in the California Supreme Court.

are filed, an evidentiary hearing (akin to a new trial but without a jury) is calendared. Since the new evidence will be reviewed in the context of the evidence previously introduced at trial, it is common to estimate the time of the evidentiary hearing as the same amount of time as the evidentiary portion of the original trial.

- If the petitioner loses in this new hearing, he/she may file a new writ of habeas corpus alleging new evidence at the court of appeal, and the entire review process described above starts over, with the writ attorney reviewing the original record and the recently denied writ of habeas corpus including the evidentiary hearing transcript.

- In some appellate districts, if the writ attorney recommends and the three-justice appellate panel agrees to issue an OSC, the court will refer the case to the superior court for an(other) evidentiary hearing to review the new evidence. In such cases, the costs would be the same as when the petition previously was filed in the trial court. In other districts, the courts of appeal would appoint counsel to represent the petitioner, and a special master to hear and decide upon the merits of the new evidence under the new standard.

- Should the petitioner lose at the court of appeal, he/she may file a petition for a writ of habeas corpus with the Supreme Court, and the entire process, including cost, time, and effort of review are repeated.

Based on the above, the Judicial Council believes that the costs to the trial courts, Courts of Appeal, and the Supreme Court associated with the enactment of SB 694, should it be enacted, must be considered in analyzing this legislation.

For these reasons, the council has adopted a neutral position, if funded, on SB 694.

Sincerely,

Sharon Reilly
Senior Attorney

SR/yc-s
cc: Mr. Justin Brooks, Director, California Innocence Project
Ms. Sandee Magliozzi, Interim Executive Director, Northern California Innocence Project
Ms. June Clark, Deputy Legislative Affairs Secretary, Office of the Governor
Mr. Martin Hoshino, Administrative Director, Judicial Council of California