



JUDICIAL COUNCIL OF CALIFORNIA

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

MARTIN HOSHINO
Administrative Director

CORY T. JASPERSON
Director, Governmental Affairs

May 27, 2016

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

Subject: SB 1134 (Leno), as introduced – Neutral, if funded

Dear Senator Leno:

The Judicial Council is pleased to inform you that the council is neutral on SB 1134, if funded. SB 1134 allows a writ of habeas corpus to be prosecuted on the basis of new evidence that is credible, material, presented without substantial delay, and of such decisive force and value that it would have more likely than not changed the outcome at trial. SB 1134 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.

While the council is neutral on the policy SB 1134 seeks to achieve, the council has 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 is 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 1134. The standard of review for writs of habeas corpus proposed by SB 1134 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.

A review of the habeas corpus writ procedure is instructive to understanding the council’s concerns about the impact of SB 1134 on courts. Generally the writ process begins at the trial court¹ 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 that do not employ 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

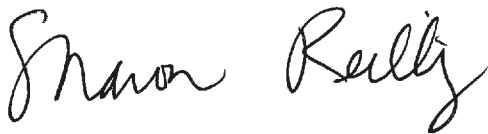
¹ The process described here is for the vast majority of habeas corpus petitions, but note that habeas corpus petitions challenging the validity of a death judgment may be filed only in the California Supreme Court.

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 1134, should it be enacted, must be considered in analyzing this legislation.

Sincerely,

A handwritten signature in black ink, appearing to read "Sharon Reilly". The signature is fluid and cursive, with the first name "Sharon" and last name "Reilly" clearly distinguishable.

Sharon Reilly
Attorney

SR/yc-s

cc: Ms. Lucy Salcido Carter, Northern California Innocence Project, Santa Clara
Mr. Alex Simpson, California Innocence Project, San Diego
Ms. Mica Doctoroff, ACLU Center for Advocacy and Policy, Sacramento
Mr. Daniel Seeman, Deputy Legislative Affairs Secretary, Office of the Governor
Mr. Martin Hoshino, Administrative Director, Judicial Council of California



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Director, Governmental Affairs

June 21, 2016

Hon. Reginald B. Jones-Sawyer, Sr., Chair
Assembly Public Safety Committee
State Capitol, Room 5100
Sacramento, California 95814

Subject: SB 1134 (Leno), as amended May 31, 2016 – Neutral, if funded
Hearing: Assembly Public Safety Committee – June 28, 2016

Dear Assembly Member Jones-Sawyer:

The Judicial Council is pleased to inform you that the council is neutral on SB 1134, if funded. SB 1134 allows a writ of habeas corpus to be prosecuted on the basis of new evidence that is credible, material, presented without substantial delay, and of such decisive force and value that it would have more likely than not changed the outcome at trial. SB 1134 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.”

While the council is neutral on the policy SB 1134 seeks to achieve, the council has 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 is 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 1134. The standard of review for writs of habeas corpus proposed by SB 1134 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.

A review of the habeas corpus writ procedure is instructive to understanding the council’s concerns about the impact of SB 1134 on courts. Generally the writ process begins at the trial court¹ 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 that do not employ 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.

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.

- 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 1134, should it be enacted, must be considered in analyzing this legislation.

For these reasons, the Judicial Council is neutral on SB 1134, if funded.

Should you have any questions or require additional information, please contact Sharon Reilly at 916-323-3121.

Sincerely,



Cory T. Jasperson

Director, Governmental Affairs

Hon. Reginald B. Jones-Sawyer, Sr.

June 21, 2016

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CTJ/SR/yc-s

cc: Members, Assembly Public Safety Committee

Hon. Mark Leno, Member of the Senate

Ms. Lucy Salcido Carter, Northern California Innocence Project, Santa Clara

Mr. Alex Simpson, California Innocence Project, San Diego

Ms. Mica Doctoroff, ACLU Center for Advocacy and Policy, Sacramento

Ms. Stella Choe, Counsel, Assembly Public Safety Committee

Mr. Gary Olson, Consultant, Assembly Republican Office of Policy

Mr. Daniel Seeman, Deputy Legislative Affairs Secretary, Office of the Governor

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Director, Governmental Affairs

July 29, 2016

Hon. Lorena Gonzalez, Chair
Assembly Appropriations Committee
State Capitol, Room 2114
Sacramento, California 95814

Subject: SB 1134 (Leno), as amended May 31, 2016 – Fiscal Impact Statement
Hearing: Assembly Appropriations Committee – August 3, 2016

Dear Assembly Member Gonzalez:

We respectfully present this fiscal analysis for SB 1134. Although the Judicial Council cannot predict the number of new petitions for writs of habeas corpus that would be filed under the authority of the bill, experts within the branch agree that it is probable the courts at all levels would experience a spike in such filings over the next several years. This is based on our assumption that the law would apply retroactively. We further believe that this surge in filings would be followed by a leveling out at a slightly higher than current rate of petitions for writs of habeas corpus, assuming SB 1134 operates as intended, and encourages more inmates to petition the courts for relief.

The Judicial Council has no way to know precisely how many refiled petitions for habeas corpus will be submitted to the courts under the authority of SB 1134. The costs presented here, which represent an anticipated spike in filings under the authority of the bill, are calculated at both a rate of 3% and a rate of 10% for initial petitions, and at a single rate of 10% based on the issuance of orders to show cause (OSC). Because of the procedural safeguards in place for *capital* habeas corpus petitions, the costs associated with capital habeas corpus petitions are

calculated separately, and they are included in a final total range of fiscal impacts. That range is \$2.6 million to \$9.0 million.

Understanding the law and the bill

SB 1134, if signed into law, would change the standard of review for alleging new evidence in habeas corpus petitions 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 procedure¹

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

- Filing clerks accept the petitions for a writ of habeas corpus, 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 petitions 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 no writ attorneys, this function is performed by a trial court judge.
- The writ attorney prepares a memo containing his or her recommendations. Upon consideration of the memo, and additional research if necessary, the judge issues a decision. If the habeas corpus petition is summarily denied, the petitioner can file a new petition in the court of appeal.
- If the habeas corpus petition 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 usually calendared. Because 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 petition for a writ of habeas corpus alleging new evidence in the court of appeal, and the entire review process

¹ The process described in this section is for the vast majority of habeas corpus petitions, specifically for non-capital cases. The habeas corpus petition process upon a judgement of death is described in the following section.

described above starts over, with the writ attorney reviewing the original record and the recently denied habeas corpus petition 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 would 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 referee (often a superior court judge) to hear and decide upon the merits of the new evidence.
- Should the petitioner lose at the court of appeal, he/she may file a petition for review or an original petition for a writ of habeas corpus with the Supreme Court, and the entire process, including cost, time, and effort of review, is repeated.

Capital Habeas Corpus Petitions

It must be emphasized that all capital inmates are statutorily entitled to the appointment of habeas corpus counsel in the investigation and preparation of their habeas corpus claims, and that appointed counsel are entitled to payment of fees and expenses according to a published schedule. This means that the process for handling capital habeas corpus petitions is not only different, it's far more expensive than the process generally applicable to the habeas corpus petitions, as described above.

- As soon as possible after the judgment of death, the Supreme Court appoints state appellate and habeas corpus counsel for the capital inmate—such counsel are paid by the court according to published schedules.
- Once the petition is filed, the court may request, as appropriate, that the Attorney General file an informal response to the petition. The date on which the informal response is filed triggers the due date for the filing of petitioner's reply to the informal response. Several extensions of time (EOTs) to file the informal response and reply are usually requested and granted.
- Once the reply to the informal response is filed, the court either denies the petition (thus disposing of the matter) or issues an order to show cause (OSC) to show why relief should not be granted. In all cases, no matter whether a denial or an OSC is issued, a written memorandum discussing all claims and their merits is prepared and reviewed by all justices. Issuance of an OSC renders the matter a "cause," thereby vesting the petitioner with certain procedural rights, including the right to discovery, and right to oral argument and a published opinion.

- If the Supreme Court issues an OSC, then, per the Rules of Court, the parties submit formal briefing in the form of a “return” by the Attorney General and a “traverse” by the petitioner, with EOTs being granted as needed.
- After the traverse is filed, the court examines the pleadings to determine whether there are factual issues in dispute (i.e., claims that cannot be resolved without determining which version of the facts is accurate). If there are no factual issues in dispute and the only disagreement is over how the law applies, oral argument is scheduled. If there are factual issues in dispute, an evidentiary hearing must be held.
- After the findings of fact issue, the court directs the petitioner and Attorney General to file a brief on the merits and objections to the referee’s findings, and a subsequent response to the opposing party’s brief and objections. Again, in all cases, after the post-hearing briefing is complete, a written memorandum discussing all claims and their merits is prepared and reviewed by all justices. The court sets the matter for oral argument, and thereafter files an opinion. The losing party may thereafter file a petition for rehearing, which our court will deny or grant. After the Supreme Court rules on the rehearing petition, the state habeas matter at issue is concluded.

As indicated above, a state habeas corpus proceeding in a capital case may be resolved either by a denial order or by an opinion after the issuance of an OSC and a reference hearing. In either situation, the capital petitioner may, and usually does, thereafter initiate habeas corpus proceedings in federal court. If the federal court finds that the federal habeas corpus petition presents claims for relief that were not presented to the state court, it will order the petitioner to exhaust his or her state remedy by presenting such claims to the Supreme Court in an “exhaustion” petition. In most, if not all capital cases, inmates have filed exhaustion petitions.

As a way to better understand the workload associated with capital habeas corpus petitions, consider that the first state habeas corpus petition filed in a capital case typically ranges from approximately 150 pages in length to over 300 pages in length, not counting exhibits such as witness declarations, medical and school records, and police, probation, and other government reports, which can span thousands of pages. The Attorney General’s informal response to this first petition typically ranges from approximately 75 pages to over 225 pages in length. Reply briefs by the petitioner typically are shorter in length than the informal responses, but sometimes are longer and attach supplemental exhibits.

Should SB 1134 pass with its lower “more likely than not” standard for habeas relief based on new evidence, we would expect a spike in new habeas corpus filings and capital case costs as petitioners whose prior habeas corpus petitions have been denied seek application of the new lower standard. There likely also would be motions to supplement pending petitions to present claims under the new standard, which would also likely involve supplemental informal responses and replies. As of July 15, 2016, there are approximately 747 capital inmates housed in our prisons (in San Quentin Prison, the Women’s correctional facility in Chowchilla, and a very small number in other jurisdictions). Of that total, approximately 350 inmates have already filed their one or more capital-related state habeas corpus petition[s], and approximately 393 to 398 capital inmates have not yet filed any such state petition, including the 14 capital inmates with appointed habeas corpus counsel who have not yet filed an “amended” petition after the prior filing of a so-called “shell” habeas corpus petition. Assuming, as we are, that SB 1134 is given retroactive effect, an estimated 350 capital inmates would be eligible to file an additional habeas corpus petition presenting a new evidence claim relying on SB 1134’s lower standard. All capital inmates, including the approximately 350 in this category, are entitled to representation by court-appointed and court-paid counsel in habeas corpus proceedings challenging their death judgments.

Fiscal impacts

The Judicial Council has no way to know with certainty the number of habeas corpus petitions that will be filed should SB 1134 be signed into law. Calculations assuming a 3% increase in filings as well as a 10% increase are presented below by way of example as to the possible fiscal impacts should SB 1134 be signed into law potentially providing individuals with a basis under which to submit a new habeas corpus petitions. These calculations do not presume new/original filings because such petitions would be filed regardless of SB 1134. Rather, these calculations assume an increase in filings based solely on the number of existing inmates who already filed a habeas corpus petition alleging new evidence that was denied, who may decide to file a new, additional petition in order to raise or renew a claim of factual innocence based on the bill’s lower standard for relief. In other words, of individuals who already filed habeas corpus petitions alleging new evidence and were denied, calculations for 3% and 10% re-filings are presented here to demonstrate the potential impact of the bill.

Court	3% Increase x Cost/Petition	= Total
Trial Courts	223 ² x \$698 ³	= \$155,654
Courts of Appeal	142 ⁴ x \$1,332 ⁵	= \$189,144
Supreme Court (non-cap)	47 ⁶ x \$3,844 ⁷	= \$180,668
Supreme Court (capital)	22 ⁸ x \$54,300 ⁹	= \$1,194,600
SUBTOTAL		= \$1,720,066

Court	10% Increase x Cost/Petition	= Total
Trial Courts	741 ¹⁰ x \$698	= \$517,218
Courts of Appeal	474 ¹¹ x \$1,332	= \$631,368
Supreme Court (non-cap)	158 ¹² x \$3,844	= \$607,352
Supreme Court (capital)	75 ¹³ x \$54,300	= \$4,072,500
SUBTOTAL		= \$5,828,438

The calculations above take into account the filings of the petitions and the time and court resources to review them prior to dismissal or issuance of an order to show cause. Therefore, in addition to the calculations above, some percentage of this spike in habeas corpus filings is likely to result in orders to show cause (OSC), which require substantially more staff resources. The analysis below assumes that 10% of the additionally filed petitions receive OSCs. The calculations are presented for both estimates as provided above. In other words, calculations are presented for both scenarios – if 10% of the 3% in newly filed petitions are ordered to show cause, and if 10% of the 10% in newly filed petitions results in an ordered to show causes.

² Based on 2015 *Court Statistics Report* total superior court habeas corpus filings of 7,410.

³ Based on trial court judicial salaries and benefits, and appropriate court staff wages and benefits for FY 2015-16.

⁴ Based on 2015 *Court Statistics Report* total Court of Appeal habeas filings of 4,742.

⁵ Based on appellate justice salaries and benefits, and appellate court clerk wages and benefits for FY 2015-16.

⁶ Based on 2015 *Court Statistics Report* total Supreme Court habeas filings of 2,326 less 747 capital cases for a revised total of 1,579.

⁷ Based on Supreme Court Justice, attorney and clerk salaries and benefits for FY 2015-16.

⁸ Based on current figures of capital inmates of 751.

⁹ See fn. 7; additional staff and increased hours required for capital cases.

¹⁰ See FN 2.

¹¹ See FN 4.

¹² See FN 6.

¹³ See FN 8.

<u>Court</u>	<u>OSC: 10% of the 3% x Cost per Petition</u>	<u>= Total</u>
Trial Courts	22 x \$20,085	= \$441,870
Courts of Appeal	14 x \$11,292	= \$158,088
Supreme Court (non-cap)	5 x \$47,288	= \$236,440
Supreme Court (capital)	2 x \$57,565	= \$115,130
SUBTOTAL		= \$5,828,438

<u>Court</u>	<u>OSC: 10% of the 10% x Cost per Petition</u>	<u>= Total</u>
Trial Courts	74 x \$20,085	= \$1,486,290
Courts of Appeal	47 x \$11,292	= \$530,724
Supreme Court (non-cap)	16 x \$47,288	= \$756,608
Supreme Court (capital)	7 x \$57,565	= \$402,955
SUBTOTAL		= \$3,176,577

Additional factors considered in this fiscal analysis:

- These costs are based on conservative estimated increases in petitions for writs of habeas corpus. Some branch experts believe the initial increase in filings will surge far beyond the 10% calculated above. Moreover, the anticipated increases, and therefore costs, could endure for several years before the surge of previously denied petitioners who file new petitions under the new standard wanes.
- The capital habeas corpus petition process,¹⁴ 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 habeas corpus petitions on behalf of petitioners; 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 where they are required, whether to determine the validity of new evidence or to remand to the trial court for retrial.* Only the costs associated with an increase in petitions filed and reviewed, and OSCs issued and briefed are included. If there are issues of fact to be litigated about the new evidence, or if an OSC results in the issuance of a writ, new trials may be required, involving jury selection and all evidence, experts, hearings, testimony, cross examination, exhibits, etc., resulting in additional costs not calculated here.
- There are approximately 129,000 individuals in the custody of CDCR; all of whom, as well as the approximately 69,500 average daily population in custody in county jails, are *eligible*

¹⁴ 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.

to file habeas corpus petitions. We did not use these figures as baselines by which to calculate the number of potential habeas corpus petitions might be filed under the authority of SB 1134, however. Instead, we used the number of habeas corpus petitions already filed, as reported in the 2015 Court Statistics Report.¹⁵ The percentages used in the calculations—3% and 10%—are for illustrative purposes. The bill's advocates suggest that in other states where the standard of review for new evidence has been changed, the increase in filings has been barely perceptible. On the other hand, court experts in California take a more conservative approach and encouraged a higher potential rate of impact. For that reason, the range is presented here.

Based on the calculations presented above, ranging from \$2.6 million to \$9.0 million, the Judicial Council believes that the costs to the trial courts, Courts of Appeal, and the Supreme Court associated with the enactment of SB 1134, 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 Andi Liebenbaum at (916) 323-3121 or andi.liebenbaum@jud.ca.gov if you have questions about the information contained in this analysis.

Sincerely,



Cory T. Jaspersen
Director, Governmental Affairs

CTJ/AL/yc-s

cc: Members, Assembly Appropriations Committee

Hon. Mark Leno, Member of the Senate

Mr. Pedro Reyes, Chief Consultant, Assembly Appropriations Committee

Mr. Allan Cooper, Fiscal Consultant, Assembly Republican Fiscal Office

Ms. Stella Choe, Counsel, Assembly Public Safety Committee

Mr. Gary Olson, Consultant, Assembly Republican Office of Policy

Mr. Daniel Seeman, Deputy Legislative Secretary, Office of the Governor

Ms. Emma Jungwirth, Budget Analyst, Department of Finance

Mr. Martin Hoshino, Administrative Director, Judicial Council of California

¹⁵ Find it here: <http://www.courts.ca.gov/12941.htm#id7495>



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September 8, 2016

Hon. Edmund G. Brown, Jr.
Governor of California
State Capitol, First Floor
Sacramento, California 95814

Subject: SB 1134 (Leno), as amended August 1, 2016 – Fiscal Impact Statement

Dear Governor Brown:

We respectfully present this fiscal analysis for SB 1134. If signed into law, SB 1134 would change the standard of review of new evidence alleging innocence in habeas corpus petitions 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.”

The standard of review proposed in SB 1134 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.) Although the Judicial Council cannot predict the number of new petitions for writs of habeas corpus that would be filed under the authority of the bill, experts within the branch agree that it is probable the courts at all levels would experience a spike in such filings over the next few years. This is based on our understanding that the law would apply retroactively. We further believe that this increase in filings would be followed by a leveling out of filings at a slightly higher than current rate of petitions for writs of habeas corpus based on the claim of new

evidence, assuming SB 1134 operates as intended, and encourages more inmates to petition the courts for relief.

The costs presented here, which illustrate the impact of an anticipated spike in filings under the authority of the bill,¹ are calculated at 3 percent (low) and 10 percent (high) for initial petitions, and at 10% for an increase in the issuance of orders to show cause (OSC). Because of the procedural safeguards in place for capital habeas corpus petitions, these costs are calculated separately with higher costs to the courts using the same range of potential increases in filings (3% and 10%). The total increase in court costs ranges from \$2.6 million to \$9.0 million per year.

Habeas corpus procedure²

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

- Filing clerks accept the petitions for a writ of habeas corpus, 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 petitions 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 no writ attorneys, this function is performed by a trial court judge.
- The writ attorney prepares a memo containing his or her recommendations. Upon consideration of the memo, and additional research if necessary, the judge issues a decision. If the habeas corpus petition is summarily denied, the petitioner can file a new petition in the court of appeal.
- If the habeas corpus petition 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 usually calendared. Because 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

¹ The increase in filings presented in this analysis calculates a single year of potential workload impacts to California's trial courts, Courts of Appeal, and Supreme Court. We believe a similar increase in filings will be experienced in the second, and possibly third years, after the bill's enactment.

² The process described in this section is for the vast majority of habeas corpus petitions, specifically for non-capital cases. The habeas corpus petition process upon a judgement of death is described in the following section.

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 petition for a writ of habeas corpus alleging new evidence in 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 habeas corpus petition 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 would 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 referee (often a superior court judge) to hear and decide upon the merits of the new evidence.
- Should the petitioner lose at the court of appeal, he/she may file a petition for review or an original petition for a writ of habeas corpus with the Supreme Court, and the entire process, including cost, time, and effort of review, is repeated.

Capital Habeas Corpus Petitions

It must be emphasized that all capital inmates are statutorily entitled to the appointment of habeas corpus counsel in the investigation and preparation of their habeas corpus claims, and that appointed counsel are entitled to payment of fees and expenses according to a published schedule. This means that the process for handling capital habeas corpus petitions is not only different, it's more expensive than the process generally applicable to the habeas corpus petitions, as described above.

- As soon as possible after the judgment of death, the Supreme Court appoints state appellate and habeas corpus counsel for the capital inmate—such counsel are paid by the court according to published schedules.
- Once the petition is filed, the court may request, as appropriate, that the Attorney General file an informal response to the petition. The date on which the informal response is filed triggers the due date for the filing of petitioner's reply to the informal response. Several extensions of time (EOTs) to file the informal response and reply are usually requested and granted.
- Once the reply to the informal response is filed, the court either denies the petition (thus disposing of the matter) or issues an order to show cause (OSC) to show why relief

should not be granted. In all cases, no matter whether a denial or an OSC is issued, a written memorandum discussing all claims and their merits is prepared and reviewed by all justices. Issuance of an OSC renders the matter a “cause,” thereby vesting the petitioner with certain procedural rights, including the right to discovery, and right to oral argument and a published opinion.

- If the Supreme Court issues an OSC, then, per the Rules of Court, the parties submit formal briefing in the form of a “return” by the Attorney General and a “traverse” by the petitioner, with EOTs being granted as needed.
- After the traverse is filed, the court examines the pleadings to determine whether there are factual issues in dispute (i.e., claims that cannot be resolved without determining which version of the facts is accurate). If there are no factual issues in dispute and the only disagreement is over how the law applies, oral argument is scheduled. If there are factual issues in dispute, an evidentiary hearing must be held.
- After the findings of fact issue, the court directs the petitioner and Attorney General to file a brief on the merits and objections to the referee’s findings, and a subsequent response to the opposing party’s brief and objections. Again, in all cases, after the post-hearing briefing is complete, a written memorandum discussing all claims and their merits is prepared and reviewed by all justices. The court sets the matter for oral argument, and thereafter files an opinion. The losing party may thereafter file a petition for rehearing, which the court will deny or grant. After the Supreme Court rules on the rehearing petition, the state habeas matter at issue is concluded.

As indicated above, a state habeas corpus proceeding in a capital case may be resolved either by a denial order or by an opinion after the issuance of an OSC and a reference hearing. In either situation, the capital petitioner may, and usually does, thereafter initiate habeas corpus proceedings in federal court. If the federal court finds that the federal habeas corpus petition presents claims for relief that were not presented to the state court, it will order the petitioner to exhaust his or her state remedy by presenting such claims to the Supreme Court in an “exhaustion” petition. In most, if not all capital cases, inmates have filed exhaustion petitions.

As a way to better understand the workload associated with capital habeas corpus petitions, consider that the first state habeas corpus petition filed in a capital case typically ranges from approximately 150 pages in length to over 300 pages in length, not counting exhibits such as witness declarations, medical and school records, and police, probation, and other government reports, which can span thousands of pages. The Attorney General’s informal response to this first petition typically ranges from approximately 75 pages to over 225 pages in length. Reply

briefs by the petitioner typically are shorter in length than the informal responses, but sometimes are longer and attach supplemental exhibits.

Fiscal impacts

Should SB 1134 pass with its lower “more likely than not” standard for habeas relief based on new evidence, we would expect a spike in new habeas corpus filings and capital case costs as petitioners whose prior habeas corpus petitions have been denied seek application of the new lower standard. There likely also would be motions to supplement pending petitions to present claims under the new standard, which would also involve supplemental informal responses and replies. As of July 15, 2016, there are approximately 747 capital inmates in California prisons. Of that total, approximately 350 inmates have already filed their one or more capital-related state habeas corpus petition[s], and approximately 393 to 398 capital inmates have not yet filed any such state petition, including the 14 capital inmates with appointed habeas corpus counsel who have not yet filed an “amended” petition after the prior filing of a so-called “shell” habeas corpus petition. Assuming, as we are, that SB 1134 is given retroactive effect, an estimated 350 capital inmates would be eligible to file an additional habeas corpus petition presenting a new evidence claim relying on SB 1134’s lower standard. All capital inmates, including the approximately 350 in this category, are entitled to representation by court-appointed and court-paid counsel in habeas corpus proceedings challenging their death judgments.

Calculations utilizing both a 3 percent increase in filings as well as a 10 percent increase are presented below. These calculations do not presume new/original filings because such petitions would be filed regardless of the change in review under the authority of SB 1134. The calculations presented assume an increase in filings based solely on the number of existing inmates who already filed a habeas corpus petition alleging new evidence that was denied, who may decide to file a new petition in order to raise or renew a claim of factual innocence based on the bill’s lower standard for relief.

Court	3% Increase x Cost/Petition	Cost
Trial Courts	223 ³ x \$698 ⁴	\$155,654
Courts of Appeal	142 ⁵ x \$1,332 ⁶	\$189,144
Supreme Court (non-cap)	47 ⁷ x \$3,844 ⁸	\$180,668

³ Based on 2015 *Court Statistics Report* total superior court habeas corpus filings of 7,410.

⁴ Based on trial court judicial salaries and benefits, and appropriate court staff wages and benefits for FY 2015–16.

⁵ Based on 2015 *Court Statistics Report* total Court of Appeal habeas filings of 4,742.

⁶ Based on appellate justice salaries and benefits, and appellate court clerk wages and benefits for FY 2015–16.

⁷ Based on 2015 *Court Statistics Report* total Supreme Court habeas filings of 2,326 less 747 capital cases for a revised total of 1,579.

⁸ Based on Supreme Court Justice, attorney and clerk salaries and benefits for FY 2015–16.

Supreme Court (capital)	22 ⁹ x \$54,300 ¹⁰	\$1,194,600
SUBTOTAL		\$1,720,066

Court	10% Increase x Cost/Petition	Cost
Trial Courts	741 ¹¹ x \$698	\$517,218
Courts of Appeal	474 ¹² x \$1,332	\$631,368
Supreme Court (non-cap)	158 ¹³ x \$3,844	\$607,352
Supreme Court (capital)	75 ¹⁴ x \$54,300	\$4,072,500
SUBTOTAL		\$5,828,438

These calculations take into account the filings of the petitions and the time and court resources to review them prior to dismissal or issuance of an order to show cause. Therefore, in addition to the calculations above, some percentage of this spike in habeas corpus filings is likely to result in orders to show cause (OSC), which require substantially more staff resources.

The analysis below assumes that 10 percent of the additionally filed petitions (above) receive orders to show cause. The calculations are presented for both scenarios—if 10 percent of the 3 percent in newly filed petitions are ordered to show cause, and if 10 percent of the 10 percent in newly filed petitions results in an ordered to show causes.

Court	OSC: 10% of the 3% x Cost per Petition	Cost
Trial Courts	22 x \$20,085	\$441,870
Courts of Appeal	14 x \$11,292	\$158,088
Supreme Court (non-cap)	5 x \$47,288	\$236,440
Supreme Court (capital)	2 x \$57,565	\$115,130
SUBTOTAL		\$951,528

Court	OSC: 10% of the 10% x Cost per Petition	Cost
Trial Courts	74 x \$20,085	\$1,486,290
Courts of Appeal	47 x \$11,292	\$530,724
Supreme Court (non-cap)	16 x \$47,288	\$756,608
Supreme Court (capital)	7 x \$57,565	\$402,955
SUBTOTAL		\$3,176,577

⁹ Based on current figures of capital inmates of 751.

¹⁰ See fn. 7; additional staff and increased hours required for capital cases.

¹¹ See FN 2.

¹² See FN 4.

¹³ See FN 6.

¹⁴ See FN 8.

By adding together the costs of the initial petitions and the costs for orders to show cause, we arrive at our range of \$2.6 million to \$9.0 as represented in this chart:

	3% change	10% change
Increase costs in filings	\$1,720,066	\$5,828,438
Increase costs for OSC	\$951,528	\$3,176,577
Total increases	\$2,671,594	\$9,005,015

Additional factors to be considered:

- These costs are based on conservative estimated increases in petitions for writs of habeas corpus. Some branch experts believe the initial increase in filings will surge beyond the 10 percent calculated above. Moreover, the anticipated increases, and associated costs, could endure for several years before the surge of previously denied petitioners who file new petitions under the new standard wanes.
- The capital habeas corpus petition process, 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 habeas corpus petitions on behalf of petitioners; 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 where they are required, whether to determine the validity of new evidence or to remand to the trial court for retrial. Only the costs associated with an increase in petitions filed and reviewed, and OSCs issued and briefed are included. If there are issues of fact to be litigated, or if an OSC results in the issuance of a writ, new trials may be required, involving jury selection and all evidence, experts, hearings, testimony, cross examination, exhibits, etc., resulting in additional costs not calculated here.
- There are approximately 129,000 individuals in the custody of CDCR, all of whom, as well as the approximately 69,500 average daily population in custody in county jails, are eligible to file habeas corpus petitions. We did not use these figures as baselines by which to calculate the number of potential habeas corpus petitions that might be filed under the authority of SB 1134. Instead, we used the number of habeas corpus petitions already filed, as reported in the 2015 Court Statistics Report.¹⁵ The percentages used in the calculations—3 percent and 10 percent—are for illustrative purposes.

¹⁵ Find it here: www.courts.ca.gov/12941.htm#id7495

Hon. Edmund G. Brown, Jr.

September 8, 2016

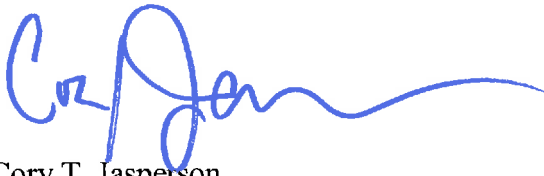
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Based on the calculations presented above, ranging from \$2.6 million to \$9.0 million, the Judicial Council believes that the costs to the trial courts, Courts of Appeal, and the Supreme Court associated with the enactment of SB 1134, should it be 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 Andi Liebenbaum at (916) 323-3121 or andi.liebenbaum@jud.ca.gov if you have questions about the information contained in this analysis.

Sincerely,



Cory T. Jasperson

Director, Governmental Affairs

CTJ/AL/yc-s

cc: Hon. Mark Leno, Member of the Senate

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