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2025 Proposition 66 Counsel Working Group
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Executive Summary

This information report provides a summary of the activities of the 2025 Proposition 66 Counsel Working Group, which was established by the Chief Justice last year to examine the current status of the appointment of counsel for petitioners in capital habeas corpus proceedings in both the superior courts and the Courts of Appeal. To provide context, the report begins with background on Proposition 66 (the Death Penalty Reform and Savings Act of 2016) and the rules of court related to qualifications and appointment of capital habeas corpus counsel that have been adopted by the Judicial Council. The report then summarizes information the working group received from speakers with experience in capital habeas corpus proceedings and provides suggestions that judicial branch entities may consider in their efforts to recruit and appoint counsel for petitioners in such proceedings.

Relevant Previous Reporting or Action

The 2025 Proposition 66 Counsel Working Group has not reported to the Judicial Council prior to this date.

Background

Proposition 66 shifted, from the Supreme Court to the superior courts, responsibility for the adjudication of capital habeas corpus petitions and the appointment of counsel in those proceedings

On November 8, 2016, the California electorate approved Proposition 66, the Death Penalty Reform and Savings Act of 2016. The proposition made a variety of changes to the statutes relating to review of death sentence cases in the California courts, many of which were intended to reduce the time spent on review. Among other provisions, Proposition 66 effected several changes to the procedures for filing, hearing, adjudication, and appeal of capital habeas corpus petitions.

Until the enactment of Proposition 66, capital habeas corpus petitions were almost always filed in and decided by the Supreme Court. Proposition 66 now requires that initial capital habeas corpus petitions generally be heard first in the superior court. (Pen. Code, § 1509(a) [“A writ of habeas corpus pursuant to this section is the exclusive procedure for collateral attack on a judgment of death”].) Proposition 66 also created a new right for either party to appeal the resulting decision to the Court of Appeal. (Pen. Code, § 1509.1.)

Particularly relevant here, Proposition 66 imposed a new responsibility on superior courts, requiring them to offer to appoint and then—subject to the necessary findings—appoint counsel for indigent persons in capital habeas corpus proceedings. (Pen. Code, § 1509(b); Gov. Code, § 68662.) However, the act provides no direction on how to fund this mandate to provide petitioners with counsel. Under the current statutory framework, the superior courts are precluded by statute from spending their funds on counsel for indigent defendants at the trial court level.¹ It is the counties that are responsible for funding such representation.

Appointment of counsel before Proposition 66

Before the act took effect, the Supreme Court generally was responsible for the appointment of counsel both on direct appeal and in state habeas corpus proceedings challenging the judgment or sentence in capital cases. The Supreme Court drew attorneys from several sources when appointing counsel to initiate and pursue habeas corpus proceedings for indigent persons subject to a judgment of death. The two primary sources were:

- The Habeas Corpus Resource Center (HCRC), which was established by legislation² in 1997. HCRC is authorized by statute to employ up to 34 attorneys to represent indigent

¹ Gov. Code, § 27706 (governing the responsibilities of a public defender). In the absence of a public defender, Penal Code section 987.2 requires the superior court to appoint private counsel for indigent defendants who request representation in certain criminal proceedings (including capital trials) and requires the expense to be paid out of the county general fund, subject to several conditions. (Gov. Code, §§ 77003(a)(7), 77009.) As discussed below, this responsibility for paying for counsel for indigent defendants likely applies to indigent petitioners in both noncapital and capital habeas corpus proceedings.

² Sen. Bill 513 (Lockyer; Stats. 1997, ch. 869, § 3).

persons in capital habeas corpus proceedings and perform other duties. (Gov. Code, § 68661.)

- Private attorneys who sought an appointment to represent an indigent person in a capital habeas corpus proceeding before the Supreme Court by applying directly to the court. Applications were reviewed by Supreme Court staff, who made recommendations to the court regarding appointment.

In addition to these two sources, the Office of the State Public Defender had been appointed for some habeas corpus proceedings and still continues to represent petitioners on older petitions pending before the Supreme Court.³ The California Appellate Project–San Francisco (CAP-SF) appears specially for petitioners before counsel has been appointed to investigate, prepare, and file an initial petition and subsequent briefs.

The Proposition 66 model for expanding the pool of counsel

The proponents of Proposition 66 intended that its passage would reduce the delay in adjudicating capital habeas corpus petitions, in part by expanding “the pool of available lawyers.”⁴ The initiative’s proponents contemplated that superior courts, and not the Supreme Court, should make the appointments because they would be in a better position to recruit attorneys from within their respective local communities.⁵ For a myriad of reasons, as discussed in greater detail below, there has been little progress in expanding the pool of available and qualified attorneys.

Proposition 66 also created a new right to appeal superior court capital habeas corpus decisions to the Courts of Appeal, necessitating additional appointments of counsel for petitioners

In addition to shifting responsibility for deciding capital habeas corpus petitions from the Supreme Court to the superior courts, Proposition 66 created a new right to appeal a superior court’s denial of a capital habeas corpus petition to the Court of Appeal. (Pen. Code, § 1509.1.) The act, however, is silent on the responsibility for appointing counsel to represent the petitioners in these appeals and on who should bear the responsibility for funding counsel.

³ The Office of the State Public Defender, which is also established by statute (Gov. Code, §§ 15400–15425), is primarily appointed to represent defendants on direct appeal from a judgment of death, but it continues to represent clients in a small number of habeas corpus proceedings in which there had been a dual appointment (i.e., to represent the same client on the automatic appeal and the habeas corpus petition).

⁴ *Voter Information Guide*, Gen. Elec. (Nov. 8, 2016), argument in favor of Proposition 66, p. 108.

⁵ Judicial Council of Cal., Working Group Rep., *Criminal and Appellate Procedure: Superior Court Appointment of Counsel in Death Penalty–Related Habeas Corpus Proceedings* (Oct. 19, 2018 [report incorrectly dated Oct. 19, 2019]), pp. 7–8, jcc.legistar.com/View.ashx?M=F&ID=6786824&GUID=CA85EBD4-E947-4E81-A1B5-21B857789B56. Some believed expansion of the pool would also result from Proposition 66 reducing the amount of time attorneys have to work on an initial habeas corpus petition from three years to one year, thereby allowing attorneys to take on more petitions with less of a time commitment than they had to make in the past. (*Ibid.*)

The complexity of these appeals demands representation by experienced attorneys. These appeals are broader in scope than typical appeals because they often present unique penalty-related issues and require consideration of issues both raised and not raised in the underlying capital habeas corpus proceeding. Many of these appeals therefore involve review of an enormous record on appeal, generally incorporating the records for the underlying trial, the capital habeas corpus petition, and the related automatic appeal in the Supreme Court.⁶

Counsel for these appeals therefore must have the skill to competently investigate not only routine appellate issues, but also those that can be raised for the first time in a habeas corpus appeal. These issues include claims of ineffective assistance of trial court counsel *and* of appellate counsel in a petitioner's prior direct appeal from the judgment of death. Moreover, claims of ineffective assistance of counsel in the appealed habeas corpus proceeding may be cognizable under certain circumstances. In part for this reason, the same attorney cannot represent a habeas petitioner at both the trial and appellate levels, unless both petitioner and counsel expressly request such representation in writing. (Cal. Rules of Court, rule 8.391(a)(3).)⁷

The Proposition 66 Rules Working Group

The act called for the Judicial Council to adopt, within 18 months of the act's effective date, "initial rules and standards of administration designed to expedite the processing of capital appeals and state habeas corpus review." (Pen. Code, § 190.6(d).) Government Code section 68665(b), which was added by Proposition 66, also requires the Supreme Court and the Judicial Council, in adopting rules of court related to the qualifications of counsel, to consider, among other factors, "the need to avoid unduly restricting the available pool of attorneys so as to provide timely appointment, and the standards needed to qualify for Chapter 154 of Title 28 of the United States Code."

Shortly after the act took effect, the Judicial Council formed the Proposition 66 Rules Working Group (Rules Working Group) to assist the council in carrying out its rulemaking responsibilities under the act.⁸ The council charged the Rules Working Group with considering what new or amended court rules, judicial administration standards, and Judicial Council forms would be needed to address the act's provisions, including, among other things, those governing the procedures for superior court appointment of counsel for capital habeas corpus proceedings.

⁶ Under California Rules of Court, rule 8.395(a), the documents filed or submitted in the trial court in capital habeas corpus proceedings *and* in the automatic appeal would be part of the clerk's transcript for the record in these appeals. The parties may stipulate, however, to a limited record under rule 8.395(b).

⁷ All further references to rules are to the California Rules of Court.

⁸ The act did not take effect immediately upon approval by the electorate because its constitutionality was challenged in a petition filed in the California Supreme Court, *Briggs v. Brown* (S238309). On October 25, 2017, the Supreme Court's opinion in *Briggs v. Brown* became final ((2017) 3 Cal.5th 808), and the act took effect.

The Rules Working Group recommended five different proposals, which the Judicial Council adopted effective April 2019.⁹ The rules relevant to the subjects examined by this working group are discussed in the sections below.

Rules 4.561 and 4.562 provide a process for recruiting, qualifying, and appointing counsel for capital habeas corpus petitioners in the superior courts

As recommended by the Rules Working Group, the Judicial Council adopted rules 4.561 and 4.562 to address a superior court’s appointment of counsel for capital habeas corpus petitioners.

Rule 4.561 establishes the procedures by which superior courts appoint qualified counsel to represent indigent persons in capital habeas corpus proceedings.

Rule 4.562 establishes procedures for the recruitment of counsel and determination of whether counsel have met the minimum qualifications for appointment in capital habeas corpus proceedings. Subdivision (f) requires each superior court in which a judgment of death has been entered against an indigent person for whom habeas corpus counsel has not been appointed to develop and implement a plan to identify and recruit qualified counsel who may apply to be available for appointment. The Rules Working Group recognized, however, that the superior courts would require assistance and support in carrying out this obligation.¹⁰ Accordingly, subdivision (b) of the rule requires each Court of Appeal to establish a regional committee that will, among other duties:

- Assist superior courts in their efforts to recruit qualified attorneys;
- Accept applications from interested attorneys;
- Determine if applicants meet the minimum qualifications, as provided in rule 8.652; and
- Upon the request of a superior court, assist the court in matching one or more qualified attorneys from the statewide panel to a specific case.¹¹

Subdivision (d)(4) provides that those attorneys the committees determine are qualified will be added to a statewide panel of counsel maintained by HCRC and posted on its website.¹² As an alternative to the statewide panel of private attorneys, individual courts, by adopting a local rule, may establish a local process for accepting attorney applications and determining whether the attorneys meet the requirements of rule 8.652.¹³

⁹ The text of all changes proposed by the Rules Working Group and adopted by the Judicial Council can be found at courts.ca.gov/system/files/file/prop66-rules-strikeout-version_0.pdf.

¹⁰ Judicial Council of Cal., Working Group Rep., *Criminal and Appellate Procedure: Superior Court Appointment of Counsel in Death Penalty–Related Habeas Corpus Proceedings*, *supra*, at p. 13.

¹¹ Rule 4.561(d).

¹² Habeas Corpus Resource Center, “4.562 Compliance,” hcrc.ca.gov/4.562.html.

¹³ Rule 4.562(g).

Rules 8.652 and 8.391 provide the qualifications for counsel representing a petitioner in the trial court and on appeal for a capital habeas corpus petition

As recommended by the Rules Working Group, rule 8.652 establishes the qualifications for counsel to be appointed to represent a petitioner on an initial petition in a capital habeas corpus proceeding in a superior court.

Rule 8.391, in turn, establishes the qualifications of counsel appointed by the Court of Appeal to represent an indigent person not represented by the State Public Defender in an appeal under Penal Code section 1509.1. Rule 8.391 requires that, to be eligible for appointment to these appeals, an attorney must meet the minimum qualifications set forth in rule 8.652—in other words, the same qualifications standards as counsel seeking appointment in the underlying superior court capital habeas corpus proceeding. In addition, however, counsel must be familiar with appellate practices and procedures in the California courts, including those related to death penalty appeals.¹⁴ Finally, as discussed earlier, due to the possibility of a claim of ineffective assistance of counsel, an appointed attorney “must not have represented the petitioner in the habeas corpus proceedings that are the subject of the appeal unless the petitioner and counsel expressly request, in writing, continued representation.”

The 2025 Proposition 66 Counsel Working Group

Following enactment of Proposition 66, many individuals are still waiting for appointment of counsel for capital habeas corpus proceedings

Very few new appointments of counsel for an initial capital habeas corpus petition have been made since the act was passed in 2016. There is only one qualified attorney on the statewide panel established under rule 4.562.¹⁵ No private counsel has been successfully appointed by a superior court since the act went into effect. Between the passage of Proposition 66 and April 2019, when the Supreme Court was still making appointments, HCRC accepted four appointments to replace previously appointed private counsel. Since April 2019, when the rules became effective, HCRC has accepted appointments to represent four petitioners, in one of those cases replacing previously appointed counsel. HCRC has reported it is working toward an appointment in one more case.

When the Rules Working Group reported to the Judicial Council in 2018, there were almost 750 individuals on death row in California. Approximately 360 of these individuals were waiting for attorneys to be appointed to represent them in habeas corpus proceedings.¹⁶ HCRC reports that

¹⁴ Rule 8.391(b).

¹⁵ Since qualifying for the panel in 2019, three of the four attorneys have withdrawn, leaving only one qualified attorney as of November 2025. Rule 4.652 requires HCRC to make available on its website a list of the qualified attorneys on the panel. The most current list can be found at hcr.ca.gov/4.562/habeas_panel.pdf. See also Habeas Corpus Resource Center, *Annual Report: 2024 in Review* (Feb. 14, 2025), p. 11, hcr.ca.gov/documents/HCRC%20Annual%20Report%202024a.pdf.

¹⁶ Judicial Council of Cal., Working Group Rep., *Criminal and Appellate Procedure: Superior Court Appointment of Counsel in Death Penalty–Related Habeas Corpus Proceedings*, *supra*, at p. 7.

the number of those on death row awaiting appointment of habeas corpus counsel to investigate, prepare, and file an initial petition is now down to 344.¹⁷

HCRC also reports that there are now 42 petitioners who are waiting for the appointment of counsel to investigate, prepare, and file an opening brief in the Court of Appeal, under the new appellate procedures established by Penal Code section 1509.1.¹⁸ To date, and despite the Judicial Council’s submission of requests for funding to be included in the Budget Act, no funding has been provided to pay counsel for representing these appellate petitioners. The Courts of Appeal have stayed these appeals until funding is provided.¹⁹

There are a number of reasons for the lack of appointments by the superior courts, chief among them is the magnitude of the work involved and the lack of funding to compensate attorneys. An additional key factor is the “serious shortage of qualified counsel willing to accept an appointment as habeas corpus counsel in a death penalty case.”²⁰ In a 2019 concurring opinion, four Supreme Court justices concluded the “the dearth of attorneys willing to take on these assignments is due in part to the sheer enormity of the undertaking. A single death penalty case can and often does dominate a lawyer’s practice for well more than a decade.”²¹ The opinion went on to explain that the protracted nature of the postconviction death penalty process, limitations on funding for petitioners’ counsel, the size of the record, and the scale of the parties’ briefing “in light of the peculiar nature of the death penalty” all contribute to the unusual burden.²²

The Chief Justice establishes the 2025 Proposition 66 Counsel Working Group

In February 2025, Chief Justice Patricia Guerrero established the 2025 Proposition 66 Counsel Working Group and charged it with the following tasks:

- Review the current processes and efforts at appointing counsel for indigent persons seeking to file a petition for habeas corpus review of the death penalty judgments imposed on them or appeals of a superior court decision on such a petition. The matters under review will include but not be limited to the time frame for appointments and the qualifications necessary to achieve competent representation, the need to avoid unduly restricting the available pool of attorneys so as to provide timely appointment, and the standards needed to qualify for chapter 154 of title 28 of the United States Code (Pen. Code, §§ 1239.1, 1509; Gov. Code, § 68665).

¹⁷ Habeas Corpus Resource Center, *Annual Report: 2024 in Review*, *supra*, at p. 10, citing 345 individuals. The appointment of HCRC to represent a petitioner in Kings County in March 2026 brings the number to 344.

¹⁸ *Id.* at p. 11.

¹⁹ *Id.* at p. 12.

²⁰ *In re Morgan* (2010) 50 Cal.4th 932, 937–938.

²¹ *Briggs v. Brown* (2017) 3 Cal.5th 808, 864.

²² *Id.* at pp. 866–869 (conc. opn. of Liu, J.).

- Consider whether there are new or better methods to recruit and appoint counsel for indigent persons who seek to petition for habeas corpus review of the death penalty judgments imposed on them or appeals of a superior court decision on such a petition. The methods to be considered will include but not be limited to new or amended court rules, judicial administration standards, and Judicial Council forms that may be appropriate to better implement the act’s provisions.
- Consider how the use of pro bono counsel could help expand the pool of attorneys available for appointment to represent indigent persons who seek to petition for habeas corpus review of the death penalty judgments imposed on them or appeal a superior court decision on such a petition.
- Based on its study of current practices and options for new or better methods for recruiting or appointing counsel, make recommendations to the Judicial Council including but not limited to new or amended court rules, judicial administration standards, and Judicial Council forms that may be appropriate to better implement the act’s provisions.

The Chief Justice appointed Administrative Presiding Justice Laurie M. Earl, Court of Appeal, Third Appellate District, as chair of the working group, and appointed the following as members:

- Administrative Presiding Justice Mary J. Greenwood, Court of Appeal, Sixth Appellate District
- Judge Charles S. Crompton, Superior Court of San Francisco County
- Presiding Judge Lisa M. Rogan, Superior Court of San Bernardino County
- Ms. Rachel W. Hill, Attorney at Law, Law Office of Rachel Hill & Hill Mediation Services
- Ms. Gretchen Nelson, Attorney at Law, Nelson & Fraenkel LLP
- Mr. Craig M. Peters, Attorney at Law, Altair Law
- Ms. Anabel Z. Romero, Court Executive Officer, Superior Court of San Bernardino County

Mr. Jonathan Lange, Assistant Chief Supervising Attorney, Supreme Court of California, served as Supreme Court liaison to the working group.

Judicial Council staff to the working group included Ms. Laura Speed, former Director, Leadership Support Services; Mr. Michael Giden, Principal Managing Attorney, Legal Services; Mr. Alex Bender, Attorney II, Criminal Justice Services; and Ms. Alexandria Torres, Analyst, Leadership Support Services.

The working group conducted six meetings and heard from eight speakers

The working group met six times between February and December of 2025, twice in person and four times by video. Three of these meetings were dedicated in part to hearing from eight guest speakers with a broad range of expertise in capital habeas corpus proceedings in California. The

following speakers are listed in the order they spoke with the working group, with the date indicated in parentheses.

- Mr. David Lash, Managing Counsel for Pro Bono and Public Interest Services, O'Melveny & Myers LLP (June 24, 2025)
- Ms. Nisha Shah, Interim Executive Director, Habeas Corpus Resource Center (July 31, 2025)
- Mr. Joseph Schlesinger, Executive Director, California Appellate Project–San Francisco (July 31, 2025)
- Mr. Bill Bilderback, Senior Assistant Attorney General and Statewide Capital Case Coordinator, California Department of Justice (July 31, 2025)
- Ms. Elisabeth A. Semel, Clinic Co-Director and Clinical Professor of Law, Berkeley Law Death Penalty Clinic (Aug. 26, 2025)
- Ms. Aimee Vierra, Supervisor of Writs and Post-Conviction Unit, Law Offices of the Public Defender, Riverside County (Aug. 26, 2025)
- Ms. Pamela Gomez, Chief of Capital Habeas Unit, Office of the Federal Public Defender, Central District of California (Aug. 26, 2025)
- Mr. Thomas Sone, Public Defender, Law Offices of the Public Defender, San Bernardino County (Aug. 26, 2025)

The working group and its staff are grateful to each of these individuals for taking the time and effort to share their experiences and expertise.

Summary of topics discussed by the speakers

The speakers discussed many topics with the members of the working group. The statements most relevant to the working group's charge are summarized below. These statements are presented for informational purposes only and do not necessarily reflect the opinions of the working group or its members. The working group's conclusions are presented in the next section.

Benefits of timely appointment of capital habeas corpus counsel

It has been over 20 years since California last executed a condemned inmate.²³ Yet the reduced threat of execution in California does not mean that people sentenced to death do not benefit from prompt appointment of habeas corpus counsel. Speakers pointed out that as time passes, witnesses die, memories fade, physical evidence degrades and disappears, all making it much harder to challenge a criminal judgment of any kind.

Some of the speakers provided recent examples of successful habeas corpus petitions that resulted in petitioners being released or sentenced to a prison term that would allow for release in

²³ The most recent execution in California occurred on January 17, 2006. The California Department of Corrections and Rehabilitation maintains a list of individuals executed by California since 1978 at cdcr.ca.gov/capital-punishment/inmates-executed-1978-to-present/.

the future. While infrequent, these examples illustrate that appointment of counsel is not merely an abstract legal requirement. It can have life-changing impacts for the represented inmates.

The speakers also noted that delay in appointment of counsel impacts individuals beyond those sentenced to death. As the proponents of Proposition 66 argued, delays in the final resolution of a capital case impact the families of murder victims, who “should not have to wait decades for justice. These delays further victimize families who are waiting for justice.”²⁴ This concern is also reflected in the provision in the California Constitution giving victims a right to “a speedy trial and a prompt and final conclusion of the case and any related post-judgment proceedings.”²⁵

Challenges to recruiting qualified counsel

There appeared to be a consensus among the speakers that absent funding for petitioners’ counsel, it will continue to be difficult to recruit qualified attorneys to apply for the panel of private attorneys available for appointment in capital habeas corpus cases. Although these speakers emphasized the lack of funding and lack of clarity about which entity is responsible for making funding available, they also noted that these were not the only issues impeding recruitment. Representing a condemned inmate on a habeas case is an extraordinary commitment on a number of different levels. The time to investigate and prepare for the filing of a habeas corpus petition and the subsequent litigation takes years. There are also considerable out-of-pocket expenses for investigation, preparation, and litigation, for which counsel would need to seek reimbursement. There is also an emotional toll on attorneys who work on these cases. Grappling with both the graphic nature of the crimes and the humanity of the person sitting across from them can have a profound and lasting impact on people who work on these cases.

Challenges to pro bono counsel accepting appointments

Speakers told the working group that law firms and clinics that provide pro bono services in capital habeas corpus cases work with limited resources. They find it necessary to prioritize work and dedicate their institution’s efforts where the need is greatest. These attorneys have concluded that the need for capital habeas corpus representation may not be as great in California as it is in other states, where there is no moratorium on execution. Further, there are very few firms in California that provide capital habeas corpus pro bono services and the firms have limited resources that restrict the number of capital cases that they are able to accept each year.

Models for providing counsel: institutions or private counsel

The speakers noted that it can be difficult for individual counsel to work in isolation, despite the assistance they receive from organizations like the California Appellate Project–San Francisco. The speakers opined that government institutions were in a better position to provide consistent, high-quality representation. Such institutions have existing infrastructure to support such

²⁴ *Voter Information Guide*, Gen. Elec. (Nov. 8, 2016), text of proposed law, Proposition 66, section 2, *Findings and Declarations*, item 3, p. 213.

²⁵ Cal. Const., art. I, § 28(b)(9), cited in an amendment to Pen. Code, § 190.6(d) made by Proposition 66.

representation, including predictable financial resources and internal training and mentoring that remain in place over the long term.

Attorney training and career path

Some of the speakers expressed concern about the dearth of new attorneys gaining experience with capital habeas corpus representation. There have been very few appointments since 2016. Many attorneys with the relevant experience have stopped taking on new appointments as they retire or near retirement. This means there are not always senior-level attorneys available to train newer attorneys. Thus, even if there were funding, these speakers believe there may be fewer attorneys capable of meeting the necessary qualifications or available to train those who are interested in taking on these appointments.

Possibility of settlement, mediation, and other avenues for resolution

Some of the speakers mentioned that settlement, mediation, and other avenues for resolution should be considered as an alternative or in addition to the preparation of a traditional habeas corpus petition. They suggested that a rule or rule amendment requiring a settlement conference could be productive in bringing down the number of petitions that require full briefing, argument, and adjudication. Another speaker raised concerns about such an approach, stating that it would still require appointment of counsel and substantial investigation and analysis.

Written materials provided to the working group

The working group members also received written materials from some of the speakers. Among these materials are a letter from the Berkeley Law Death Penalty Clinic dated June 13, 2025 (Attachment A); *Death Penalty Report* from the Committee on Revision of the Penal Code, dated November 2021;²⁶ and *Annual Report: 2024 in Review* from HCRC.²⁷

Analysis/Rationale

The working group reviewed the current process and efforts at appointing counsel for indigent persons seeking to file a petition for writ of habeas corpus challenging a death judgment or appealing a superior court decision on such a petition. This review included the time frame for appointments and the qualifications necessary to achieve competent representation, taking into account Proposition 66's mandate to avoid unduly restricting the available pool of attorneys and to provide timely appointment, consistent with the standards needed to qualify for chapter 154 of title 28 of the United States Code (Pen. Code, §§ 1239.1, 1509; Gov. Code, § 68665).

The working group also considered whether there are new or better methods, consistent with the requirements of Proposition 66, to recruit and appoint counsel for indigent persons who seek to pursue a petition for writ of habeas corpus challenging a death judgment or an appeal from a

²⁶ Committee on Revision of the Penal Code, *Death Penalty Report* (Nov. 2021), clrc.ca.gov/CRPC/Pub/Reports/CRPC_DPR.pdf.

²⁷ Habeas Corpus Resource Center, *Annual Report: 2024 Update* (Feb. 14, 2024), hcrc.ca.gov/documents/HCRC%20Annual%20Report%202024a.pdf.

superior court decision on such a petition. The methods considered included the recruitment of pro bono counsel as well as new or amended court rules, judicial administration standards, and Judicial Council forms that may be appropriate to better implement the act's provisions.

In addition to hearing from the eight speakers on how the California system is structured, the members of the working group considered how capital habeas corpus attorneys are provided in other state courts. California appears to be unique in requiring the appointment of counsel—but without a comprehensive system of counsel (either public or private) that is funded and available to handle the demand for appointments. In that sense, none of the other jurisdictions provided a model of how California can address the shortage of qualified counsel without first establishing how counsel will be funded.

New or amended rules of court, standards of judicial administration, or forms related to the qualifications or appointment of counsel are not necessary

The working group reviewed the current rules of court on qualifications of counsel and the process for appointing counsel.²⁸ None of the speakers indicated that any of the rules impede the recruitment of private counsel, and the working group agrees that the rules are not an impediment. Instead, the dearth of private counsel appointments since the passage of Proposition 66 appears to be caused by the lack of funding for counsel in both the superior courts and the Courts of Appeal and the personal and professional challenges associated with taking on these appointments.

However, the working group did not foreclose the possibility that the rules of court related to either qualifications of counsel or the process for appointing counsel might be amended in the future. Once funding is made available, and there has been greater experience with the appointment and qualifications requirements found in the rules, it may be worth evaluating that experience to determine if any new or amended rules, standards, or forms are appropriate in these areas to increase the pool of qualified attorneys willing to accept appointments.

Pro bono representation is unlikely to resolve the substantial backlog of unrepresented individuals

As the charge required, the working group considered the viability of using pro bono attorneys. The use of pro bono attorneys, either from law firms, innocence projects, or law school clinics, may help some individual petitioners but it would have little impact on the substantial backlog of nearly 400 unrepresented individuals—344 requiring counsel for the initial petitions in the superior courts and 42 more requiring counsel for the appeals of decisions on the initial petitions. As noted above, the speakers explained that investigation and preparation of a capital habeas corpus petition can require an enormous amount of time and effort, sometimes requiring over a decade to complete. The cases may also involve a substantial amount of out-of-pocket financial resources for investigation, for which counsel would need to seek reimbursement. Given these challenges, only a limited number of large law firms or well-funded law school clinics would be

²⁸ Rules 4.561, 4.562, 8.391, and 8.652.

able to take on an appointment, and even then, the number of appointments would be limited to one or two per institution. Finally, many of the law firms and clinics with experience in this area have decided to direct their efforts where they believe they are most needed, and the current moratorium on executions, among other reasons, has made them more likely to take cases outside California.

Although pro bono representation would not resolve the backlog of hundreds of unrepresented individuals on their own, the working group believes this option should not be overlooked and may be worth further efforts. Even a modest number of additional appointments makes a difference to the represented inmates, and these appointments can provide important training opportunities to interested attorneys and law students.

Regional committees should reactivate and the Judicial Council should consider providing additional support as requested by the committees

Rule 4.562 requires the Court of Appeal for each of California's six appellate districts to establish a death penalty-related habeas corpus panel committee (regional committee). Among other duties, these committees are required to assist superior courts in their efforts to recruit attorneys to represent indigent petitioners in capital habeas corpus proceedings. Although each of the six districts established such a committee in 2019, the committees became less active after the emergence of the COVID-19 pandemic.

The working group believes the regional committees are best poised to promote and coordinate the recruitment of new attorneys. Committees may be able to draw on their familiarity with their local legal communities to encourage qualified pro bono attorneys to take on representation, to work with local law schools to set up clinical programs related to the capital habeas corpus proceedings, or to generate innovative recruitment ideas.

However, the committees need assistance in their recruitment efforts. The working group believes it may be helpful if Judicial Council staff worked with the regional committees to provide new education or training for their members to familiarize them with the rules of court applicable to the recruitment and appointment of counsel in capital habeas corpus proceedings that the council adopted in 2019.

Recognizing that addressing the backlog of inmates needing habeas corpus representation will require a substantial pool of willing and qualified attorneys, there is a need to not only identify attorneys willing to accept future appointments, but to ensure they are qualified. Because very few attorneys have been appointed since 2016, there have likewise been few opportunities for new attorneys to gain experience with capital habeas corpus representation. The working group believes it may be helpful if the regional committees, with the support of Judicial Council staff, as requested, worked to encourage and facilitate the provision of education and training opportunities to attorneys willing to accept future appointments.

Importance of the judicial branch continuing to seek funding for counsel to represent petitioners in appeals from superior court decisions on capital habeas corpus petitions

After Proposition 66 became effective, and at the recommendation of the Administrative Presiding Justices Advisory Committee (APJAC), the Judicial Council began submitting budget change proposals to the Department of Finance. Every year since fiscal year 2021–22, the APJAC has recommended budget change concepts that sought ongoing funding to support the new workload and costs associated with implementation of Proposition 66 in the Courts of Appeal, including additional court staff, appointed counsel, investigations, records storage, and technology upgrades.²⁹ The Department of Finance has not approved any of these requests.

Recognizing that the judicial branch has an interest in the timely appointment of qualified attorneys to represent petitioners in capital habeas corpus proceedings, the working group believes it is important for the APJAC, the Judicial Branch Budget Committee, and the Judicial Council to continue developing, approving, and submitting these budget change proposals to the Department of Finance. Should these requests for funding be approved and included in the state’s annual Budget Act, the Courts of Appeal would then be able to begin appointing counsel for all petitioners who have pending and future Proposition 66 appeals.

Additionally, consistent with efforts to recruit qualified attorneys willing to accept future appellate appointments, the Judicial Council may want to consider whether future budget change proposals should include funding for the Courts of Appeal, regional committees, or other entities to provide education and training to attorneys willing to accept such appointments.

Counties should be encouraged to seek funding for appointed counsel to represent petitioners in the superior courts

In contrast to its suggestion that the Judicial Council continue to submit budget change proposals for appellate counsel for petitioners whose decisions are submitted to the Courts of Appeal, the working group does not recommend that the council seek funding for appointed counsel for petitioners in the superior courts. Under the statutory framework governing trial court funding,³⁰ trial courts are prevented from spending their own funds on indigent defense counsel. Specifically, Government Code section 77003, which defines “court operations” for purposes of authorized court expenditures, specifically excludes “indigent criminal defense” from those expenses that a trial court is authorized to pay.³¹ This interpretation is reinforced in Government

²⁹ Judicial Branch Budget Committee, *Notice and Agenda of Open Meeting with Closed Session* (Apr. 21, 2020), pp. 27–35, courts.ca.gov/system/files/file/jbbc-20200421-materials.pdf.

³⁰ See the Lockyer-Isenberg Trial Court Funding Act of 1997 (Assem. Bill 233; Stats. 1997, ch. 850) and subsequent amendments. The act shifted responsibility for funding trial courts from the counties to the state and established what costs would be the responsibilities of the counties and what costs would be the responsibilities of trial courts.

³¹ Gov. Code, § 77003(a)(7). Government Code section 77009 requires trial courts to deposit all funds for their operations into an account and states that those funds “shall be payable only for the purposes set forth in [Government Code] Sections 77003 and 77006.5, and for services purchased by the court pursuant to subdivisions (b) and (c) of [Government Code] Section 77212.” Government Code sections 77006.5 and 77212 do not contradict the restriction on using court funds for indigent defense.

Code section 77201, which states that nothing in the section “is intended to relieve a county of the responsibility for justice-related expenses not included in Section 77003 which are otherwise required of the county by law, including, but not limited to, *indigent defense representation and investigation*”³²

Although Proposition 66 clearly vests the superior courts with responsibility for appointing counsel in the capital habeas corpus proceedings before them, the proposition is silent on what government entity is responsible for paying for counsel. There is an argument that relevant statutory authorities indicate that funding counsel in habeas corpus proceedings in the superior courts would be a county expense, reimbursable by the state. The first authority is Penal Code section 987.2(a), which requires that attorneys appointed to represent indigent persons “in a criminal trial, proceeding, or appeal” must “be paid out of the general fund of the county.” The second authority is Penal Code section 4751(d), which states that a county may recover “[c]osts incurred by the public defender or court-appointed attorney with respect to any matter set forth in Section 4750.” Penal Code section 4750, in turn, provides that “[a] city, county, or superior court shall be entitled to reimbursement for reasonable and necessary costs connected with state prisons or prisoners in connection with any of the following: [¶] ... [¶] (c) Any hearing on any return of a writ of habeas corpus prosecuted by or on behalf of a prisoner.” There is nothing in Penal Code section 4750 that excludes capital habeas corpus petitions from the matters for which a county may be reimbursed.

Although courts have expressed differing opinions regarding whether a county public defender, specifically, may be required to accept appointment in a habeas corpus proceeding,³³ no court has directly addressed the underlying funding responsibility. But to the extent prior authorities involving the public defender are relevant, they make clear that, at a minimum, a public defender has the discretion to represent an indigent petitioner in a noncapital habeas corpus proceeding—at the county’s expense. It may reasonably be inferred from that conclusion that the cost of any habeas corpus representation would be a cost for the county to cover—whether the petitioner is represented by the public defender or private counsel, when the public defender declines the assignment under Penal Code section 987.2. Since there is no distinction in the statute between responsibility for noncapital and capital habeas corpus proceedings, the same logic would apply to impose liability on counties for funding representation of indigent capital habeas corpus petitioners. The working group suggests that it may be helpful for the council to communicate this interpretation of the governing statutes to our sister branches of government to help achieve

³² Gov. Code, § 77201(g) (italics added); see Gov. Code, §§ 77201.1(d) (same), 77201.3(f) (same).

³³ In *Harmon v. Superior Court* (2026) 117 Cal.App.5th 1236, the Court of Appeal held that under Government Code section 27706(a) a public defender is not required to represent an indigent petitioner in a noncapital habeas corpus proceeding but has the discretion to do so under Government Code section 27706(g). In reaching this conclusion, the Court of Appeal expressed disagreement with *Charlton v. Superior Court* (1979) 93 Cal.App.3d 858, to the extent that *Charlton* could be read as requiring public defenders to take on representation of an indigent petitioner in a noncapital habeas corpus proceeding (*Harmon, supra*, at pp. 1251–1253) and noted that *Bemore v. Superior Court* (2025) 108 Cal.App.5th 1125 was not inconsistent with its holding because *Bemore* addressed whether a petitioner could choose their own private counsel despite a public defender’s request to be appointed (*Harmon, supra*, at pp. 1253–1254).

clarity on the question of responsibility for funding counsel. Otherwise, there is a risk of even greater confusion and greater likelihood that the question will not be resolved satisfactorily.

District attorneys and public defenders should be encouraged to engage in settlement discussions to resolve death sentences before an initial petition is filed

Some of the speakers stated that many sentences have been reduced following reexamination before an initial petition was filed, based on the discovery of new facts or the availability of new statutory remedies like the Racial Justice Act (Assem. Bill 2542; Stats. 2020, ch. 317). District attorneys and public defenders should be encouraged to engage in settlement discussions or mediations to examine those cases in which capital habeas corpus counsel have not yet been appointed to determine whether any of those cases would lend themselves to reduced sentences based on new facts or new legal rights. The Judicial Council may want to consider whether a settlement or mediation program would be beneficial. This may enable death-sentenced inmates to get more prompt relief, and it would reduce the backlog of cases requiring appointment of counsel.

Fiscal Impact and Policy Implications

California law mandates that courts appoint counsel for petitioners in capital habeas corpus proceedings and appeals. But many of the factors that would make qualified counsel available for appointment are outside the control of the courts and the judicial branch. Specifically, the courts have no control over funding for such counsel, and attorneys are unlikely to accept appointments unless they know they will be paid for their work and reimbursed for their out-of-pocket costs. In addition, the training of attorneys is outside the purview of the Judicial Council's educational efforts. In the absence of funding and adequate attorney training, however, judicial branch entities can explore any of the actions discussed in this report that are within their control and should continue efforts to recruit and appoint counsel in spite of these challenges.

Attachments and Links

1. Attachment A: June 13, 2025, letter from the Berkeley Law Death Penalty Clinic to the working group

Faculty

Elisabeth Semel, Co-Director
Ty Alper, Co-Director

Paralegal

Stephanie Shattuck

Deputy Director

Mridula Raman

June 13, 2025

Michael I. Giden
Managing Attorney, Legal Services
Judicial Council of California
455 Golden Gate Avenue
San Francisco, CA 94102-3688

Via Email to michael.giden@jud.ca.gov

Re: Law School Clinics Participation in Capital Habeas Representation

Dear Mr. Giden,

Thank you for your email. It came at a busy time for us. We apologize that it has taken us several days to reply.

While we appreciate the Judicial Council's concern, respectfully, we do not believe that it is possible for law school clinics to play any meaningful role in addressing the shortage of attorneys able and willing to represent clients facing execution in California by providing pro bono direct representation to people sentenced to death in the state. The enormous amount of time and financial resources required to competently represent a capital client in state habeas proceedings precludes law school clinics from engaging in this representation at any scale. We note that one of the Berkeley Law Death Penalty Clinic's core contributions to addressing the shortage of attorneys for death-sentenced individuals in California and nationwide has been by training the next generation of capital defense lawyers.

The current number of death-sentenced men and women in California without habeas counsel reflects a decades-old structural deficiency in the state's administration of the death penalty. When the California Commission on the Fair Administration of Justice ("Commission") issued its report in 2008, there were 291 prisoners on our state's death row who did not have habeas counsel. Cal. Comm'n on the Fair Admin. of Just., *Report and Recommendations on the Administration of the Death Penalty in California* 50 (June 30, 2008) ("CCFAJ Report"). The average wait for appointment of counsel was then eight to ten years. *Id.* at 50–51. The Commission recommended expansion of the Habeas Corpus Resource Center ("HCRC") by increasing its budget five-fold as the best and likely the only means of addressing the chronic shortage of qualified counsel. *Id.* at 55. Acknowledging that individual appointments would nonetheless be necessary, the Commission proposed revising the California Supreme Court's procedures to ensure that habeas counsel are qualified under Guideline 4.1(A)(2) of the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases

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and “fully compensated at rates that are commensurate with the provision of high quality legal representation and reflect the extraordinary responsibilities in death penalty representation.” *Id.*

Almost fifteen years later, the Commission’s recommendations remain unfulfilled, and the crisis in representation has worsened: There are now 345 individuals without habeas counsel on California’s death row, and the average time from imposition of sentence to appointment is 16 years. Habeas Corpus Resource Center, *Annual Report: 2024 in Review* 10, 12 (Feb. 14, 2025) (“*HCRC Report*”). The number of HCRC attorneys is statutorily frozen at 34. *Id.* at 14. Last year, the agency’s budget was reduced by more than \$903,000, which forced the agency to impose a hiring freeze. *Id.*

In the recently filed petition for certiorari to the United States Supreme Court in *Guerrero v. Redd*, Chief Justice Guerrero acknowledged, “Few attorneys have the necessary qualifications [for appointment] to begin with, and budgetary constraints limit the California judiciary’s ability to attract even those attorneys who are qualified.” Pet. for Writ of Cert. at 6, *Guerrero v. Redd*, No. 24-948 (U.S. Feb. 28, 2025); *see also People v. Wilson*, 16 Cal. 5th 874, 969 (2024) (Liu & Evans, JJ., dissenting) (“It is well known, especially to this court, that there is a dearth of qualified counsel and funding for capital appointments.”). This has been the status quo since at least 2010, when the California Supreme Court recognized the “critical shortage of qualified attorneys” for capital state habeas proceedings. *In re Morgan*, 50 Cal. 4th 932, 934 (2010).

We are the only capital punishment clinic in California. We suspect that there are few, if any, faculty at other law school clinics in the state who qualify for appointment under Rule 8.652(c). We leave for another discussion, should it be appropriate, our reservations about appointment under subdivision (d) and concerns about whether appointment under either provision meets the requirements of ABA Guideline 4.1(A)(2). We note, however, that a key feature of clinical teaching involves modeling professional conduct, including “competence” under Rule 1.1 of the California Rules of Professional Conduct.

When the Death Penalty Clinic was founded in 2001, Professor Charles Weisselberg, who was at the time the Director of Clinical Legal Education, agreed that the clinic would accept an appointment by the California Supreme Court in a death penalty case. After Professor Semel joined the faculty as the clinic’s inaugural director, the court appointed her to represent a client, along with private counsel, who had previously been appointed. Several years later, after Professor Alper joined the Death Penalty Clinic, he was also appointed to the case. We are appointed in all capital post-conviction proceedings, including automatic appeal, habeas, and clemency in state court. We have represented the client for more than 20 years in state and federal habeas proceedings and related state court litigation.

Pursuant to its policies, the California Supreme Court capped reimbursement for state habeas investigation at \$50,000. Cal. Sup. Ct. Policies Regarding Cases Arising from Judgments of Death, Policy 3.3, std. 3.3.1, ¶ 4. (Feb. 1, 2025) (“Cal. Sup. Ct. Policies”). The Commission observed, “The expenses for a habeas investigation and the retaining of necessary experts can easily exceed this maximum.” *CCFAJ Report* at 53. The reimbursement allocation in the clinic’s

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case was *far* from sufficient.¹ As your email states, there is no funding for the appointment of counsel nor for ancillary costs in the superior courts under Proposition 66. Clinic faculty have devoted thousands of hours to representing our client. We cannot envision that a clinic would be able, much less willing, to contribute tens, potentially hundreds of thousands, of dollars to fund a capital habeas investigation, including expert witness declarations, which must be filed with the initial petition.

Your email also mentioned pro bono work by law firms. Before joining the Berkeley Law faculty, Professor Semel was director of the ABA's Death Penalty Representation Project for four years. One of her responsibilities was recruiting law firms to represent death-sentenced individuals. Should you be interested, she is available to discuss that experience. However, as you know, the California Supreme Court, with the assistance of the California Appellate Project and HCRC, spent decades encouraging law firms to take capital appellate and habeas cases. It is our understanding that the outcome was consistent with Professor Semel's experience: The recruitment numbers did not reduce the backlog. While there were some cases in which pro bono firms made the life-and-death difference for clients, there were mixed results in terms of the continuity and quality of the representation.

Even if a handful of law school clinics and law firms accept a handful of cases—assuming they are qualified to do so—they cannot remedy what HCRC correctly called “[t]he systemic dysfunction and potential for injustice that [the number of individuals awaiting habeas counsel] represents.” *HCRC Report* at 20.

If a phone call would be helpful, we would be happy to speak with you.

Sincerely,



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¹ The Commission's report cited Professor Semel's testimony, which stated that the law firm of Coley Goodward LLP "provided 8,000 hours of pro bono attorney time, 7,000 hours of paralegal time, and litigation expenses of \$328,000" in a single habeas case. *CCFAJ Report* at 53 n.71 (referring to *In re Lucas*, 33 Cal. 4th 682 (2004) and citing Testimony of Elisabeth Semel, February 28, 2008). Should you wish, we can provide a copy of Professor Semel's testimony. Those numbers are consistent with our experience, though we note that the litigation in *Lucas* ended more than twenty years ago. Costs have increased dramatically since then, while the court's hourly rates have not and its reimbursement cap remains the same. Cal. Sup. Ct. Policies, Policy 3.3, std. 3.3.1, ¶ 4.