

File No. 111110

Committee Item No. 5
Board Item No. _____

COMMITTEE/BOARD OF SUPERVISORS AGENDA PACKET CONTENTS LIST

Committee: Budget and Finance Committee

Date: November 30, 2011

Board of Supervisors Meeting

Date _____

Cmte Board

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Completed by: Victor Young

Date: November 21, 2011

Completed by: Victor Young

Date: _____

An asterisked item represents the cover sheet to a document that exceeds 25 pages. The complete document is in the file.

1 [Placing Funds for Defense of Special Circumstances Cases on Controller Reserve and
2 Establishing Release Guidelines]

3 **Resolution placing funds intended for defense of special circumstances cases on**
4 **Controller reserve and adopting guidelines for release of such funds.**

5
6 WHEREAS, the FY2011-2012 budget included an appropriation for the General City
7 project PGECML "Court-Mandated Legal Services" under the oversight of the Controller for
8 the purpose of making these funds available for the Public Defender and Superior Court as
9 potential supportive services resources for the defense of any cases involving serious charges
10 under Section 987 of the Penal Code that could result in the death penalty or life without
11 possibility of parole; and

12 WHEREAS, It is the intent of the Board of Supervisors that these funds should remain
13 available to defendants subject to special circumstances charges that could result in life
14 without possibility of parole even if prosecution is not pursuing the death penalty; and,

15 WHEREAS, The Board of Supervisors has not provided guidelines regarding the
16 release of these funds from the General City budget; now, therefore be it

17 RESOLVED, That funds in the General City budget Project PGECML "Court-Mandated
18 Legal Services" be moved to a new account titled "Indigent Defense Special Circumstances
19 Reserve" and placed on Controller's Reserve; and, be it

20 FURTHER RESOLVED, That upon presentation by the Public Defender or the Superior
21 Court of documentation showing that an indigent defendant is facing a charge in which special
22 circumstances are alleged that could result in the death penalty or life imprisonment without
23 possibility of parole and a confidential declaration that auxiliary funds are needed to provide
24 "supportive services" under Penal Code 987.8(g)(1) and a budget requirement for such
25 supportive services, the Controller shall release a portion of such appropriation authority from

1 reserve and transfer appropriation authority to the Public Defender or the Superior Court
2 sufficient for the proposed budget, up to the limits of available appropriation authority; and, be
3 it

4 FURTHER RESOLVED, The documentation requirements for release of the reserve
5 may be modified by mutual consent of the Controller, the Public Defender and the Superior
6 Court; and, be it

7 FURTHER RESOLVED, With the cooperation of the Public Defender and Superior
8 Court, the Controller shall conduct an annual reconciliation of outstanding advances paid out
9 of this reserve as of June 30 by July 31 of each year, determining amounts spent by recipients
10 for each account and the unspent balance. Any funds remaining at the conclusion of the
11 proceedings will be returned to the General Fund; and, be it

12 FURTHER RESOLVED, The guidelines for release of this reserve shall remain in effect
13 in future years subject to the availability of appropriation authority for this purpose.

Item 5
File 11-1110

Department:
Controller's Office
Public Defender's Office
Superior Court

EXECUTIVE SUMMARY

Legislative Objective

- Resolution (a) approving a transfer General Fund revenues of \$750,000 from an existing FY 2011-12 Court-Mandated Legal Services account into a newly created Indigent Defense of Special Circumstances Reserve account, under the City's General City Responsibility budget, (b) placing the entire \$750,000 on a Controller's Reserve, and (c) adopting guidelines for the release of such reserved funds.

Key Points

- Under the proposed resolution, monies in the newly created Indigent Defense Special Circumstances Reserve account could be expended, subject to the Controller's release of reserves, for specified supportive services for the Public Defender and the Superior Court for the defense of indigent defendant cases that could result in either life without the possibility of parole or the death penalty.

Fiscal Impacts

- Over the past 13 years, the City has expended an average of \$451,934 annually for supportive services provided by the Public Defender and the Superior Court including, but not limited to, legal assistance or legal counsel, medical and psychiatric examinations, investigative services, and expert testimony for indigent defense cases that could result in either life without the possibility of parole or the death penalty, with an average of 17 requests per year. The highest amount expended in one year was \$724,200 in FY 2010-11 for 19 requests.
- To date, no requests for funding have been made in FY 2011-12, such that the balance in the account remains at \$750,000.

Policy Consideration

- The Superior Court presently interprets that State Penal Code Section 987.9 permits expenditure of the subject funds for supportive services on indigent defense cases only for cases that could result in the death penalty and not for cases that could result in life without the possibility of parole. In contrast, Mr. Matt Gonzalez, Chief Attorney, Office of the Public Defender notes that defense services, at public expense, are available to indigent defendants in non-death penalty cases, under the California Supreme Court's holding in *Corenevsky v. Superior Court* (1984) 36 Cal.3d 307. Mr. Gonzalez also notes that it has been the practice for over two decades for the Public Defender to expend such funds for cases that could result in life without the possibility of parole, in addition to cases that could result in the death penalty.
- Until the guidelines, which are included in the proposed resolution, are approved by the Board of Supervisors for the expenditure of the subject funds on both cases that could result in the death penalty or life without the possibility of parole, the Controller will not release such monies for cases that could result in life without the possibility of parole.

Recommendation

- Approval of the proposed resolution is a policy matter for the Board of Supervisors.

MANDATE STATEMENT / BACKGROUND**Mandate Statement**

State Penal Code Section 987.9 provides that in the trial of a capital case, or for persons not eligible for the death penalty due to being under the age of 18 at the time of the commission of the crime, an indigent defendant, through the defendant's counsel, may request the court for funds for the specific payment of investigators, experts, and others for the preparation or presentation of the defense. The application for funds shall be by affidavit and shall specify that the funds are reasonably necessary for the preparation or presentation of the defense.

Background

The City's FY 2011-12 budget, as finally adopted by the Board of Supervisors, included a \$750,000 General Fund appropriation under the General City Responsibility budget designated for a new Court-Mandated Legal Services account. According to Leo Levenson, Controller's Office Budget and Analysis Director, this new Court-Mandated Legal Services account is intended to provide funding for the Public Defender and the Superior Court for supportive services, which include, but are not limited to legal assistance or legal counsel, medical and psychiatric examinations, investigative services, expert testimony, or any other form of services to assist indigent defendants in the preparation and presentation of the defendants' cases.

According to Mr. Levenson, in prior fiscal years, General Fund appropriations were included in the City's annual budget for such supportive services for the Public Defender or for the Superior Court related to cases involving both the death penalty and life without possibility of parole, depending on the individual Superior Court judges directive, with such funds being placed in a Death Penalty Appeals account under the General City Responsibility budget. Previously, the Controller's Office managed and released monies from the Death Penalty Appeals account to the Public Defender or the Superior Court upon presentation of a Superior Court directive, or documentation demonstrating that a defendant was facing charges with alleged special circumstances that could result in the death penalty or life without possibility of parole.

In the past, according to both the Public Defender's Office and the Superior Court, the Superior Court judges authorized the expenditure of the subject funds for indigent defense related to both cases that could result in the death penalty as well as for cases that could result in life without the possibility of parole. However, Mr. Michael Yuen, Court Executive Officer of the Superior Court advised that beginning in January 2011, the Superior Court Judge, responsible for authorizing the expenditure of the subject funds, has ruled that the subject funds can only be expended for indigent defense cases which could result in the death penalty but that such funds can no longer be expended for cases that could result in life without the possibility of parole.

Table 1 below identifies the total expenditures paid by the Public Defender's Office and the Superior Court from the Death Penalty Appeals account, in the City's General City Responsibility budget, over the past 13 years.

Table 1

Historical Supportive Services Paid Out of General City Responsibility for the Public Defender's Office and Superior Court Special Circumstances Appeals						
	Total		Public Defender's Office		Superior Court	
	Expenses	Number of Requests	Expenses	Number of Requests	Expenses	Number of Requests
FY 98-99	\$652,233	15	\$568,827	12	\$83,406	3
FY 99-00	712,982	19	559,127	13	153,855	6
FY 00-01	579,381	13	481,000	9	98,381	4
FY 01-02	601,907	50	175,708	3	426,199	47
FY 02-03	614,242	36	244,095	6	370,147	30
FY 03-04	456,823	21	205,128	7	251,695	14
FY 04-05	191,477	9	149,605	6	41,872	3
FY 05-06	452,246	11	440,571	10	11,675	1
FY 06-07	435,272	12	352,643	9	82,629	3
FY 07-08	220,786	4	100,786	2	120,000	2
FY 08-09	120,165	5	65,315	3	54,850	2
FY 09-10	113,431	8	83,431	5	30,000	3
FY 10-11	724,200	19	130,700	3	593,500	16
13-year Average	\$451,934	17	\$273,610	7	\$178,324	10
Last 3-year Average	\$319,265	11	\$93,149	4	\$226,117	7
Last 5-year Average	\$322,771	10	\$146,575	4	\$176,196	5

Source: Office of the Controller

As shown in Table 1 above, over the past 13 years, the Public Defender's Office and the Superior Court have expended an average of \$451,934 for supportive services from the Death Penalty Appeals account, with an average of 17 approved requests for funding per year. The highest expenditure amount was \$724,200 in FY 2010-11 for 19 requests. The highest number of requests approved in a single fiscal year was 50 in FY 2001-02, with expenditures totaling \$601,907.

DETAILS OF PROPOSED LEGISLATION

The proposed resolution would transfer \$750,000, as previously appropriated by the Board of Supervisors in the FY 2011-12 General City Responsibility budget, from the existing Court-Mandated Legal Services account to an Indigent Defense of Special Circumstances Reserve account. The \$750,000 would be placed on a Controller's Reserve. Additionally, the below-stated guidelines for the Controller's release of such funds would be adopted through the approval of this proposed resolution. According to Mr. Levenson, regarding the existing name of this account, Court-Mandated Legal Services, the expenditures from this account are not

court-mandated. Therefore, the Controller determined that the proposed new title, Indigent Defense of Special Circumstances Reserve, was a more appropriate name.

Mr. Levenson notes that the Superior Court asserts, based on the current Superior Court judge's directives, that a strict interpretation of State Penal Code Section 987.9 permits the subject funds to be only expended on indigent cases that could result in the death penalty and that the subject funds cannot be expended for cases that could result in life without the possibility of parole. In contrast, the Public Defender's Office notes that San Francisco has relatively few death penalty cases and wants to make it explicit that the subject funds, which have been expended in the past on cases that could result in life without the possibility of parole can continue to be expended, for such indigent defense cases which could result in life without the possibility of parole, in addition to cases that could result in the death penalty.

Mr. Yuen acknowledges that in the past, Superior Court judges who were responsible for authorizing the expenditure of the subject funds, authorized the subject funds to be expended for indigent defense related to cases that could result in the death penalty as well as for cases that could result in life without the possibility of parole. However, as noted above, Mr. Yuen advises that beginning in January 2011, the Superior Court Judge responsible for making such decisions decided that the subject funds can only be expended for indigent defense cases which could result in the death penalty and that such funds could not be expended for cases which could result in life without the possibility of parole.

The Controller's Office believes that until guidelines, included in this proposed resolution, are approved by the Board of Supervisors to explicitly authorize the expenditures of the subject funds on cases that could result in the death penalty, as well as indigent defense cases that could result in life without the possibility of parole, the Controller will not release such monies for cases that could result in life without the possibility of parole, given the latest interpretation of the Superior Court Judge.

The proposed resolution would establish the following guidelines for the Controller's release of funds from the newly created Indigent Defense of Special Circumstances Reserve account. The subject \$750,000, as previously appropriated by the Board of Supervisors, would be available for the Public Defender and Superior Court for supportive services including, but not limited to, legal assistance or legal counsel, medical and psychiatric examinations, investigative services, expert testimony, or any other form of services provided to assist indigent defendants in the preparation and presentation of the indigent defendant cases that could result in life without the possibility of parole as well as cases that could result in the death penalty, as defined under California Penal Code Section 987(g)(1).¹ These specified guidelines for the Controller's release of funds in the Indigent Defense of Special Circumstances Reserve would remain in effect in future years. Future year expenditures would be subject to the appropriation approval by the Board of Supervisors.

¹ California Penal Code, Section 987(g)(1): "Legal assistance" means legal counsel and supportive services including, but not limited to, medical and psychiatric examinations, investigative services, expert testimony, or any other form of services provided to assist the defendant in the preparation and presentation of the defendant's case.

The proposed resolution requires that the Public Defender and/or the Superior Court provide documentation to the Controller demonstrating that an indigent defendant is facing charges with alleged special circumstances that could result in either life without the possibility of parole or in the death penalty and a confidential declaration that the requested funds are required for the needed supportive services, as defined above. Additionally, the proposed resolution states that the documentation requirements for release of such funds may be modified by mutual consent of the Controller, the Public Defender, and the Superior Court.

The proposed resolution also directs the Controller to conduct an annual reconciliation of the expenditures made from this newly created Indigent Defense of Special Circumstances Reserve as of June 20th by July 31st of each fiscal year. Any unexpended balances at the end of each fiscal year would be returned to the City's General Fund.

FISCAL IMPACTS

The subject \$750,000 General Fund appropriation for the Indigent Defense of Special Circumstances Reserve, as previously appropriated by the Board of Supervisors in the City's FY 2011-2012 General City Responsibility budget, includes (a) \$500,000 from a carry-forward appropriation of unexpended FY 2010-2011 funds, and (b) \$250,000 in the FY 2011-12 budget.

To date, no FY 2011-12 requests for funding by the Public Defender or the Superior Court have been submitted to the Controller, such that the balance in the fund remains at \$750,000.

POLICY CONSIDERATIONS

Allowing for City Funding of Supportive Services in Indigent Defense Cases that Could Result in Either Life without the Possibility of Parole or in the Death Penalty

According to Mr. Matt Gonzalez, Chief Attorney, Office of the Public Defender, the Superior Court is currently exercising a strict interpretation of Penal Code Section 987.9 limiting the expenditure of monies from the existing Court-Mandated Legal Services account (proposed to be renamed the Indigent Defense of Special Circumstances Reserve account) for only cases that could result in the death penalty and not for cases which could result in life without the possibility of parole.

Mr. Gonzalez references *Corenevsky v. Superior Court* (1984) 36 Cal.3d 307, in which the California Supreme Court noted that, even if the death penalty was off the table in a special-circumstances case, and the funding not available under a strict reading of Penal Code Section 987.9, the U.S. Constitution and other statutes grant the right to necessary funding. (Id. at 318.) Specifically, Mr. Gonzalez advises that funding is mandated under: (a) Evidence Code Sections 730 and 731(a) and Government Code Section 29603 (relating to expert witnesses); (b) Penal

Code Section 987(a) and Penal Code Section 987.8(f) (1) (now Penal Code §987.8(g) (1)) (relating to an indigent's right to legal assistance); and (c) the constitutional right to the effective assistance of counsel. (Id. at 319.) Therefore, Mr. Gonzalez notes that an indigent's constitutional right to counsel includes the right to have expert assistance to counsel as necessary to prepare a defense for cases that could result in life without the possibility of parole; in fact, a defendant may be entitled to appointment of an expert at public expense, even in the absence of express statutory authority. (*People v. Worthy* (1980) 109 Cal.App.3d 514, 518-521.)

However, according to Mr. Yuen, State Penal Code Section 987.9, based on the current Superior Court Judge's strict interpretation, does not permit the expenditure of monies from the proposed Indigent Defense of Special Circumstances Reserve account for indigent cases that could result in life without the possibility of parole and instead permits such expenditures only for cases that could result in the death penalty.

The Budget and Legislative Analyst notes, with the concurrence of Mr. Gonzalez and Mr. Yuen, that the subject \$750,000 account has been previously appropriated by the Board of Supervisors in the City's FY 2011-2012 General City Responsibility budget with City General Fund revenues, such that the Board of Supervisors has full discretion to determine guidelines on how such funds should be expended. Therefore, the Budget and Legislative Analyst considers approval of the proposed resolution to be a policy decision for the Board of Supervisors.

Is Placing the Funds on a Controller's Reserve Necessary?

Since the \$750,000 appropriation was previously approved by the Board of Supervisors, in the City's FY 2011-12 General City Responsibility budget, it is now not technically necessary to place the funds on a Controller's Reserve. However, according to Mr. Levenson, placing the funds on a Controller's Reserve will enable the Controller to carefully analyze that each requested expenditure complies with the proposed guidelines for the expenditure of such funds contained in this proposed resolution.

RECOMMENDATION

Approval of the proposed resolution is a policy matter for the Board of Supervisors.