Dear Geri,

I apologize for my delay in responding. I keep hoping that I will be able to give a more optimistic answer to the proposal to have the legislature make those with an LWOP sentence eligible for parole. I think it is worth the try, but I worry whether the legislature has this power.

The California Constitution, in Article II, section 10, states that "The Legislature ... may amend or repeal an initiative statute by another statute that becomes effective only when approved by the electors unless the initiative statute permits amendment or repeal without their approval."

My understanding is that LWOP sentences are the result of the Briggs Death Penalty initiative which prescribed that those who commit murder with a special circumstance will receive either a death sentence of a sentence of life without parole. Other initiatives (Prop. 7 and Prop. 115) expanded the crimes warranting such a sentence.

The legislature authorizing parole for those sentenced to LWOP would seem to be a fundamental change in the law adopted by initiative. This would seem to require another initiative. On the positive side, there is precedent for a change by the California legislature. SB 394, adopted in 2017, allows parole eligibility for those sentenced to LWOP for crimes committed before age 18 after they serve 25 years in prison. This would seem to indicate a power of the legislature to authorize parole notwithstanding the law created by initiatives. But it also must be remembered that the Supreme Court in *Miller v. Alabama* (2012), held that the Eighth Amendment prohibits a sentence of mandatory life without parole for homicides committed by juveniles. SB 394, at least in substantial part, was to bring California law in compliance with the Constitution.

The question is how far can the legislature go in modifying what is required by an initiative. The memo you sent me quotes *People v. Kelly*, but the California Supreme Court's decision is less favorable than the quote makes it seem. The Court also said in that case: "We begin with the observation that '[t]he purpose of California's constitutional limitation on the Legislature's power to amend initiative statutes is to 'protect the people's initiative powers by precluding the Legislature from undoing what the people have done, without the electorate's consent.' . . . In this vein, decisions frequently have asserted that courts have a duty to 'jealously guard' the people's initiative power, and hence to 'apply a liberal construction to this power wherever it is challenged in order that the right' to resort to the initiative process 'be not improperly annulled' by a legislative body. . . . At the same time, despite the strict bar on the Legislature's authority to amend initiative statutes, judicial decisions have observed that this body is not thereby precluded from enacting laws addressing the general subject matter of an initiative. The Legislature remains free to address a 'related but distinct area.'"

The crucial question is whether allowing parole hearings for those with LWOP sentences is inconsistent with the initiatives passed by the voters or is a "related but distinct area." I worry that a court will conclude a statute allowing parole for those sentenced to LWOP is fundamentally inconsistent with the initiatives.

But that said, I think it is worth the try in the legislature and the courts. I obviously completely support this change in the law and want to do all I can to help. I wanted, though, to respond to your message in the most direct and honest way I can.

I wish I could be more optimistic. Let me know anything I can do to be of assistance.

Warmly,

Erwin