

To: Judicial Council of California
Presiding Justice Dennis M. Perluss, Chair
Proposition 66 Rules Working Group

From: Committee on Appellate Courts, Litigation Section

Date: November 15, 2018

Re: Invitations to Comment

SP 18-21: Appellate Procedure: Appeals from Superior Court Decisions in Death Penalty-Related Habeas Corpus Proceedings

SP 18-22: Criminal Procedure: Superior Court Procedures for Death Penalty-Related Habeas Corpus Proceedings

The Committee on Appellate Courts appreciates the Working Group's efforts to balance the mandates of Proposition 66 with the need to ensure reasonable procedures and qualifications for death penalty habeas proceedings. The current invitations to comment contain numerous issues, and the Committee provides the following responses for the issues on which it has substantive suggestions.

1. Appellate Procedure: Appeals from Superior Court Decisions in Death Penalty-Related Habeas Corpus Proceedings – SP 18-21

The Committee on Appellate Courts generally supports this proposal, and responds as follows to the Working Group's request for specific comments.

Are the minimum qualifications that the working group is proposing for attorneys appointed to represent a person in a death penalty-related habeas corpus proceeding in the superior court also the appropriate qualifications for counsel appointed to represent such person in appeals from superior court decisions in such proceedings under Penal Code section 1509.1?

The Committee agrees that attorney qualifications in superior court death-penalty habeas proceedings should be similar to attorney qualifications in appeals from those proceedings. The Committee also recognizes that the Working Group must consider the ability to increase the pool of qualified attorneys.

However, the Committee reiterates concerns it raised in response to SP 18-12, when the Working Group first solicited comments on the qualification process for death-penalty habeas appointments in superior courts. Specifically, the Committee suggests that:

- appointed counsel should have significant experience representing a defendant/appellant/petitioner, rather than solely representing the prosecution/respondent;
- appointed counsel should have some experience handling other murder cases; and,
- appointed counsel should have experience with habeas matters, rather than merely direct appeals.

As a possible middle ground between these suggestions and the Working Group's SP 18-12 proposals, the Committee suggests adopting a two-tiered qualification structure. Attorneys with the above experience could be deemed "fully qualified," and operate without direct supervision. Meanwhile, attorneys with less experience could be deemed "provisionally qualified." Such attorneys would be permitted to handle a capital habeas petition, but their first such appointment should be supervised by a "fully qualified" attorney.

While California confers no constitutional right to counsel for seeking collateral relief from a judgment of conviction via state habeas corpus proceedings, the long-standing practice of the California Supreme Court has been to appoint qualified counsel to work on behalf of an indigent inmate in the investigation and preparation of a petition for a writ of habeas corpus that challenges the legality of a death judgment. (*See, In re Barnett* (2003) 31 Cal. 4th 466, 475 citing *In re Sanders* (1999) 21 Cal.4th 697, 717; *In re Anderson* (1968) 69 Cal.2d 613, 633; Cal. Supreme Ct., Internal Operating Practices & Proc., XV, Appointment of Attorneys in Criminal Cases; Cal. Supreme Ct., Policies Regarding Cases Arising from Judgments of Death, policy 3].)

That practice was codified in principle at Government Code section 68662, which promotes the state's interest in the fair and efficient administration of justice and, at the same time, protects the interests of all capital inmates by assuring that they are provided a reasonably adequate opportunity to present their habeas corpus claims.

Moreover, competent state habeas counsel protects victims' interests in finality and promotes the purpose of Proposition 66 to more efficiently resolve capital cases. The most efficient approach is to appoint fully qualified counsel at the state trial court level who will conduct a competent investigation and spot claims that must be raised.

Over the last 20 years alone, federal courts have granted relief in at least 13 serious felony (non-capital) California cases, where those individuals were later *exonerated*. Six of those cases involved the denial of petitioners' Sixth Amendment right to effective counsel. In five of the six IAC cases, state courts summarily denied relief without ordering an evidentiary hearing or stating reasons for denying relief. The state courts' error rate in evaluating IAC claims is distressing. Lowering the standards for who qualifies as competent counsel to represent

petitioners in state court capital habeas proceedings, whether in superior court or the appellate courts, will only increase the state courts' error rate in those proceedings.

As of 2010, federal courts have rendered final judgment in 63 habeas corpus challenges to California death penalty judgments and granted either a new guilt trial or a new penalty hearing in 43 of those cases. Of the 43 cases, relief was granted in 25 on the ground that the condemned prisoner's appointed trial counsel was ineffective—in six cases during the guilt phase and in 19 cases during the penalty phase—typically for counsel's failure to investigate mitigating evidence. In all of those 25 cases, the state courts found *no* Sixth Amendment error; whereas the federal courts—wherein petitioners are represented by qualified habeas counsel appointed by the federal courts—determined that the petitioners *did* suffer Sixth Amendment constitutional violations and granted some form of relief. It is imperative that post-conviction counsel representing condemned inmates, whether in the superior court or in the appellate courts, have significant experience working on capital cases so they understand the importance of investigating and presenting mitigating evidence, among other capital-case specific issues.

These requirements would help to ensure that appointed counsel have some familiarity conducting investigations, which form a vital component of death-penalty habeas practice. This experience is critical in order to avoid unnecessary delay during the federal habeas process. And the experience is especially critical at the appellate level, given the expanded scope of appellate issues for ineffective assistance of habeas counsel under Penal Code § 1509.1.

Should the Attorney General and/or district attorney receive notice if a request for a notice of appealability is denied by the Court of Appeal?

Yes, the People's representative should generally receive notice whenever the Court of Appeal issues an order in a death penalty case. Providing this notice requires the Court to perform relatively little additional work, and helps to avoid any unnecessary confusion.

Are stipulations to a limited record on appeal likely to be used or helpful in these appeals and should the rules include a provision addressing such stipulations?

The Committee does not anticipate that parties will stipulate to a limited record with any frequency. By doing so, petitioner's counsel would run an unnecessary risk of providing ineffective assistance. Both parties may be required to perform significant additional work in order to determine which portions of the record were relevant to the specific issue raised. The Committee therefore does not believe the rules should include such a provision.

Are the proposed timeframes for filing briefs in these appeals and the proposed limits on the length of the briefs in these appeals appropriate, including in appeals that raise a claim of ineffective assistance of trial counsel that was not raised in the habeas corpus petition?

The Committee suggests that the timeframe for filing briefs in death-penalty habeas appeals should be considered in conjunction with the timeframe for filing briefs in the superior court. Specifically, the Committee is concerned that (1) the proposed rule for superior court briefing

would afford only 45 days to file response briefs and 30 days to file replies, while (2) the proposed rule for appellate courts would permit 120 days to file response briefs and 60 days to file replies.

In the habeas context, briefs filed in the superior court and appellate court are likely to raise many similar issues. The Committee therefore suggests that the timeframe to respond and reply should be similar during each phase. The timeframe for superior court briefing seems unnecessarily short, given the magnitude of issues potentially presented, so the Committee recommends adopting a 120-day response and 60-day reply timeframe for both the superior and appellate courts.

What would the implementation requirements be for courts? For example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems.

Intermediate appellate court attorneys and justices will need training on procedural and substantive issues. Although they already have experience in handling “jumbo” special circumstance murder cases, *Batson-Wheeler* issues, etc., they will need special training on the new procedures (such as the standard of review on an appeal from a habeas ruling). They will also need training on capital-specific substantive issues such as death qualifying a jury, law governing penalty phase and mitigation evidence, and law on standards for effective representation in the penalty phase. The importance of court attorney education will increase if the experience of assigned counsel is limited, as court staff may not have the benefit of reliable briefing.

The Committee has been generating appellate specialization CLE webinars and in-person programs for many years, and is at your service if it can be of any help in developing educational material for the courts. Our members include court attorneys, attorneys from the state attorney general’s office, and capital defense counsel who would be happy to volunteer their services in this regard.

2. Criminal Procedure: Superior Court Procedures for Death Penalty–Related Habeas Corpus Proceedings – SP 18-22

The Committee on Appellate Courts supports this proposal as a whole, and responds as follows to the Working Group’s request for specific comments.

Should there be a Judicial Council form for the superior court to issue a certificate of appealability?

Yes. The Committee recognizes that every case will raise different issues, and therefore the form must be able to accommodate individualized input. However, most judges are unlikely to develop significant experience preparing a certificate of appealability. A general form will therefore help to provide guidance and ensure some uniformity of practice throughout the state.

Are the deadlines included in the proposed rule for submitting papers adequate? Concern re informal response deadline.

The Committee suggests that the timeframe for filing briefs in death-penalty habeas petitions in the superior court should be reconsidered when compared with the timeframe for filing briefs in the appellate court. Specifically, the Committee is concerned that (1) the proposed rule for superior court briefing would afford only 45 days to file response briefs and 30 days to file replies, while (2) the proposed rule for appellate courts would permit 120 days to file response briefs and 60 days to file replies.

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