

CONFERENCE COMMITTEE BACKGROUND FOR PROPOSED AMENDMENTS TO SB 1088 (LOCKYER)

California's Death Row Backlog

There are presently 154 inmates on California's death row who are awaiting appointment of counsel. This backlog continues to grow despite the best efforts of the Supreme Court's Automatic Appeal Monitor and the Office of State Public Defender. Currently approximately 3 death penalty cases per month are certified to the Supreme Court while the Court's monitor is only capable of recruiting between 24 and 36 new attorneys per year. This recruitment effort by the Court would likely be sufficient to avoid an ever increasing backlog of death penalty cases if the Office of State Public Defender (OSPD) were capable of accepting appointment of counsel in significant numbers. According to the Administrative Office of the Courts, since 1991, OSPD has been appointed to 13 cases and has backed out of 5, for a net total of 8 cases. The State Public Defender contends that her inability to handle any greater workload is based, in large part, on the lack of funding sufficient enough to employ deputies and staff to keep up with California's increase in death penalty cases.

In fiscal year 1983-84 and again in fiscal year 1984-85, the Governor reduced the staff and budget of the OSPD. By fiscal year 1984-85, the OSPD's staff had been reduced from its prior level of 154 personnel years to 74 personnel years. OSPD was required to discharge 40 attorneys and 36 support staff and was forced to close its San Diego office. Since that time, OSPD has operated with a marginal level of staffing and has been unable to effectively aid in the reduction of the growing backlog of death penalty appeals.

The New Federal Law

The Antiterrorism and Effective Death Penalty Act of 1996, Pub.L. No. 104-132, 110 Stat. 1214 (the "Act"), became effective April 24, 1996. Pursuant to the Act, there is now a new federal statute of limitations concerning the filing of federal habeas corpus petitions. Under the new law, only states with adequate procedures for appointing competent capital appellate lawyers can use the new timetables, which give prisoners six months to file their federal habeas petitions and require judges to rule on those petitions equally quickly (Chapter 154).

In May of this year, Northern District Chief Judge Thelton Henderson ruled that California does not qualify for the new federal timetables. (*Ashmus v. Calderon*, 935 F.Supp 1048 (N.D.Cal. 1996)). In rendering his decision, Judge Henderson opined that the competency standards set out by the California Judicial Council for attorneys in death penalty cases were insufficient. On Monday, August 18, 1997, in a 2-1 decision the 9th U.S. Circuit Court of Appeals affirmed the lower court and held that California does not provide timely legal representation to condemned prisoners and, therefore, is not entitled to take advantage of the

benefits of Chapter 154. (Ashmus v. Calderon, 97 Daily Journal D.A.R. 10687). The Ashmus court based its ruling on the following points:

- California does not impose binding or mandatory competency standards for the appointment of counsel;
- California does not provide compensation for counsel to adequately investigate and present collateral claims;
- California's failure to actually appoint counsel after an indigent prisoner has said he or she will accept counsel precludes California from qualifying under Chapter 154.

No state has qualified to take advantage of the new expedited federal habeas review and it is likely that neither California nor any other state similarly situated will qualify in the near future. This assessment is based, in part, on the Court's ruling in Ashmus as well as a Florida case where the court held that Florida could not qualify under Chapter 154 despite its best efforts resulting in only 11 of between 20 and 30 death sentenced cases remaining without appointment counsel. (Hill v. Butterworth, 170 F.R.D. 509).

CONFORMING WITH THE NEW FEDERAL LAW

In light of Ashmus and Hill, it seems evident that any effort to bring California into compliance with the new federal requirements must incorporate a plan to cure the deficiencies, as enumerated by the 9th Circuit, as well as a vigorous effort by the private bar, the Supreme Court and the State Office of the Public Defender to eliminate the death row logjam. The proposed amendments to SB 1088 are offered to accomplish that goal by doing the following:

- Create a resource center to provide investigative, legal and other necessary support services to counsel appointed by the Supreme Court;
- Provide a greater economic incentive for private counsel to accept appointment as counsel in death penalty appeals by increasing the rate of hourly compensation and providing compensation for counsel to adequately investigate and present collateral claims;
- Require that the Judicial Council, in consultation with the Supreme Court, adopt binding or mandatory competency standards for the appointment of counsel;
- Provide increased funding to the Office of State Public Defender to allow for the hire of attorneys and staff sufficient enough to allow OSPD to accept appointment as counsel for 33% of the unrepresented backlogged capital cases;
- Provide increased funding to the Supreme Court to allow it to carry out the requirements of the proposed legislation.