

Introduced by Senators Harman, Cogdill, and Runner
(Coauthor: Assembly Member Spitzer)

February 22, 2007

An act to amend Sections 15402, 68511.5, 68664, and 68665 of the Government Code, and to add Chapter 1.5 (commencing with Section 1509.1) to Title 12 of Part 2 of the Penal Code, relating to death penalty appeals.

LEGISLATIVE COUNSEL'S DIGEST

SB 636, as introduced, Harman. Death penalty appeals: appointment of counsel.

Existing law provides for the creation of the Habeas Corpus Resource Center to provide counsel for persons convicted and sentenced to death, who are without counsel and determined to be indigent.

Existing law requires the Judicial Council and the Supreme Court to adopt, by rule of court, binding and mandatory competency standards for the appointment of counsel in death penalty direct appeals and habeas corpus proceedings.

This bill would provide that these standards shall require appointed counsel to be a member in good standing of the State Bar for a total of 5 years and have at least 3 years' experience in handling appeals or postconviction felony proceedings. The court may, for good cause, appoint an attorney not meeting these requirements.

Existing law provides that the executive director of the Habeas Corpus Resource Center be chosen by a 5 member board and confirmed by the Senate. The board members are appointed by various Appellate Projects.

This bill would require each Justice of the Supreme Court to appoint a board member, and the board would be increased to 7 members.

Existing law provides for the employment and supervision of the attorneys of the State Public Defender, as specified. This bill would provide that the State Public Defender shall maintain no less than 127 funded positions, including 67 attorney positions.

Existing law establishes the procedures for the appointment of counsel in indigent criminal appeals when it is other than the State Public Defender.

This bill would provide that in noncapital cases the appointee must apply to the Supreme Court within 6 months of meeting competency standards, or in capital cases, to have been appointed by the Supreme Court.

This bill would further provide an expedited system of reviewing cases in which a death sentence is imposed. These provisions would be the only procedures for challenging a conviction that resulted in a sentence of death, except as specified.

Vote: majority. Appropriation: no. Fiscal committee: yes.
State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. Section 15402 of the Government Code is
2 amended to read:
3 15402. The State Public Defender may employ deputies and
4 other employees, and establish and operate offices, as he or she
5 may need for the proper performance of his or her duties. The State
6 Public Defender may contract with county public defenders, private
7 attorneys, and nonprofit corporations organized to furnish legal
8 services to persons who are not financially able to employ counsel
9 and pay a reasonable sum for those services pursuant to the
10 contracts. He or she may provide for participation by those
11 attorneys and organizations in his or her representation of eligible
12 persons. The attorneys and organizations shall serve under the
13 supervision and control of the State Public Defender and shall be
14 compensated for their services either under those contracts or in
15 the manner provided in Section 1241 of the Penal Code.
16 The State Public Defender may also enter into reciprocal or
17 mutual assistance agreements with the board of supervisors of one
18 or more counties to provide for exchange of personnel for the
19 purposes set forth in Section 27707.1.
20 ~~The~~

In order to ensure indigent defendants the effective assistance of counsel in the implementation of Section 15421, the office of the State Public Defender may hire 15 additional staff attorneys and the support staff necessary for proper implementation of Section 15421 shall maintain no less than 127 funded positions, including 67 attorney positions.

SEC. 2 Section 68511.5 of the Government Code is amended to read:

68511.5. ~~Not later than January 1, 1985, the~~ *The* Judicial Council shall adopt rules of court regulating the selection of appointed counsel, other than the State Public Defender, to handle criminal appeals by indigent defendants. These rules shall establish procedures for the appointment of counsel in all appellate districts, *and require appointees to noncapital cases to have either applied to the Supreme Court within six months of meeting the court's competency standards or been appointed by the Supreme Court to represent an indigent defendant in a death penalty appeal or postconviction review appeal.* In developing these rules, the Judicial Council shall consider the need to include screening of eligible appointees, the need to match the skills and experience of the attorney with the demands of the case and the process by which this might be done, and the need or desirability of evaluating an attorney's performance before assigning the attorney to another case. Further, in developing these rules, the Judicial Council shall consult with local bar associations and the Office of the State Public Defender.

SEC. 3 Section 68664 of the Government Code is amended to read:

68664. (a) The center shall be managed by an executive director who shall be responsible for the day-to-day operations of the center.

(b) The executive director shall be chosen by a ~~five-member~~ *seven-member* board of directors and confirmed by the Senate. Each ~~Appellate Project~~ *Justice of the Supreme Court* shall appoint one board member, all of whom shall be attorneys. However, no attorney who is employed as a judge, prosecutor, or in a law enforcement capacity shall be eligible to serve on the board. The executive director shall serve at the will of the board.

(c) Each member of the board shall be appointed to serve a four-year term, and vacancies shall be filled in the same manner

1 as the original appointment. Members of the board shall receive
2 no compensation, but shall be reimbursed for all reasonable and
3 necessary expenses incidental to their duties. The first members
4 of the board shall be appointed no later than February 1, 1998.

5 (d) The executive director shall meet the appointment
6 qualifications of the State Public Defender as specified in Section
7 15400.

8 (e) The executive director shall receive the salary that shall be
9 specified for the executive director in Chapter 6 (commencing
10 with Section 11550) of Part 1 of Division 3 of Title 2.

11 SEC. 4. Section 68665 of the Government Code is amended
12 to read:

13 68665. The Judicial Council and the Supreme Court shall adopt,
14 by rule of court, *the following* binding and mandatory competency
15 standards for the appointment of *lead* counsel in death penalty
16 direct appeals and ~~habeas corpus proceedings~~. *postconviction*
17 *review appeals*:

18 (a) *The attorney must have been admitted to practice in*
19 *California or another state for a total of five years and have at*
20 *least three years experience in the handling of appeals or*
21 *postconviction proceedings in felony cases. The court shall*
22 *consider experience in defense and prosecution equally for this*
23 *purpose.*

24 (b) *The court, for good cause, may appoint an attorney not*
25 *meeting the requirements of subdivision (a) whose background,*
26 *knowledge, or experience would otherwise enable him or her to*
27 *properly represent the defendant, with due consideration to the*
28 *seriousness of the possible penalty and to the unique and complex*
29 *nature of the litigation.*

30 SEC. 5. Chapter 1.5 (commencing with Section 1509.1) is
31 added to Title 12 of Part 2 of the Penal Code, to read:

32
33 CHAPTER 1.5. DEATH PENALTY APPEALS
34

35 1509.1. The purpose of this chapter is to establish an expedited
36 system of review of cases in which a death sentence is imposed,
37 in order to achieve the following goals:

38 (a) Comply with the requirements Chapter 154, Title 28, United
39 States Code in order to obtain the benefit of expedited federal
40 habeas proceedings under that chapter.

1 (b) Improve the accuracy, completeness, and justice of review
2 proceedings by requiring that postconviction review commence
3 immediately after the imposition of a sentence of death and that
4 factual questions be resolved in the forum best suited to resolve
5 them.

6 (c) Allow for the full and fair examination of all legally
7 cognizable postconviction issues by the trial court and the
8 California Supreme Court.

9 (d) Eliminate, to the fullest extent possible, unreasonable and
10 unjust delays in the resolution of postconviction issues by reducing
11 the number of proceedings in capital cases.

12 1509.2. (a) Notwithstanding any other statute or rule, a motion
13 under this chapter and the direct appeal are the only procedures
14 for challenging a sentence of death or the conviction that resulted
15 in the sentence of death, except that a claim of ineffective
16 assistance of appellate counsel may be made in a habeas corpus
17 petition to the California Supreme Court.

18 (b) This chapter applies whether the sentence of death was
19 imposed before or after the effective date of this chapter, except
20 as provided in subdivision (c) and except as required by the
21 California Constitution or by the Constitution or laws of the United
22 States.

23 (c) Notwithstanding subdivision (a), a habeas corpus case in
24 which the petition was filed before the effective date of this chapter
25 may continue under prior law, but the court may, for good cause
26 shown, convert the habeas proceeding into a motion under this
27 chapter and transfer it to the trial court.

28 1509.3. As used in this chapter, unless the context otherwise
29 requires:

30 (a) “Direct appeal” means the appeal pursuant to Chapter 1
31 (commencing with Section 1235) to the California Supreme Court
32 of any issues raised at the entry of a guilty plea, before trial, at
33 trial, at the penalty phase hearing, or in a motion for new trial.

34 (b) “Direct appeal counsel” means the attorney retained by the
35 defendant, or appointed by the Supreme Court for purposes of
36 representing the defendant in direct appeal proceedings.

37 (c) “New postconviction counsel” means the attorney retained
38 by the defendant, or appointed by the trial court to represent an
39 indigent defendant, for the purposes of representing the defendant
40 in postconviction review and postconviction review appeal

1 proceedings. New postconviction counsel cannot have previously
2 represented the defendant with regard to the capital felony charge.

3 (d) “Postconviction review” means review as provided in this
4 chapter by the trial court that occurs after conviction in a capital
5 felony case in which the death penalty is imposed as punishment.

6 (e) “Postconviction review appeal” means the appeal to the
7 California Supreme Court of any issues raised in postconviction
8 review proceedings.

9 (f) “Trial counsel” means the attorney who represents the
10 defendant with regard to the capital felony charge: For the purposes
11 of any guilty plea; before trial; at trial; at the penalty phase hearing;
12 for the purposes of a motion for new trial; for the purposes of
13 postconviction review if the defendant chooses to continue with
14 trial counsel for purposes of postconviction review; and for the
15 purposes of direct appeal if the defendant chooses to continue with
16 trial counsel for purposes of direct appeal. “Trial counsel” does
17 not include new postconviction counsel appointed pursuant to
18 Section 1509.5 or direct appeal counsel.

19 1509.4. (a) After imposition of a sentence of death, the trial
20 court shall order the defendant, trial counsel, and the prosecution
21 to attend a hearing to be held after the date upon which the sentence
22 of death is imposed. At the hearing, the trial court shall:

23 (1) Advise the defendant of the nature of review as provided in
24 this chapter.

25 (2) Advise the defendant of the right to direct appeal counsel.

26 (3) Advise the defendant that the issue of ineffective assistance
27 of trial counsel before trial, at trial, or during the penalty phase
28 hearing may only be raised on postconviction review and on
29 postconviction review appeal.

30 (4) Advise the defendant that the issue of ineffective assistance
31 of counsel on direct appeal counsel may only be raised by way of
32 a petition for a writ of habeas corpus filed in the California
33 Supreme Court by new postconviction counsel or the defendant.

34 (5) Determine whether the defendant intends to pursue
35 postconviction review.

36 (6) If the defendant intends to pursue postconviction review,
37 determine whether the defendant intends to proceed with or without
38 counsel.

39 (b) After a full discussion on the record, if the defendant
40 knowingly, voluntarily, and intelligently waives the right to pursue

1 postconviction review or the right to appointed counsel for
2 postconviction review, the trial court shall enter an order finding
3 that the waiver was knowing, voluntary, and intelligent.

4 1509.5. (a) At or after the hearing held pursuant to Section
5 1509.4, if the defendant chooses to pursue postconviction review,
6 the trial court shall enter an order appointing new postconviction
7 counsel for the defendant if the trial court finds that the defendant
8 is indigent and either the defendant requests and accepts such
9 appointment or the trial court finds that the defendant is unable to
10 competently decide whether to accept or reject the appointment.
11 However, the trial court shall not appoint new postconviction
12 counsel if any of the following apply:

13 (1) The defendant has retained new postconviction counsel.

14 (2) The defendant has elected to proceed without counsel and
15 the trial court finds, after a full discussion on the record, that the
16 defendant's election to proceed without counsel is knowing,
17 intelligent, and voluntary.

18 (3) The defendant elects to have trial counsel continue
19 representing the defendant for purposes of postconviction review
20 and the trial court finds, after a full discussion on the record, that
21 all of the following apply:

22 (A) The defendant understands that new postconviction counsel
23 can be retained by the defendant for purposes of postconviction
24 review or appointed by the trial court for the defendant if the
25 defendant is indigent.

26 (B) The defendant understands that, by electing to have trial
27 counsel continue to represent the defendant for purposes of
28 postconviction review, the defendant waives the right to challenge
29 the effectiveness of trial counsel's representation at any stage of
30 the proceedings.

31 (C) The defendant's election to have trial counsel continue to
32 represent the defendant for purposes of postconviction review is
33 knowing, intelligent, and voluntary.

34 (D) Trial counsel agrees to continue representing the defendant
35 for purposes of postconviction review.

36 (b) In appointing new postconviction counsel to represent an
37 indigent defendant, the trial court shall appoint one or more
38 attorneys, at least one of whom meets the qualifications provided
39 in Section 1509.55.

1 (c) In any case in which the trial court appoints new
2 postconviction counsel or new postconviction counsel is retained,
3 the new postconviction counsel shall not be retained or appointed
4 to act as co counsel with trial counsel and shall not be associated
5 or affiliated with trial counsel. New postconviction counsel shall
6 exercise independent judgment and act independently from trial
7 counsel.

8 (d) The ineffectiveness of counsel during postconviction review
9 shall not be a basis for relief.

10 1509.55. (a) Except as provided in subdivision (b) of this
11 section, at least one attorney appointed to represent the defendant
12 in proceedings governed by this chapter shall have been admitted
13 to practice in California or another state for a total of five years
14 and have at least three years experience in the handling of appeals
15 or postconviction proceedings in felony cases. Experience in
16 defense and prosecution shall be considered equally for this
17 purpose.

18 (b) The court, for good cause, may appoint an attorney not
19 meeting the requirements of subdivision (a) whose background,
20 knowledge, or experience would otherwise enable him or her to
21 properly represent the defendant, with due consideration to the
22 seriousness of the possible penalty and to the unique and complex
23 nature of the litigation.

24 1509.6. (a) (1) In any case in which a defendant has been
25 convicted of a capital felony and been sentenced to death, all
26 motions for postconviction review and all postconviction review
27 proceedings are governed by this chapter and by the rules adopted
28 to implement this chapter.

29 (2) Any motion for postconviction review shall state with
30 particularity the grounds upon which the defendant intends to rely,
31 including a statement of the facts and citations of law. A motion
32 for postconviction review may include only those issues specified
33 in paragraph (3) of this subdivision. If any claim alleges a crime
34 or violation of professional duty by any person, the motion shall
35 include a declaration by counsel that he or she has investigated
36 the claim and has probable cause to believe the allegation is true.

37 (3) The claims to be considered on a motion for postconviction
38 review are limited to claims that would have been proper grounds
39 for relief from a judgment on a writ of habeas corpus under the
40 law in effect prior to enactment of this chapter and which either

1 (A) cannot be made on appeal because they are based on facts
2 outside the appellate record, (B) allege ineffective assistance of
3 trial counsel, or (C) meet the criteria for a successive petition under
4 Section 1509.7.

5 (b) By alleging that trial counsel rendered ineffective assistance,
6 the defendant automatically waives the attorney client privilege
7 between the defendant and trial counsel with respect to information
8 that is related to the defendant's claim of ineffective assistance.

9 (c) Neither the defendant nor the prosecution may file a motion
10 for reconsideration or rehearing of the trial court's ruling on the
11 motion for postconviction review. The granting or denying of a
12 motion for postconviction review under this section is a final order
13 reviewable on appeal by the California Supreme Court.

14 (d) Unless relieved by the Supreme Court, postconviction
15 counsel shall continue to represent the defendant on appeal from
16 trial court's grant or denial of the motion. If the direct appeal is
17 completed, postconviction counsel shall concurrently evaluate
18 whether defendant has a substantial claim of ineffective assistance
19 of appellate counsel, and, if so, file a habeas corpus petition for
20 that claim in the Supreme Court.

21 1509.7. (a) The initial motion for postconviction review shall
22 be filed within six months of the appointment of counsel or of the
23 court's decision not to appoint counsel pursuant to Subdivision
24 (a) of Section 1509.5. An initial motion filed after that date and
25 any successive motion shall be dismissed unless it contains a claim
26 meeting the criteria under subdivision (b).

27 (b) A claim presented in a successive motion or an untimely
28 initial motion shall be dismissed unless one or more of the
29 following apply:

30 (1) The failure to raise the claim in a timely initial motion was
31 the direct result of interference by government officials with the
32 presentation of the claim in a manner which violated the
33 constitution or laws of the United States or California.

34 (2) The facts upon which the claim are based were unknown to
35 the defendant and could not have been ascertained by the exercise
36 of due diligence, and the defendant has a substantial claim that he
37 or she is actually innocent of the offense.

38 (3) The right asserted by the defendant is a constitutional right
39 that was recognized by the supreme court of either the United
40 States or California, the constitutional right applies retroactively

1 to defendant's case, and the motion is filed within 90 days of the
2 date of the decision, or, if retroactivity is not clearly established
3 at the time the right is recognized, within 90 days of the decision
4 making it retroactive.

5 (4) Clear and convincing evidence establishes that the defendant
6 is actually innocent of the offense.

7 (c) For the purpose of a claim of actual innocence under
8 paragraph (2) or (4) of subdivision (b), the court shall consider all
9 available evidence, regardless of its admissibility at trial. A claim
10 that goes only to sentence or degree of offense or a claim based
11 on voluntary intoxication or mental disease or defect is not a claim
12 of innocence for this purpose.

13 (d) Before a motion under subdivision (b) is filed in the Superior
14 Court, the party shall apply in the Supreme Court for an order
15 authorizing the Superior Court to consider the motion. The Superior
16 Court shall immediately dismiss any motion filed in violation of
17 this requirement. The Supreme Court shall grant the application
18 only if it determines that the application makes a prima facie
19 showing that the motion satisfies the requirements of subdivision
20 (b). The determination that a prima facie showing has been made
21 does not preclude a determination by the Superior Court of whether
22 the requirements are satisfied, and the Superior Court shall dismiss
23 the motion if it finds the requirements are not satisfied. The
24 Supreme Court shall decide an application under this subdivision
25 within 30 days of filing. An application under this subdivision is
26 not an "application for State postconviction or other collateral
27 review" within the meaning of 28 U.S.C. Sec. 2244(d)(2), and a
28 delayed or successive motion filed without authorization is not
29 "properly filed" within the meaning of that section.

30 SEC. 6. In addition to all other positions currently provided
31 for, the Department of Justice shall increase the number of attorney
32 positions in the Criminal Division by six.