

## PROPOSITION 66 - THE DEATH PENALTY REFORM AND SAVINGS ACT

A defendant sentenced to death can challenge his conviction and sentencing in two ways: by direct appeal, and by a writ of habeas corpus. The direct appeal challenges legal proceedings up to and through the trial and sentencing, as reflected in the court file and transcribed proceedings. The writ of habeas corpus is requested by petition and challenges other aspects of the proceedings not reflected in the record including misconduct of the judge, jurors, prosecutors and defense attorneys.

Proposition 66, passed by voters in 2016, radically altered the process by which capital defendants seek relief via petition for habeas corpus. The changes implemented by Proposition 66 affect every aspect of the capital habeas corpus procedure, with the most significant effects felt by habeas corpus petitioners, habeas corpus counsel, the superior courts, and the courts of appeal.

This two-part series will explain capital habeas corpus procedure as defined by Proposition 66, and the potential detrimental effects on a condemned inmate, and his or her legal community.

### PART 1 - CAPITAL HABEAS CORPUS PROCEDURE POST PROPOSITION 66

A defendant sentenced to death can challenge his conviction and sentencing in two ways: by direct appeal, and by a writ of habeas corpus. The direct appeal challenges legal proceedings up to and through the trial and sentencing, as reflected in the court file and transcribed proceedings. The writ of habeas corpus is requested by petition and challenges other aspects of the proceedings not reflected in the record. Habeas corpus may involve investigation into the conduct of law enforcement, the district attorney, the judge, jurors, witnesses, and defense counsel. Examples of misconduct raised in habeas corpus include offering untruthful testimony, hiding evidence favorable to the defendant, and improper communication between a judge and jurors, witnesses, or counsel.

The most common claim in capital habeas corpus is the claim of ineffective assistance of trial counsel. Ineffective assistance of trial counsel occurs when a defense attorney's representation of his or her client falls below an objective standard of practice, and, but for the attorney's poor representation, the client would not be sentenced to death. When a trial attorney fails to investigate and prepare a defense, or when an attorney fails to uncover mitigating evidence from the defendant's life that would help jurors recommend a sentence of life in prison, rather than death, that attorney may be providing ineffective assistance of counsel.

The California Constitution requires the California Supreme Court to review the issues raised on direct appeal and file a written opinion on each death penalty appeal. Until now, the Supreme Court also ruled on capital habeas corpus petitions. In 2016, Proposition 66 was voted into law, removing jurisdiction for the review of capital habeas corpus petitions from the Supreme Court to the Superior Court of each county.

Until now, when a defendant is convicted and sentenced to death, the Supreme Court appointed habeas corpus counsel. Opposing counsel was the Attorney General. The Habeas Corpus petition was to be filed within 3 years, with time extensions as needed. Now, when a defendant is convicted and sentenced to death, Proposition 66 requires the trial judge at sentencing to offer appointment of new counsel to investigate and prepare the habeas corpus petition. The habeas corpus attorney or attorneys must file the habeas corpus petition in the trial court within one year of appointment of habeas corpus counsel.

#### PRE-PROP 66

- Supreme Court appoints habeas corpus counsel; Attorney General is opposing counsel
- Supreme court authorizes payment of habeas corpus counsel, investigators and experts
- Habeas Corpus counsel files HC petition on behalf of defendant; Attorney General replies
- Supreme Court can
  - Deny petition, or
  - Order further hearings in Superior Court, or
  - Affirm findings of Superior Court, and grant petition

#### POST-PROP 66

- Superior Court appoints habeas corpus counsel; opposing counsel is undefined
- Habeas corpus counsel files HC petition in Superior Court within 1 year; opposing counsel replies
- Superior Court reviews pleadings of both parties
- Superior Court orders evidentiary hearings
- Superior Court
  - Denies petition, or
  - Affirms all or part of petition
- Both parties can appeal Superior Court ruling to the Court of Appeal
- Either party can appeal Court of Appeal findings to Supreme Court

All agree that skilled habeas corpus counsel is essential to the guarantee that a defendant's prosecution, trial, and sentencing were fair and constitutionally sound. It is widely recognized that few California attorneys are capable of effective assistance of counsel in a death penalty case. Even fewer attorneys are capable of effective legal representation in habeas corpus proceedings.

Currently, habeas corpus counsel for condemned inmates are appointed by the Supreme Court from the Habeas Corpus Resource Center (HCRC), a Judicial Branch agency established by statute in 1997 to represent death row clients in capital habeas corpus proceedings. HCRC is limited by statute to 34 attorneys. Habeas Corpus counsel may also be appointed from the California Appellate Project, San Francisco (CAP-SF), a non-profit organization funded by the California Judicial Council, the Office of the State Public Defender, or the Federal Defenders.

However, the largest source of capital habeas corpus counsel is appointed private counsel. The current rule of court guides the Supreme Court to appoint counsel for indigent defendants in capital cases "only if it has determined, after reviewing the attorney's experience, writing samples, references, and evaluations . . . that the attorney has demonstrated the commitment, knowledge, and skills necessary to competently represent the defendant." *California Rules of Court, rule 8.605(b)*.

A goal of Proposition 66 is to expand the pool of attorneys who can be appointed to represent client in capital habeas corpus proceedings. The new Rules of Courts which implement Proposition 66 accomplish this in two ways. First, authority for appointment of habeas corpus counsel is exclusively the province of the Superior Court. Second, the Superior Court's appellate district is to develop a regional committee consisting of a presiding appellate justice, three superior court judges, and three attorneys who have experience with capital cases. The committee is chartered to develop a plan to recruit, qualify and train a local pool of attorneys to represent capital habeas corpus petitioners. Superior Court judges may appoint attorneys from the regional pool, or they may appoint any attorney that the superior court has determined to be qualified under a local rule of court. A Public Defender may be appointed if the Superior Court determines that the defender is qualified and is conflict-free.

The new Rules of Court now establish requirements that capital habeas corpus and habeas corpus appellate counsel must meet, and specify number of years of legal experience, depth and breadth of experience, and legal education necessary for appointment. These requirements are not mandatory.

#### **QUALIFICATIONS FOR APPOINTED HABEAS CORPUS COUNSEL**

The new Rule of Court, Rule 8.652, specifies the minimum qualifications for appointment as capital habeas corpus counsel as: (1) Five years of active legal practice in California; (2) (A) experience as counsel of record in a capital habeas corpus proceeding; (B) (i) experience as associate counsel in two capital habeas corpus proceedings; (ii) experience as counsel of record *for either party* in a combination of at least five completed appeals, habeas corpus proceedings, or jury trials in felony cases, including as counsel of record for a petitioner in at least two habeas corpus proceedings; (C) Service as counsel of record *for either party* in a combination of at least eight completed appeals, habeas corpus proceedings, or jury trials in felony cases, including as counsel of record for a petitioner in at least two habeas corpus proceedings. This rule also specifies a minimum of 15 hours of recent continuing legal education.

Of course, a Superior Court may find an attorney qualified if they demonstrate enough knowledge of California Criminal Procedure, and proficiency in issue identification, research, analysis, writing, investigation, and advocacy.

Notably, there is no qualification that an attorney has actual experience representing a criminal defendant.

#### **APPOINTMENT OF ENTITIES WHICH ASSIST HABEAS CORPUS COUNSEL**

Habeas Corpus Resource Center (HCRC) is the only government organization whose sole charter is representation of indigent capital habeas corpus clients; those 34 attorneys have the necessary skill and experience to represent petitioners without assistance. Recognizing that no appointed attorney would be working in isolation but should always have the support and assistance of another attorney with expertise in death, all private appointed counsel has access to an “assisting entity” - California Appellate Project - San Francisco, for wide ranging legal assistance. CAP-SF provides services before counsel is appointed to protect and preserve the record; assistance and support for private attorneys appointed to represent petitioners; and common case services, such as maintaining a brief bank and providing training to appointed counsel.

The new Rules of Court acknowledge that appointment of an “assisting entity” is critical for inexperienced attorneys, but the Rules do not establish a requirement that the Superior Court appoint a specific “assisting entity”. Similarly, the national standard for appointment of counsel in death penalty cases requires appointment of two or more counsel for any capital case<sup>1</sup>, however, the Rules treat this requirement as merely aspirational.

*Next month: "Implications of Proposition 66 Implementation in the Superior Court."*

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<sup>1</sup> 2003 ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, section 4.1(A)(1).