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OPINION	:	No. 83-204
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THE HONORABLE GROVER C. TRASK II, DISTRICT ATTORNEY OF RIVERSIDE COUNTY, requests our opinion on the following question:

Is the accounting that defense counsel must furnish at the termination of the proceedings in a "capital case" under Penal Code section 987.9 confidential so as not to be open to inspection by the district attorney and the public?

CONCLUSION

The accounting that defense counsel must furnish at the termination of the proceedings in a "capital case" under Penal Code section 987.9 is confidential and is not open to inspection by the district attorney or the public until such time as the judgment is final.

ANALYSIS

The right of an indigent accused of a crime to have counsel appointed to effectively defend him (U. S. Const., 6th Amend.; Cal. Const., art. I, § 15) includes a right to be able to procure those ancillary services of experts and investigators as may be necessary to prepare and present an effective defense. (*Keenan* v. *Superior Court* (1982) 31 Cal.3d 424, 428; *People* v. *Faxel* (1979) 91 Cal.App.3d 327, 330; *Anderson* v. *Justice Court* (1979) 99 Cal.App.3d 398, 401; cf. *Brubaker* v. *Dickson* (9th Cir. 1962) 310 F.2d 30, 37, cert. den. (1966) 385 U.S. 876; *Mason* v. *State of Arizona* (9th Cir. 1974) 504 F.2d 1345, 1351; see also Margolin & Wagner, *The Indigent Criminal Defendant and Defense Services: A Search for Constitutional Standards* (1973) 24 Hast. L.J. 647, 662.) These rights are codified and ensured through various sections of the California Penal Code which provide for the assignment of counsel to defend a person unable to employ one (§ 987) and for that counsel to receive a reasonable sum for compensation *and* for "necessary expenses." (§ 987.2; *Keenan* v. *Superior Court*, *supra*, 31 Cal.3d at 431, fn. 9; *People* v. *Faxel*, *supra*, 9 Cal.App.3d at 330; *Puett* v. *Superior Court* (1979) 96 Cal.App.3d 936, 939.)

In a "capital case," i.e., one in which the death penalty is sought (*Sand* v. *Superior Court* (1983) 34 Cal.3d 567 (S.F. 24496; Sept. 8, 1983)), ability to obtain funds for ancillary services is more particularly set forth by statute. Penal Code section 987.9, the subject of this opinion, provides that in a capital case, defense counsel may apply for funds for the payment of investigators, experts and others whose services are reasonably necessary for the preparation or presentation of the defense. (§ 987.9; cf. § 987, subd. (b).) To satisfy the demands of the California cases which have placed restrictions on discovery by the prosecution,[1] the section provides that the fact of any application for such funds, as well as its contents, be *confidential*, and that any hearings and rulings made thereon take place *in camera*, i.e., in a closed meeting with the judge outside the presence of others including the prosecution. (§ 987.9; cf. *People* v. *Faxel*, *supra*, 91 Cal.App.3d at 330, fn. 1; *Keenan* v. *Superior Court*, *supra*, 31 Cal.3d at 428, fn. 5; *Puett* v. *Superior Court*, *supra*, 96 Cal.App.3d at 940, fn. 2.) If the court finds the request to be reasonable, i.e., that the requested funds are needed to provide a complete defense, it must disburse an appropriate amount to the defendant's attorney. At the "termination of the proceedings," however, the attorney must furnish the court with "a complete accounting of all monies so received and disbursed." (§ 987.9.) We are asked whether that accounting is also confidential or is open to inspection by the prosecution and the public. We conclude that it is confidential at the time it is rendered and is not open to inspection by the prosecution or the public until such time as the judgment in the case is final.

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[1] See, e.g., *Allen* v. *Superior Court* (1976) 18 Cal.3d 520, 525-526; *Reynolds* v. *Superior Court* (1974) 12 Cal.3d 834, 837; *Prudhomme* v. *Superior Court* (1970) 2 Cal.3d 320, 326.

We start with the general proposition that court records are "public records" and are available to inspection by the public unless a specific exemption, as one established by statute or countervailing public policy, makes certain specific records nonpublic. (*Estate of Hearst* (1977) 67 Cal.App.3d 777, 782-783, & 782, fn. 2.) Such an exemption is found in section 987.9 which provides:

> "In the trial of a capital case the indigent defendant, through his counsel, may request the court for funds for the specific payment of investigators, experts, and others for the preparation or presentation of the defense. The application for such funds shall be by affidavit and shall specify that the funds are reasonably necessary for the preparation or presentation of the defense. *The fact that such an application has been made shall be confidential and the contents of the application shall be confidential*. Upon receipt of such application, a judge of the court, other than the trial judge presiding over the capital case in question, shall rule on the reasonableness of the request and shall disburse an appropriate amount of money to defendant's attorney. *The ruling on the reasonableness of the request shall be made at an in camera hearing*. In making such a ruling, the court shall be guided by the need to provide a complete and full defense for the defendant.
>
> "*At the termination of the proceedings*, *the attorney shall furnish to the court a complete accounting of all moneys received and disbursed pursuant to this section*. (Added by Stats. 1977, c. 1048, p. 3178, § 1, urgency, eff. Sept. 24, 1977.)"

The section thus contemplates three separate happenings occurring at different times: first, the filing by defense counsel of an application for funds for ancillary services needed for the defense of the case; second, the ruling by the court upon the application and the appropriate disbursement of the needed monies; and third, the accounting for the funds by defense counsel at "the termination of the proceedings." It specifically clothes the first two events with an aura of secrecy: the fact that an application has been filed as well as its contents is *confidential*, and the ruling upon it and disbursement of funds not only occur at an *in camera* hearing, but also before a judge other than the one presiding over the capital case itself. (§ 987.9; cf. *Anderson* v. *Justice Court* (1979) 99 Cal.App.3d 398, 402.) The prosecution is not involved in those endeavors which in fact, as we shall see, were meant to take place outside its presence. (*Keenan* v. *Superior Court*, *supra*, 31 Cal.3d at 428, fn. 5; *People* v. *Faxel*, *supra*, 91 Cal.App.3d at 330, fn. 1; *Puett* v. *Superior Court*, *supra*, 96 Cal.App.3d at 940, fn. 2.) But no such *statutory* curtain surrounds the accounting which defense counsel must make to the court at the "termination of the proceedings," and the

question is squarely posed as to whether the Legislature meant for one to surround it as well.

The task is one of statutory construction where the desideratum is to ascertain the intent of the Legislature so as to effectuate the purpose of the law. (*Select Base Materials* v. *Board of Equal.* (1959) 51 Cal.2d 640, 645.) To arrive at the Legislature's intent in regard to the confidentiality of defense counsel's accounting, we consider the context in which the provisions for it were enacted and their original purpose. (*People* v. *Ventura Refining Co.* (1928) 204 Cal. 286, 292; cf. *West Pico Furniture Co.* v. *Pacific Finance Loans* (1970) 2 Cal.3d 594, 607-608; *Rich* v. *State Board of Optometry* (1965) 235 Cal.App.2d 591, 604; *County of San Diego* v. *Miltoz* (1953) 119 Cal.App.2d Supp. 871, 880.)

The obvious purpose for requiring an accounting of funds by defense counsel of course is to force a responsible expenditure of them by the knowledge that that will eventually be scrutinized by another for its regularity. (Cf. *Seccombe* v. *Dionne* (1935) 3 Cal.App.2d 731, 734.) And, since public funds are here involved, that accounting would ordinarily be open to public scrutiny or that of its representatives. As our Supreme Court said early-off: "In this country it is a first principle that the People have the right to know what is done in their courts." (*In re Shortridge* (1893) 99 Cal. 526, 530; cf. *Estate of Hearst*, *supra*, 67 Cal.App.3d 777; cf. Gov. Code, § 6260.) But as noted prefatorily, another consideration attends the situation which is not entirely compatible with the notion of public or prosecutorial investigation of defense expenditures—to wit, the need to not compromise the integrity of the defense through forced disclosure of certain of its aspects. Unlike Solomon then (1 Kings 3:16-3:28) we must put the baby together, and to do so we first explore the genesis of that second consideration.

In *Prudhomme* v. *Superior Court*, *supra*, 2 Cal.3d 320, our Supreme Court held that a defendant may not be compelled by a discovery order to disclose information to the prosecution (such as the names, addresses and expected testimony of defense witnesses) unless the information sought "cannot possibly tend to incriminate [him]" or "conceivably . . . lighten the prosecution's burden of proving its case in chief." (*Id.*, at 326.) Compelled disclosure otherwise would violate a defendant's *federal* constitutional right against self-incrimination. (*Id.*, at 323-324, 325.) In *Reynolds* v. *Superior Court* (1974) 12 Cal.3d 834, 843 (notice of alibi) the court admitted it was "more solicitous of the privilege against self-incrimination than federal law . . . requires" (*id.*, at 843) and in *Allen* v. *Superior Court* (Dec. 1976) 18 Cal.3d 520 it iterated that solicitude, affirmed the stringent standards it set forth in *Prudhomme* for protection of the privilege, and, now founding it on article I, section 15, of the *California* Constitution (*id.*, at 525, 527 & 525, fn. 2), issued a writ of prohibition to restrain enforcement of a discovery order compelling disclosure of the names of prospective defense witnesses in a criminal case. (*Id.*, at 527.)

Section 987.9 was enacted in September 1977 as an urgency measure to accompany the Legislature's restoration of capital punishment (Stats. 1977, chs. 316, 1255, § 1) after that had been declared unconstitutional by the California Supreme Court the previous December in *Rockwell* v. *Superior Court* (1976) 18 Cal.3d at 420. (Stats. 1977, ch. 1048, p. 179, § 2.) At the time it was enacted we can safely presume the Legislature was aware of the decisional background wrought by the *Prudhomme-Reynolds-Allen* line of cases which placed restrictions on discovery by the prosecution that would compromise the defense. (Cf. *People* v. *Dixon* (1979) 24 Cal.3d 43, 51.) In light of it the purpose for the confidentiality provisions of section 987.9 is seen as an effort to fill the constitutional need of providing the indigent defendant in a capital case with sufficient monies for ancillary services necessary to prepare and present a complete and effective defense but in such a way that would not run afoul of the constitutional warnings of *Prudhomme* and *Allen* against premature forced disclosures of certain of its aspects, i.e., those which would "tend to incriminate the defendant" or "might conceivably lighten the prosecution's burden." Undoubtedly the Legislature felt an impermissible disclosure would occur if a defendant's need for monies for ancillary services and its particulars were made known to the prosecution. It thus provided for their confidentiality in section 987.9 to avoid that possibility and freed the defense from the course it otherwise would have had to steer between the Scylla of publicly applying for needed funds and in so doing disclosing some of the defense to the prosecution and the Charybdis of keeping the defense secret but, in so doing, foregoing the necessary monies for its preparation and presentation.

That the Legislature thought it was rectifying a constitutional infirmity inherent in that dilemma is clear from its recital of facts to undergird the urgency basis on which the section was enacted:

> "The facts constituting such necessity are: The California Supreme Court has declared the existing death penalty law unconstitutional. This act remedies one aspect of the constitutional infirmities found to be in existing law, and in order to guarantee the public the protection inherent in an operative death penalty law, it is necessary that this act take effect immediately." (Stats. 1977, ch. 1048, p. 3179, § 4.)

The declaration of urgency confirms the legislative purpose for the enactment of section 987.9 and provides a cynosure by which to interpret it. (*Moyer* v. *Workmen's Comp. Appeals Bd.* (1973) 10 Cal.3d 222, 230; *Select Base Materials* v. *Board of Equal.*, *supra*, 51 Cal.2d 640, 645; cf. *Friends of Mammoth* v. *Board of Supervisors* (1972) 8 Cal.3d 247, 256.) Since the purpose for which the section was enacted was to avoid unduly forcing disclosure of those *aspects of the defense* or *defense strategy which might conceivably lighten the prosecution's burden* (*Allen* v. *Superior Court*, *supra*, 18 Cal.3d at 524-525; *Keenan* v. *Superior Court*, *supra*, 31 Cal.3d at 430), it would not be concerned with

disclosures which occur when there is no longer a defense to be compromised or a prosecutorial burden to be lightened. In other words there no longer would be a statutory purpose served by confidentiality at a time when, as it were, all the cards are played. Thus the problem is not so much one of determining the confidentiality of the accounting, as it is one of defining the phrase "termination of the proceedings," for given the fact that public monies are involved, public policy would dictate that at that time when the reason for confidentiality of an accounting for them loses force, that the accounting be publicly available. (Cf. *Estate of Hearst*, *supra*, 67 Cal.App.3d 777; *In re Shortridge*, *supra*, 99 Cal. 526; cf. Gov. Code, § 6260.)

Under section 987.9 the fact of an application and its contents are confidential, and the application and rulings thereon are to occur at *in camera* hearings before a judge of the court other than the trial judge presiding over the case in question. (§ 987.9; see also *Puett* v. *Superior Court*, *supra*, 96 Cal.App.3d at 940, fn. 2.) These are events which occur at or before a trial for they attend the presentation of the defense of the case. The section then speaks of an accounting to be made "at the termination of the proceedings." To effectuate the other purpose of the statute *and* provide an accounting that is meaningful, that event must be when the proceedings *at the trial level* are terminated and the court is divested of jurisdiction over the cause. (See *In re Black* (1967) 66 Cal.2d 881, 882; *People* v. *Banks* (1959) 53 Cal.2d 370, 383; *People* v. *Helton* (1979) 91 Cal.App.3d 987, 997; cf. Cal. Rules of Court, rule 250.) Review of capital cases through appeal can span well nigh half a decade (see, e.g., *Barefoot* v. *Estelle* (1983) ___ U.S. ___ , 77 L.Ed.2d 1090, 1098-1100) or even longer (see, e.g., inter alia, *People* v. *Chessman* (1950) 35 Cal.2d 455; *People* v. *Chessman* (1951) 38 Cal.2d 166, cert. den. (1952) 343 U.S. 915, rehrg. den. (1952) 343 U.S. 937; *People* v. *Chessman* (1959) 52 Cal.2d 467, cert. den. (1959) 361 U.S. 925 & cert. den. *sub nom. Chessman* v. *Dickson* (1960) 362 U.S. 965) and the meaningfulness of an accounting, if not the ability to effect one at all, would surely be lost if it awaited their resolution. In addition, as one court has pointed out:

> "[A]s there may be more than one application for funds during the course of an action, administratively it is preferable to have all such applications heard by the same court. The court will have the full record before it of all applications filed, what funds were granted and for what specific purposes. Also the section provides, 'At the termination of the proceedings, the attorney shall furnish *to the court* a complete accounting of all moneys received and disbursed pursuant to this section,' and as the *same court has heard all applications only one accounting will be required of the attorney*." (*Anderson* v. *Justice Court*, *supra*, 99 Cal.App.3d at 402.)

Clearly then, the Legislature intended the accounting to occur immediately after *the trial proceedings* were terminated when familiarity with the application for funds and their disbursement is current and the court which disbursed the funds is still in place.[2]

Under the *Prudhomme-Allen* rationale, the need for confidentiality in the fact of an application for defense funds and its contents would not terminate with the trial. (Compare *Keenan* v. *Superior Court*, *supra*, 31 Cal.3d at 428, fn. 5, with *Puett* v. *Superior Court*, *supra*, 96 Cal.App.3d at 940, fn. 2.) As long as the possibility for a retrial after appeal exists, there would still be a need to present a defense, the forced disclosure of aspects of which *might* incriminate the defendant or "'*conceivably might lighten* the prosecution's burden of proving its case in chief.'" (*Allen* v. *Superior Court*, *supra*, 18 Cal.3d at 525 quoting *Prudhomme* v. *Superior Court*, *supra*, 2 Cal.3d at 326; emphasis as quoted.) The need for the confidentiality of the fact that an application for section 987.9 funds had been made, and its contents, would still be viable but would be rendered meaningless if an accounting of the disbursed funds were made for *it* would perforce disclose the fact of the application as well as its contents. Thus the accounting of the disbursements must remain confidential as well for as long as the underlying need exists for confidentiality respecting the application. But when that is no longer justifiably necessary, as when judgment in a case is final, i.e., when time for appeal has run without a notice of appeal being filed or when the judgment is affirmed on appeal and the time set forth in rule 24 has run, public policy, as we have seen, dictates that the accounting be made publicly available. (*Estate of Hearst*, *supra*, 67 Cal.App.3d 777; *In re Shortridge*, *supra*, 99 Cal. 526; cf. Gov. Code, § 6260.) And, in addition, as one court has stated, "a record of the proceedings *in camera* should be preserved so that the court's determination may be reviewed. [Citation]." (*Puett* v. *Superior Court*, *supra*, 96 Cal.App.3d at 940.)

We therefore conclude as follows: the accounting that defense counsel must make at the termination of the proceedings in a capital case under Penal Code section 987.9 is confidential and not open to inspection by the district attorney or the public at the time it is made at the conclusion of the trial but it loses its confidentiality and becomes subject to inspection by the public when the judgment becomes "final."

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[2] We thus reject the suggestion that "the termination of *the* proceedings" refers to the point in time when the case is finally determined, i.e., when all avenues of appeal have been exhausted. If the definite article "the" was not used and the phrase simply read "the termination of proceedings" the suggestion would have some force. But its use before the word "proceedings" indicates the Legislature had some *definite* and particular proceedings and point in time in mind. (Cf. *Anderson* v. *Justice Court*, *supra*, 99 Cal.App.3d 398, ("By the use of the word 'trial' in the section, the Legislature indicated an intention that only the court with trial jurisdiction over the cause should have jurisdiction over the application for funds.").)