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OFFICE OF THE ATTORNEY GENERAL
State of California

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Attorney General

OPINION	:	No. 84-102
	:	
of	:	<u>JULY 10, 1984</u>
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THE HONORABLE KENNETH CORY, STATE CONTROLLER, has requested an opinion on the following question:

When a county public defender's office uses the services of its salaried investigators, experts or other personnel to assist in the defense of an indigent defendant in a death penalty prosecution, may that office obtain reimbursement from the state for the costs of such services through a court order pursuant to Penal Code section 987.9?

CONCLUSION

When a county public defender's office uses the services of its salaried investigators, experts or other personnel (other than counsel) to assist in the defense of an indigent defendant in a death penalty prosecution, that office may obtain reimbursement from the state for the costs of such services through a court order pursuant to Penal Code section 987.9.

ANALYSIS

The Budget Act of 1983 (Stats. 1983, ch. 324), in Item 8160-111-001, established a fund to assist counties in the defense of indigents in death penalty cases.¹ The item provided in part as follows:

"1. The funds appropriated in this item are for contributions to counties for providing legal assistance to indigents in accordance with Section 987.9 of the Penal Code.

"2. The Controller shall adopt regulations pursuant to Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code, controlling reimbursements under Section 987.9 of the Penal Code. The regulations shall consider compensation for attorneys, investigators, expert witnesses, and other expenses that may or may not be reimbursable under Section 987.9 of the Penal Code. The Controller shall adopt the regulations no later than June 30, 1984.² The Controller shall follow these regulations until final approval by the Office of Administrative Law."

As is apparent, this fund is tied into Penal Code section 987.9, (see 66 Ops.Cal.Atty.Gen. 407 (1983)) which provides as follows:

"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 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 an application has been made shall be confidential and the contents of the application shall be confidential. Upon receipt of an 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

¹ The Budget Bill of 1984 (AB 2313, as amended May 21, 1984) reestablishes this fund. See also Governor's Budget 1984-85, section 8160.

² Proposed regulations were drafted by the Controller and were considered at a public hearing conducted on May 24, 1984. This opinion does not address the specifics of any proposed or adopted regulations.

hearing. In making the ruling, the court shall be guided by the need to provide a complete and full defense for the defendant.

"The Controller shall not reimburse any county for costs that exceed Board of Control standards for travel and per diem expenses. The Controller may reimburse extraordinary costs in unusual cases if the county provides sufficient documentation of the need for such expenditures.

"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." (Emphasis added.)

When a county public defender is appointed to represent an indigent defendant (Pen. Code, § 987.2) in a death penalty case and uses the services of salaried investigators, experts or other personnel from his or her office in the defense and the court includes some or all of the costs of such services in its ruling under Penal Code section 987.9, may reimbursement for such costs be obtained from the state fund appropriated in Item 8160-111-001? We conclude that the county public defender may obtain such reimbursement.

Penal Code section 987.9 allows an indigent defendant "through his counsel" to request reimbursement from the state for certain ancillary defense expenses. We discern no ambiguity in the term "through his counsel." The digest of Legislative Counsel prepared when the statute was enacted in 1977 (concurrently with a new death penalty statute) states in part as follows (Summary Digest, 1977-1978 Regular Session, pg. 281):

"Existing law provides for the assignment of counsel in capital cases and for the employment of counsel at public expense if the defendant is unable to employ counsel.

"This bill would provide for payment of investigators, experts, and others for the preparation or presentation of the defense of indigent defendants in capital cases."

There was no express legislative intent to preclude reimbursement of such costs when a public defender is assigned as counsel for the indigent defendant. Indeed, the availability of ancillary defense services to an indigent defendant does not turn on the status of defense counsel. (*People v. Worthy* (1980) 109 Cal.App.3d 514, 520.)

The statute and the budget item make no distinction between persons in public employment and persons in private employment. Under Penal Code section 987.9,

counsel makes the application for the funds. Counsel may be either the county public defender, retained counsel³ or appointed private counsel; the investigators may be either the public defender's investigators, if any, or private investigators. Likewise, the statute and the budget item do not distinguish between county employees assisting in the preparation or presentation of the defense and private persons specially hired for the same purpose.

Section 987.9 establishes a reimbursement procedure for ancillary defense expenses in capital cases only thereby recognizing a need for special monetary assistance to indigent defendants confronted with the possibility of a death sentence. Subsequent court cases have recognized the need for additional funds in death penalty cases. In *Keenan v. Superior Court* (1982) 31 Cal.3d 424, 434, the court stated:

"[S]ection 987.9 . . . reflects a legislative intent that the court be guided by a capital defendant's need for a 'complete and full defense'."

The same court in *Sand v. Superior Court* (1983) 34 Cal.3d 567, 575 noted the general need for additional defense services in capital cases:

"The Legislature's provision of special funding in 'capital cases' reflects a belief that ancillary defense services may be needed both because of the inherent difficulty of preparing for a murder trial and because of the gravity of the potential penalty."

The indigent defendant may have a need for additional defense services whether he is represented by the public defender, retained counsel or appointed private counsel. Penal Code section 987.9 offsets the increased costs to counties associated with providing such necessary defense services in capital cases. These costs are incurred by a county whether private counsel is assigned and uses private investigators or private experts, or whether the public defender is assigned and uses county employed investigators and experts from his or her office.

³ Retained counsel may make an application for funds under Penal Code section 987.9. (*Anderson v. Justice Court of San Benito County* (1979) 99 Cal.App.3d 398, 402-403 (defendant personally indigent but counsel retained by family).)