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CALIFORNIA COMMISSION ON THE FAIR ADMINISTRATION OF JUSTICE

**REPORT AND RECOMMENDATIONS ON THE ADMINISTRATION
OF THE DEATH PENALTY IN CALIFORNIA.**

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INTRODUCTION: CHARGE AND NATURE OF INQUIRY.

The California Commission on the Fair Administration of Justice was established in 2004 by California State Senate Resolution No. 44 to carry out the following charges:

- (1) To study and review the administration of criminal justice in California to determine the extent to which that process has failed in the past, resulting in wrongful executions or the wrongful conviction of innocent persons;
- (2) To examine ways of providing safeguards and making improvements in the way the criminal justice system functions;
- (3) To make any recommendations and proposals designed to further ensure that the application and administration of criminal justice in California is just, fair, and accurate.

In carrying out these charges, the Commission has undertaken a thorough review and analysis of the administration of the death penalty in California. This is the first time since the California death penalty law was legislatively enacted in 1977 that any official body has undertaken a comprehensive review of its operation. The Commission funded a feasibility study by the Rand Corporation, and independent research by professors at California law schools, to examine particular aspects of death penalty administration in California.¹ A recent analysis of California's death row deadlock by Senior

¹ Professors Harry Caldwell, Carol Chase and Chris Chambers of Pepperdine University School of Law conducted research to identify the processes by which California District Attorneys decide to proceed with a homicide prosecution as a death penalty case; Professor Ellen Kreitzberg of Santa Clara University School of Law conducted research to identify which special circumstances were utilized in all cases

Judge Arthur Alarcon of the United States Court of Appeals for the Ninth Circuit was especially helpful to the Commission.² The Commissioners also considered the research and recommendations of numerous other academics and organizations who have studied the operation of California's death penalty law, as well as the laws of other states.

The Commission convened three public hearings, in Sacramento, Los Angeles and Santa Clara, and heard the views of 72 witnesses. The witnesses described a system that is close to collapse. The elapsed time between judgment and execution in California exceeds that of every other death penalty state.³ California now has the largest death row in the nation, with 670 awaiting execution.⁴

The initial witnesses before the Commission offered thoughtful proposals to address the problems of justice, fairness and accuracy in the administration of California's death penalty law. Based upon their

resulting in a death judgment in California since 1977; and Professors Linda E. Carter and Mary Beth Moylan of the University of the Pacific, McGeorge School of Law conducted research regarding the use of commutation in California death penalty cases. The results of this research are available on the Commission's website, www.ccfaj.org, and will be summarized in this Report.

² Arthur L. Alarcon, *Remedies for California's Death Row Deadlock*, 80 U.S.C.L. Rev. 697 (2007).

³ Latzer & Cauthern, *Justice Delayed? Time Consumption in Capital Appeals: A Multistate Study* (John Jay College of Criminal Justice, 2006).

⁴ The Death Penalty Information Center tracks the population of each State's death row based upon information from official prison sources. As of February, 2008, there were a total of 3,263 men and women on the nation's death rows.

presentations, subsequent witnesses were asked to respond to eleven “focus questions” compiled by the Commission.⁵

Commissioners heard the testimony of judges, prosecutors, and defense lawyers actively engaged in the administration and operation of California’s death penalty law, as well as academics, victims of crime, concerned citizens and representatives of advocacy organizations. A total of 66 written submissions addressing these questions were also received.

The Commission does not view its charge in Senate Resolution No. 44 as calling for a judgment on the morality of the death penalty. The Commissioners hold a broad spectrum of divergent views on the death penalty, some of which are reflected in individual statements attached to this report.

After careful study, the Commission finds itself in full agreement with California Chief Justice Ronald M. George in his conclusion that California’s death penalty system is dysfunctional.⁶

The system is plagued with excessive delay in the appointments of counsel for direct appeals and habeas corpus petitions, and a severe backlog in the review of appeals and habeas petitions before the California Supreme Court. Ineffective assistance of counsel and other claims of constitutional

⁵ The “focus questions” are attached to this report as Appendix I.

⁶ Testimony of California Chief Justice Ronald M. George, January 10, 2008.

violations are succeeding in federal courts at a very high rate. Thus far, federal courts have rendered final judgment in 54 habeas corpus challenges to California death penalty judgments. Relief in the form of a new guilt trial or a new penalty hearing was granted in 38 of the cases, or 70%.⁷

The Chief Justice told the Commission that if nothing is done, the backlogs in post conviction proceedings will continue to grow “until the system falls of its own weight.” While some opponents of the death penalty might welcome such a prospect, the members of this Commission believe that doing nothing would be the worst possible course. The failures in the administration of California’s death penalty law create cynicism and disrespect for the rule of law, increase the duration and costs of confining death row inmates, weaken any possible deterrent benefits of capital punishment,⁸ increase the emotional trauma experienced by murder victims’ families, and delay the resolution of meritorious capital appeals.

⁷ See Appendix II, *infra*. If a case is remanded for a new trial or a new penalty hearing, the defendant is removed from death row. The case is returned to the State courts to start over. At that point, there may be a disposition by a plea admitting to lesser criminal culpability or accepting a sentence of life without the possibility of parole (LAOP), a dismissal of charges or the death sentence, or a new guilt trial or penalty hearing before another jury. If it results in another death sentence, the process of direct appeal and habeas corpus petitions begins anew.

⁸ Whether the death penalty has a deterrent effect is a hotly contested issue. Compare Dr. Paul Rubin, Testimony Before the Subcommittee on the Constitution, Civil Rights, and Property Rights of the Committee on the Judiciary, U.S. Senate, Feb. 1, 2006, with Donohue & Wolfers, *Uses and Abuses of Empirical Evidence in the Death Penalty Debate*, 58 Stan. L. Rev. 791 (2005), and see Shepard, *Murders of Passion, Execution Delays, and the Deterrence of Capital Punishment*, 33 J. Legal Studies 283 (2004). If there is a deterrent value, however, it is certainly dissipated by long intervals between judgment of death and its execution.

The Commission heard moving testimony from the parents and other relatives of murder victims who await the execution of the perpetrator. Some described the anger and frustration they experience over continuing delays in the administration of the death penalty. Several have waited twenty-five or thirty years for the execution of the perpetrator of a vicious murder of a son or a daughter. Many others expressed opposition to the death penalty, arguing that they will receive no consolation from the execution of someone who murdered a family member. Both views received the respectful consideration of the Commission.

SUMMARY OF RECOMMENDATIONS

This report is divided into three parts. In Part A, the Commission identifies flaws in California's death penalty system that render it dysfunctional, and remedies we unanimously recommend to repair it. Repairing the system would enable California to achieve the national average of a twelve year delay between pronouncement of sentence and the completion of all judicial review of the sentence. In Part B, the Commission offers the Legislature, the Governor, and the voters of California information regarding alternatives available to California's present death penalty law. The Commission makes no recommendation regarding these alternatives. In

Part C, the Commission presents recommendations relating to miscellaneous aspects of the administration of California's death penalty law. We were not able to reach unanimous agreement upon all of these recommendations, and dissents are noted where applicable. Commissioner Jerry Brown, Attorney General of California, agrees in principle with some of the Commission's recommendations as set forth in his separate statement. Commissioner William Bratton, Chief of Police for the City of Los Angeles, abstains from the specific recommendations in this Report, and will issue a separate explanatory statement.

Part A: Why the system is broken, and what it will take to fix it.

In 1978, the people of the State of California expressed their support for the death penalty and, accordingly, the death penalty is the law of this State. However, it is the law in name only, and not in reality.

We currently have a dysfunctional system. The lapse of time from sentence of death to execution averages over two decades in California. Just to keep cases moving at this snail's pace, we spend large amounts of taxpayers' money each year: by conservative estimates, well over one hundred million dollars annually. The families of murder victims are cruelly deluded into believing that justice will be delivered with finality during their lifetimes. Those condemned to death in violation of law must wait years

until the courts determine they are entitled to a new trial or penalty hearing. The strain placed by these cases on our justice system, in terms of the time and attention taken away from other business that the courts must conduct for our citizens, is heavy. To reduce the average lapse of time from sentence to execution by half, to the national average of 12 years, we will have to spend nearly twice what we are spending now.

The time has come to address death penalty reform in a frank and honest way. To function effectively, the death penalty must be carried out with reasonable dispatch, but at the same time in a manner that assures fairness, accuracy and non-discrimination. The California Commission on the Fair Administration of Justice unanimously recommends the following steps to achieve the goals of California's death penalty law:

1. The Commission recommends that the California Legislature immediately address the unavailability of qualified, competent attorneys to accept appointments to handle direct appeals and habeas corpus proceedings in California death penalty cases:

A. The Commission recommends that the backlog of cases awaiting appointment of counsel to handle direct appeals in death penalty cases be eliminated by expanding the Office of the State Public Defender to an

authorized strength of 78 lawyers. This will require a 33% increase in the OSPD Budget, to be phased in over a three year period.⁹

B. The Commission recommends that the backlog of cases awaiting appointment of counsel to handle habeas corpus proceedings in death penalty cases be eliminated by expanding the California Habeas Corpus Resource Center to an authorized strength of 150 lawyers. This will require a 500% increase in the CHCRC Budget, to be phased in over a five year period.¹⁰

C. The Commission recommends that the staffing of the Offices of the Attorney General which handle death penalty appeals and habeas corpus proceedings be increased as needed to respond to the increased staff of the Office of the State Public Defender and the California Habeas Corpus Resource Center.

D. The Commission recommends that funds be made available to the California Supreme Court to ensure that all appointments of private counsel to represent death row inmates on direct appeals and habeas corpus proceedings comply with ABA Guidelines 4.1(A), and are fully compensated at rates that are commensurate with the provision of high quality legal representation and reflect the extraordinary

⁹ Commissioner Hersek abstains from this recommendation.

¹⁰ Commissioner Laurence abstains from this recommendation.

responsibilities in death penalty representation. Flat fee contracts should not be utilized unless an hourly alternative is available, and any potential conflicts of interest between the lawyer maximizing his or her return and spending for necessary investigation, and expert assistance and other expenses are eliminated.

2. The Commission recommends that funds be appropriated to fully reimburse counties for payments for defense services pursuant to California Penal Code Section 987.9.

3. The Commission recommends that the California Legislature reexamine the current limitations on reimbursement to counties for the expenses of homicide trials contained in Government Code Sections 15200-15204.

4. The Commission recommends that California counties provide adequate funding for the appointment and performance of trial counsel in death penalty cases in full compliance with ABA Guidelines 9.1(B)(1), 3.1(B), and 4.1(A)(2). Flat fee contracts that do not separately reimburse investigative and litigation expenses should not be permitted. Such contracts should not be utilized unless an hourly alternative exists. In all cases, attorneys must be fully compensated at rates that are commensurate with the provision of high

quality legal representation and reflect the extraordinary responsibilities in death penalty representation.

Part B: Available Alternatives.

The remedies which the Commission has proposed in Part A will require the new investment of at least \$95 million dollars per year. We recognize that we call for this investment in the face of a budget crisis of great magnitude for California. The Commission has examined two alternatives available to California to reduce the costs imposed by California's death penalty law.

First, to reduce the number of death penalty cases in the system by narrowing the list of special circumstances that make one eligible for the death penalty, and second, to replace the death penalty with a maximum penalty of lifetime incarceration without the possibility of parole.

Using conservative rough projections, the Commission estimates the annual costs of the present system (\$137 million per year), the present system after implementation of the reforms recommended in Part A (\$232.7 million per year), a system in which significant narrowing of special circumstances has been implemented (\$130 million per year), and a system which imposes a maximum penalty of lifetime incarceration instead of the death penalty (\$11.5 million). There may be additional alternatives or

variations which the Commission has not considered. While the Commission makes no recommendations regarding these alternatives, we believe they should be presented so the public debate over the future of the death penalty in California will be fully informed.

Whether to do nothing, to make the investments needed to fix the current system, to replace the current system with a narrower death penalty law, or to replace capital punishment with lifetime incarceration are ultimately choices that must be made by the California electorate, balancing the perceived advantages gained by each alternative against the potential costs and foreseeable consequences. We hope the balancing required can take place in a climate of civility and calm discourse. Public debate about the death penalty arouses deeply felt passions on both sides. The time has come for a rational consideration of all alternatives based upon objective information and realistic assessments. As U.S. Supreme Court Justice John Paul Stevens observed in his recent concurrence in the judgment upholding execution by lethal injection:

The time for a dispassionate, impartial comparison of the enormous costs that death penalty litigation imposes on society with the benefits that it produces has certainly arrived.¹¹

¹¹ *Baze v. Rees*, No. 07-5439, U.S. Supreme Court (Stevens, J. concurring) (April 16, 2008). Justice Stevens took particular note of California's death penalty stalemate:

Some argue that these costs are the consequence of judicial insistence on unnecessarily elaborate and lengthy appellate procedures. To the contrary, they result "in large part from the States' failure to apply constitutionally sufficient procedures at the time of initial [conviction or] sentencing." *Knight v. Florida*, 528 U.S. 990, 998 (1999) (Breyer, J., dissenting from denial of

The following chart summarizes the additional annual charges to the California state budget which each of four alternatives would impose: the present system, the present system with the reforms recommended in Part A of this Report, a significantly narrowed death penalty law, and a maximum punishment of lifetime incarceration without possibility of parole.

ESTIMATING THE ANNUAL COSTS OF FOUR ALTERNATIVES

	CURRENT SYSTEM	CURRENT SYSTEM WITH PART A ADDITIONS	NARROWED DEATH PENALTY LAW WITH PART A ADDITIONS	MAXIMUM OF LIFETIME INCARCERATION [LWOP]
ADDITIONAL COST OF TRIALS	\$20 Million	\$30 Million	\$18 Million	\$5 Million
ADDITIONAL COST OF APPEAL AND HABEAS PROCEEDINGS	\$54.4 Million	\$139.4 Million	\$77 Million	\$3 Million
ADDITIONAL COST OF CONFINEMENT	\$63.3 Million [Increasing]	\$63.3 Million [Declining]	\$35 Million [Declining]	\$3.5 Million
TOTAL	\$137.7 Million [Increasing]	\$232.7 Million [Declining]	\$130 Million [Declining]	\$11.5 Million