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The Commission on the Fair Administration of Justice Speaks on the Death Penalty

July, 2008

CRIMINAL JUSTICE

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THE COMMISSION ON THE FAIR ADMINISTRATION OF JUSTICE SPEAKS ON THE DEATH PENALTY

INTRODUCTION

On June 30, 2008, California's Commission on the Fair Administration of Justice finally released its *Report and Recommendations on the Administration of the Death Penalty in California*.¹ The subject matter of the *Report* is significant to all Californians

whether they support or oppose the death penalty. The system is simply not working. As Chief Justice Ronald George has said, the present system is “dysfunctional.”^[2] The system is broken and, if it is not discarded, the conclusion of the Commission, the Chief Justice and most of those who are involved in capital cases is that it must be fixed.

THE COMMISSION ON THE FAIR ADMINISTRATION OF JUSTICE

The *Commission Report* under consideration here is the seventh and final report in the series of reports on the criminal justice system by the California Commission on the Fair Administration of Justice. The CCFAJ was formed by the California State Senate to study how people came to be convicted by judge and jury only to find after years in prison that they were innocent. At the time of the formation of the Commission, August 27, 2004, over 100 people had been exonerated based largely on DNA evidence.^[3] The Commission’s duties were to determine how the system failed to allow these wrongful convictions, how it could be fixed and what further recommendations could be made to make the criminal justice system fair and just.

As reported in this column in past months, the Commission on the Fair Administration of Justice is comprised predominantly by current and former members of law enforcement, prosecutors and the judiciary.^[4] The staff and consultants included former prosecutors and one of the studies commissioned by the Commission was conducted by Harry Caldwell, a former Santa Barbara Deputy District Attorney and now Pepperdine Law School Professor. While there were separate signing statements and two dissents, the core findings of the *Commission Report on the Death Penalty* were either unanimous or commanded a strong majority. Twenty-two Commissioners signed the document.

This part of the *Commission Report* totals 110 pages followed by 35 pages of Appendix and statements of individual Commissioners, dissents and concurrences. The core findings of the Commission in this *Report* were either unanimous or commanded a strong majority. Ultimately, 22 Commissioners signed the final document. Senate Resolution 10 of the 2006-2007 session extended the life of the Commission to June 30, 2008. This final *Report*, bearing that same date, June 30, 2008, appears to be the last official act of the Commission.

THE EXISTING REPORT AND RECOMMENDATIONS ON PROCEDURES WHICH MIGHT LEAD TO THE INNOCENT BEING SENTENCED TO DEATH

The *Report* concludes that the death penalty system in California is broken. This last section, what we are calling the *Report* here is really a culmination of the Commission's work to understand what flaws in the criminal justice system have led to wrongful convictions and how to fix them. Five of the previous six sections,^[5] have to be considered in evaluating whether or not California law and procedure are sufficient to the task of safeguarding against wrongful convictions in any case, capital or non-capital. Where the Commission found serious need for reform, those flaws are present with all the more significance when the ultimate, irreversible penalty is sought to be imposed. So, the context of this *Report* on the death penalty itself begins with an understanding of these previously reported flaws that could lead to an innocent person being executed.^[6]

1. *Eyewitnesses identified the wrong person.* The identification may have been made in court after an in field show up, a line up or, most often, a photo array presented by the police. The intentional, but more often unintentional, suggestiveness of these identification procedures have led to witnesses taking the stand and making emphatic identifications of the defendant only to find out years later that the wrong person was convicted and the real killer has remained free. The Commission recommended Police to use a double-blind procedure for showing eyewitnesses photo arrays, to use a sequential process, to admonish witnesses that the perpetrator may not be in the photos, to avoid show-up (one person line-ups), to not confirm any possible identifications, to have the witness make a statement as to the level of certainty of the identification, to tape record the procedure when possible, to have a minimum of six subjects (live or photo) in the line up and to present to only one witness at a time. There should be training programs for police, attorneys and judges, to re-evaluate current jury instructions and to have continued study of mistaken eyewitness identifications.

2. *The defendant confessed, or was reported to have confessed, to a crime that he or she did not commit.* The confession, or sometimes hours of interrogation leading up to the confession, were often times not audio or video recorded. These confessions are easily and understandably accepted by juries as conclusive proof of guilt. Yet convincing confessions have turned out, in fact, to be false and innocent

people have been sent to death row. The Commission recommended that interrogations of suspects in serious felonies be tape recorded in their entirety if possible. They also recommended that the jury should be advised that an unrecorded statement should be viewed with caution. They suggested procedures for logging and preservation of recordings and state funding for law enforcement and special training procedures, including training in dealing with people with learning or other disabilities.

3. *Jailhouse informants - people in jail who often made deals on their own cases to testify against a defendant - testified falsely at trial.* There has been a chronic problem of presenting to juries people who were in custody and testified falsely in someone else's case in order to gain favor in theirs. Many innocent people, later exonerated by DNA and otherwise, were convicted by juries who heard and belied this evidence. The Commission recommended that the benefits that a jail house informant was to receive for cooperation in the pending case be recorded and that the prosecutor's offices adopt written policies on informants. They also recommended that a jailhouse informant's testimony be corroborated by independent evidence. Again they recommended training for prosecutors, defense lawyers and judges on the subject.

4. *Scientific evidence was introduced that was not reliable due to its nature as "junk science" or because it was developed by less than competent people or people with inadequate labs and facilities.* Too many times, "evidence" that would not pass muster in a scientific laboratory is offered to the jury as real science. Experts have been found to be unqualified or underqualified and sometimes the competitive nature of the enterprise has led to false conclusions and the conviction of the innocent. The Commission recommended certification of forensic experts and that allegations of negligence or misconduct be timely reported to the prosecution agencies who will, in turn report such allegations and their investigations to the Attorney General. They recommend that a statewide agency be established to increase the proficiency and ethics of forensic scientific agencies through record keeping, training and funding and that the state improve DNA testing and education and cure the backlog of DNA evaluations. Once again, training and education of prosecutors, defense attorney and judges should be provided.

5. *Prosecutors or defense lawyers did not meet their ethical and professional obligations.* Prosecutors or police failed to disclose information to the defense that was not consistent with their theory of the case. Defense lawyers were not

adequately prepared or did not take the time and effort to properly investigate and defend the client. These factors led to the conviction of the innocent. The Commission recommended that both prosecutors and defense lawyers be reported to the State Bar and their supervisors for breaches of ethical duties which led to reversals of criminal convictions. They recommended record keeping that would make the information available and that there be training for prosecutors, defense lawyers and judges to avoid misconduct in the first place.

As of this writing, none of these recommendations have been enacted into law. The governor has vetoed proposed legislation over the last two legislative sessions which started to address some of these concerns. Legislation is pending currently to again address some of these issues. However, even if it is enacted there is much more work to do to avoid conviction (and possible condemnation to death) of the innocent. Furthermore, these remedies are prospective and do not address the cases of the 673 people currently on death row.^[7]

THE NEW REPORT ON THE DEATH PENALTY ITSELF

The *Commission Report* on the death penalty says: “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.”^[8] The *Report* is divided into three parts.

Part A is a discussion of “Why the system is broken and what it will take to fix it.” First, the Commission analyzes California’s Death Penalty law. In essence, the death penalty is supposed to be for the worst of the worst. There are supposed to be filters which narrow the class of people who would be eligible for the death penalty. Otherwise, the penalty is imposed randomly. California, however, fails in this regard in that the “special circumstances” qualifying a person for the death penalty cover at least 87% of first degree murder cases. Still, out of all the eligible murders in California, only 813 people have had the sentence of death imposed, roughly 10% of those eligible. Nevertheless, the Death Row population continues to increase.

Second, every case in which there is a judgment of death in the trial court is susceptible to three stages of review. Direct appeal, petition for writ of habeas corpus and federal review. Only one inmate, Scott Peterson, has a retained lawyer. All the rest are indigent and are either waiting for or have appointed counsel. The national average for sentence to execution is 12 years and it is 17 in California. They found that this may prolong the lives of the guilty but also delays the exoneration of the innocent or those for whom legal relief is appropriate. There are delays of years in finding and appointing competent counsel and delays of years in scheduling oral argument or hearing habeas petitions.

Third, delays are also caused by the fact that the case was not handled properly the first time and has to be reversed. 70% of the cases are reversed by the federal courts most often because of ineffective assistance of counsel. Standards for appointment of counsel have been lax in the past and there has not been adequate compensation for counsel and experts. Where the public defender cannot take the case, there is a declining pool of counsel willing to take on death penalty cases because of the specialized nature of the task and the lack of adequate funding.

Fourth, the risk of wrongful convictions, death sentences and actual executions still poses a significant threat. While the Commission found no evidence that one of the people actually executed so far in California was innocent, there have been people exonerated who were condemned to death row. There are also others who were found to not be properly subject to a death sentence.

As a result, the Commission made the following recommendations:

1. The Legislature address the unavailability of competent counsel to take direct appeals and habeas corpus before the Supreme Court;
2. Expand the Office of the State Public Defender;
3. Expand the Habeas Corpus Resource Center;
4. Increase the staff of the Office of the Attorney General;

5. Provide funding for appointment of counsel and to ensure that they comply with the standards or representation, including eliminating flat fee contracts, avoiding conflicts and providing for separate funding for investigators, experts and other necessary expenses and to adequately reimburse counties for expenditures.

In Part B, the Commission went on to explore available alternatives that could lessen the burden on the criminal justice system. First, the number and scope of special circumstances could be limited. It has been suggested in other studies that the number be limited to five and that “felony murder” specifically be excluded since almost any case can be brought within that circumstance. The Commission left the decision on how to limit the list to the legislature but concluded that such a limiting would not only save resources but assure more fairness in selecting who would ultimately be given death. For instance, the controversial execution of Manny Babbitt (a decorated Vietnam veteran Marine suffering from neglected Post Traumatic Stress Disorder, whose victim died of a heart attack when he stole change from her room) would not have been selected as one of the 13 “worst” Californians to receive the death penalty since 1967.

Second, life without the possibility of parole could be imposed instead of death as the New Jersey study found: 1) there is no evidence that the death penalty serves a penological purpose; 2) the costs of the death penalty are greater than cost of life without parole; 3) the death penalty is inconsistent with evolving standards of decency; 4) the interest, if any, in executing a small number of people is not worth the risk of executing an innocent person; 5) life without possibility of parole meets the needs of public safety and the interests of the victim’s families; 7) the money saved could be used for the benefit of victims’ families. The Commission found that, if this approach were instituted in California, hundreds of millions of dollars would be saved.

In Part C, the Commission addressed administrative reforms. These included, reforms to the California Supreme Court’s methods of handling capital cases which would be dependent on implementing the recommendations in Part A. If the recommendations were implemented, then the Court could consider sending some matters to the Courts of Appeal and encouraging more factual hearings on habeas corpus to avoid case having to go to the federal courts for such hearings and reversals. The Commission also recommended that there should be a broad based Death Penalty Review Panel which would monitor implementation of recommendations and the progress of improvements in general to the death penalty system. There should be reporting

requirements on the courts and counsel to provide information to the Panel. The Commission also recommended that prosecutors' offices have written policies and that the Constitution and statutes be amended to remove an anachronistic procedural restriction on pardon or commutation.

There were signing statements, concurrences and dissents which ranged from an outright abolition of the death penalty to a preference for business as usual. However, the majority of the Commission found that the death penalty in California is broken and in need of serious repair.

CONCLUSION

Once again, we will have to see what effect this study has on the California Legislature and the Governor. In a time of budget crisis, the saving of millions - even hundreds of millions - should be attractive to politicians. The total abolition of the death penalty would effect the most savings and has the added benefit of being the right thing to do in the 21st century. The United States is fifth in the world in the number of executions per year. China and Iran are first and second. No European nation has the death penalty at all.

And whether or not there is abolition, speeding up executions is not the answer. California has the largest death row in the United States with 677 people and the numbers are increasing. Eliminating the "backlog" - if human beings, however damaged, can be called that - would require five executions a month for twelve years or two a day for a year. If we did the later, we as the State of California alone, would take first spot from China in leading executions in the world. And, of course, the people our progressive state would be executing would be people who are poor, the mentally deficient and mentally ill, and the marginalized of society. Furthermore, the majority of those we will be marching into the death chamber would be of color - not a good image.

So, we have a chance to make an intelligent change where no change is not an option. We will see.

^[1]<http://www.ccfaj.org/documents/reports/dp/official/FINAL%20REPORT%20D EAT...> (hereinafter, “*Commission Report*” or “*Report*”).

^[2]Testimony of the Chief Justice before the Commission, January 10, 2008; *Commission Report* 3.

^[3]Senate Resolution No. 44 of the 2003-04 Session of the California State Senate, adopted on August 27, 2004.

^[4]The Commission is comprised of top law enforcement officers from throughout the State. It is headed by former California Attorney General, John Van de Kamp, who had also been District Attorney of Los Angeles and United States Attorney for the Central District. Other Commissions include the current Attorney General, the Chiefs of Police and Sheriffs of several cities and counties, the District Attorneys of several counties and other present and former prosecutors as well as a federal Magistrate Judge. The remainder of the Commission includes the Public Defender of the County of Los Angeles, a habeas corpus lawyer, and three people involved in community affairs.

^[5]The sixth section, “Remedies for Wrongful Conviction,” dealt not with the flaws that led to wrongful convictions but what to do with people who lingered in prison for years as a result of those flaws..

^[6]We reported on these in more detail in prior columns and will only briefly re-summarize the findings here.

^[7][Http://www.cdcr.ca.gov/reports_research/docs/condemnedinmatessummary .pdf](http://www.cdcr.ca.gov/reports_research/docs/condemnedinmatessummary.pdf) (as of July 11, 2008).

^[8]*Report* 3. Unless otherwise noted all facts referred to in the remainder of the article are from the body of *Report* without additional citation.