DISSENT TO CALIFORNIA
COMMISSION ON THE FAIR ADMINISTRATION OF JUSTICE
REPORT AND RECOMMENDATIONS ON THE ADMINISTRATION
OF THE DEATH PENALTY IN CALIFORNIA

June 30, 2008

We respectfully dissent from the *Report and Recommendations on the Administration of the Death Penalty in California*, which was issued today by the California Commission on the Fair Administration of Justice. Regrettably, we believe the majority report indirectly assaults California's death penalty by seeking to undermine public confidence in our capital punishment law and procedure. While the majority refrains from making specific recommendations to weaken this voter approved law, the tone and unbalanced discussion of potential reform is anything but neutral. By doing so, the majority exceeds the scope of its original charge and unfortunately, diminishes the value of other worthwhile recommendations.

The duties of the Commission were to make recommendations as to the application and administration of the criminal justice system in California, not to advocate for or against the public policy issue of whether California should have a death penalty. Although the report purports to be neutral as to capital punishment, it unmistakably reveals a personal bias against the death penalty. The report does not reflect the views of those Commissioners joining this dissent, or those of the majority of Californians.

At the outset, it is important to note two themes in the report with which we wholeheartedly agree. First, delay on appeal and in habeas corpus in state and federal court is excessive and frustrates the effective administration of the death penalty. Second, additional resources should be expended to address a major source of that delay, the availability of sufficient competent appellate counsel, coupled with an increase in the number of attorney general deputies to respond to the appeals and writs. Additional funding for appellate counsel is a realistic measure that could significantly reduce the backlog and the delays that currently plague the administration of the death penalty in California. The Commission has performed an important service in quantifying how much these changes would cost, and the expected benefits from those expenditures. While the total figure of $95 million is a significant amount of money, it is a small proportion of our state's $140 billion annual budget, or of our state judicial branch's $3.5 billion budget.

Unfortunately, the Commission did not limit itself to fact-based recommendations, but added discussion motivated by the personal philosophies of the Commissioners. For example, the majority repeatedly uses the statement that "California's Death Penalty system is dysfunctional."[1] This broad indictment of a criminal sanction that was overwhelmingly approved by voters and still enjoys the Californian's support by a 2 to 1 margin is not simply

[1] See majority report, pp. 3, 6 and 60.

improper – it is highly misleading.[2] The report quotes California Chief Justice Ronald M. George as stating that the death penalty system in California is "dysfunctional." However, a careful reading of the Chief Justice's comments and writings makes clear that he is referring only to the overburdened capital appellate process, and not to the entire death penalty system.[3] By completely disregarding this context, the majority effectively bootstraps this comment into a broader indictment of entire death penalty system and law.

The report discusses two "available alternatives" to increased funding: narrowing the list of special circumstances that would make a murder case eligible for the death penalty, and eliminating the death penalty altogether. The Commission purports to "make[] no recommendation regarding these alternatives" and claims that it merely "presents information regarding them to assure a fully informed debate." But the lengthy discussion of these proposals consists entirely of arguments in favor of these alternatives and excludes any discussion against them. A "fully informed debate" should include both sides of an issue, not just one side.

Reducing the number of special circumstances would exclude some of California's most brutal murderers from death row. The report goes so far as to suggest that these changes be retroactive to killers already on death row, even though the death penalty was lawfully imposed in those cases at the time. A few examples will illustrate how reducing the number of special circumstances would exclude from the death penalty some of California's most heinous murders:

- Gregory Scott Smith is on death row for the murder of an 8-year-old boy for whom he was a teacher's aide.[4] He had previously been mean to the victim, and on two occasions had tied him up with jump ropes. Angry that the victim had asked that Smith be fired, Smith gagged the victim with a cloth gag and duct tape, forcibly sodomized him, and strangled him. He poured fire accelerant on the body and set the body on fire, where it was discovered burning by firefighters. Smith was convicted of murder in the commission of a kidnapping, a lewd act upon a child, and an act of sodomy. None of these special circumstances would warrant the death penalty under the Commission's proposal.

- The Commission's proposal would also exclude Mitchell Sims, known as the Domino's Pizza Killer, who is on death row with all state and federal review completed.[5] After ordering pizza to be delivered to his motel room, Sims robbed the delivery driver, tied him up, strangled him with a rope, and fully submerged him in a bathtub with a gag tied into his mouth. After killing the driver, Sims went to Domino's, robbed two other employees at gunpoint, and forced them into the cooler, suspended with nooses around

[2] The current death penalty law, Proposition 7, was an initiative approved at the General Election of November 7, 1978, by 72 percent of the voters. (*People v. Teron* (1979) 23 Cal.3d 103, 124-125.) A recent poll shows 63% of adults in favor of the death penalty, 32% opposed, and 5% with no opinion. (Field Poll, March 3, 2006.) For registered voters, the figures were 67% in favor, 29% opposed, and 4% no opinion. (*Ibid*.)

[3] California Supreme Court Chief Justice Ronald M. George used the term "dysfunctional" in the narrow context of death penalty appeal delays. In a January 7, 2008 article he wrote: "The existing system for handling capital appeals in California is dysfunctional and needs reform. The state has more than 650 inmates on death row, and the backlog is growing." (Ronald M. George, Reform Death Penalty Appeals, *Los Angeles Times*, January 7, 2008.)

[4] *People v. Smith* (2005) 35 Cal.4th 334.

[5] *People v. Sims* (1993) 5 Cal.4th 405; *Sims v. Brown* (9th Cir. 2005) 425 F.3d 560.

their necks. When one employee warned that the delivery driver was due back, Sims took off his sweater to reveal a Domino's shirt with the driver's name tag and chuckled, "No, I don't think so." Sims was found guilty of murder with special circumstances of murder while lying in wait and during the commission of a robbery, as well as attempted murder and robbery of the other employees. These special circumstances would not warrant the death penalty under the Commission's proposal.

- Stevie Lamar Fields is also on death row, with state and federal review completed.[6] Shortly after being released from prison for a previous manslaughter, Fields became what the California Supreme Court described as "a one-man crime wave." Sitting in a car with a victim, he fired five shots and told the driver to keep on driving. He said that the victim was not dead and he needed to be sure she was, so he hit her in the head with a blunt object and dumped her body into an alley. He was convicted of robbery-murder with the special circumstance of murder during the commission of a robbery, as well as kidnapping for robbery and forced oral copulation of several other women. Under the Commission's proposal to limit special circumstances, Fields would escape the death penalty.

- The Commission advocates eliminating the death penalty in felony-murder cases. One such case this proposal would exclude is Vicente Benavides, who was sentenced to death for the murder of a 21-month-old girl he was babysitting.[7] The victim died of an acute blunt force penetrating injury of the anus. The anus was expanded to seven or eight times its normal size, and multiple internal organs were injured. The victim's upper lip was torn, consistent with a hand being held over her mouth, and there was evidence of previous rib fractures. The special circumstances were felony-murder rape, felony-murder rape, and felony-murder sodomy, all of which the proposal would eliminate as bases for the death penalty.

These are but a few examples of special circumstances that voters, prosecutors, and juries have rightly determined to warrant death. The Commission's proposal to eliminate these and many other special circumstances is not a mere efficiency measure, but would seriously weaken California's death penalty law.

The credibility of the report is further damaged by giving serious consideration to a proposal that in order to obtain the death penalty, the prosecution be required to prove that the crime has "legally impacted all citizens of the State of California," an artificial concept that has no precedent in the law and is totally unworkable.

A significant portion of the report is devoted to promising various purported benefits of eliminating the death penalty altogether, including cost savings, shorter periods of jury service, and freeing the Supreme Court to hear more cases of other types. This section makes no attempt to even mention a single argument in favor of the death penalty such as deterrence that will save lives, the community's sense of justice, or upholding the will of the People who enacted the

[6] *People v. Fields* (1983) 35 Cal.3d 329; *Fields v. Brown* (9th Cir. 2007) 503 F.3d 755.
[7] *People v. Benevides* (2005) 35 Cal.4th 69.

death penalty.[8] One of the most important reasons for maintaining the death penalty, its deterrent effect, is quickly dismissed in a footnote earlier in the report as a "contested issue."[9]

Some of the commissioners came to the project with the unfounded assumption that the death penalty is being administered in a discriminatory manner against minorities, and that prosecutors must be considering some undisclosed improper factors to make decisions. The report engages in a circular logic that bemoans the lack of evidence to support these assumptions, and then proposes establishing another commission, the California Death Penalty Review Panel, to study whether there is any evidence to support these suspicions. In fact, during the 30-year history of California's death penalty law, there is never been even a single finding of prosecutorial abuse in this decision making process. We oppose the creation of a California Death Penalty Review Panel as an unnecessary creation of another level of bureaucracy.

The report's apprehension regarding the process utilized by district attorneys to make death penalty decisions is similarly without factual basis. The report begins with the assumption that 87% of first degree murders are eligible for the death penalty, a figure that we cannot accept as accurate. For example, in Ventura County, the District Attorney has sought death in only 4% of the murder cases filed, reserving this decision for the worst of the worst. Statewide, only 2% of "cleared" murder cases have resulted in death verdicts. The formulation of formal written policies as to how prosecutorial discretion will be exercised is not required by law and would serve primarily to create new grounds for condemned prisoners to challenge their convictions. The factors to be considered are already laid out in the statutory enumeration of factors in aggravation and factors in mitigation.

Most puzzling is the lengthy discussion and the call for further study on the issue of "geographic disparity" between the counties, even though the law is clear that uniformity between different jurisdictions is not required. This entire discussion is inappropriate in light of the Commission's acknowledgement that the "data does not establish that prosecutorial discretion is affected by race and class bias, unconscious or otherwise." The voters of each county select a District Attorney to enforce the law, including the death penalty, according to his or her exercise of discretion. Uniformity is not mandated and should not have been the subject of the Commission's agenda.

The Commission discusses the proposal of Ninth Circuit Senior Judge Arthur Alarcon to encourage hearing habeas corpus petitions in Superior Court. The report also discusses the proposal of Chief Justice Ronald M. George to transfer capital appeals from the California Supreme Court to the Courts of Appeal. These are thoughtful proposals from distinguished jurists that merited additional discussion and study before an endorsement by the Commission should have been made. Additional ideas, such as establishing a court of criminal appeals similar to that used in Texas, also warrant discussion, and should have been addressed by the Commission.

[8] See *Baze v. Rees* (2008) 128 S.Ct. 1520, 1547, 170 L.Ed.2d 420, 450, fn. 13 (Stevens, J., conc.), and 128 S.Ct. at 1553, 170 L.Ed.2d at 456 (Scalia, J., conc.).
[9] Majority report, p. 4, n. 8.

The report's introduction correctly notes that the commissioners hold a diverse spectrum of divergent views on the death penalty. We respect the diversity of opinion on this issue in our democratic society and have never doubted the sincerity of any of the commissioners in their views. The problem is that the final report is entirely unbalanced. It gives weight only to those who seek to limit or eliminate the death penalty, and ignores views in favor.

We fear that the important accomplishments of the Commission addressing improvements in the administration in the death penalty will be overshadowed by the report's obvious bias against capital punishment. The Commission's report will rightly expose the Commission to extensive criticism where the horrific facts of hundreds of cases impacted by such a policy will be cited in detail. Such recommendations create the likelihood that the Commission will be marginalized and identified as an anti-death penalty body. Under no circumstances can we support or be a silent partner to such a fundamentally flawed effort to weaken our existing death penalty law.

Respectfully submitted,

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I join in the dissent:

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