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STATE BAR NO. 73297

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John K. Van de Kamp, Esq., Chair
Commission on the Fair Administration of Justice
900 Lafayette Street, Suite 608
Santa Clara, California 95050

Dear Mr. Van de Kamp:

The range of my experiences in the criminal justice system offers me a fairly unique vantage point from which to comment on some of the focus questions the Commission has put forward related to the death penalty. I have in the past served as a court administrator in state appellate courts, and an appellate prosecutor, in a state (Alaska) whose criminal justice system is not burdened by capital cases. For the last 17 years I have represented death-sentenced California prisoners on habeas corpus in both federal and state court.

Focus Question 2

The Supreme Court's recent proposal to allow transfer of capital appeals to the Courts of Appeal has illuminated an issue much broader than the small one the Supreme Court sought to address. The Supreme Court's appeal jurisdiction is only one of the many points at which the volume of death sentences overwhelms the system, and certainly not the one with the most overall systemic impact. I was pleased to see that many observers concluded that the Supreme Court's proposal was inadequate because it would not reduce the systemwide demand on resources, but at best would only shift a small part of that demand from the Supreme Court to the Courts of Appeal.

If the Supreme Court's proposal has prompted the Commission and other opinion leaders to examine the many ways in which capital cases strain the resources of prosecution agencies, the defense bar (both institutional and individual), the state courts at all levels, and the federal courts, then that proposal (whatever its own merits) has performed a valuable service. It is time for a serious look at all the myriad ways in which the capital punishment process in California does not work.

Focus Question 3

The Chief Justice has also spoken, albeit rather abstractly, about the possibility of shifting capital habeas corpus litigation from the Supreme Court to the Superior Courts. Commenting on this possibility is difficult because no specific proposal has been offered. Nevertheless, it should be clear to the Commission by now that the resources available to litigate capital cases at all stages of the process in California, even if greater than in many other states, are well below what is necessary to insure basic fairness and comply with the American Bar Association

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Guidelines. This fact suggests that, on two different levels, transfer of capital habeas corpus cases to the Superior Courts is unlikely to contribute to a solution of any of the underlying problems.

First, it is not plausible that counties which are underfunding capital *trial* defense will provide a more realistic level of resources the second time around, on habeas, or even provide enough money to fill in the gaps with supplemental funding for habeas beyond whatever is provided by the state.

Second, the inadequacy of resources available to the trial defense is likely to be a subject of any capital habeas corpus petition, both directly, *see, e.g., Ake v. Oklahoma*, 470 U.S. 68 (1985), and as part of the factual basis for claims of ineffective assistance of counsel. Although the prejudice from inadequate trial defense is case-specific, the Commission is learning that many of the underlying causes are systemic. Local judges are day-to-day participants in the systems and processes whose adequacy and independence are among the issues to be tested on habeas, so these judges will not be able to serve as impartial factfinders in many, if not most, capital habeas cases. As a result, capital habeas corpus petitions will routinely require the additional complications, delay, and expense of changes of venue or, at a minimum, assignment of an out-of-county judge.

If the suggestion to transfer habeas petitions to the Superior Court is being driven, at least in part, by an expectation of more evidentiary hearings, then I fear we run the unacceptable risk of having the worst of both worlds. On the one hand, we will have a process which, because of the inadequacy of resources, will still not be a fair test of the petitioner's habeas claims. But it may look thorough enough that federal courts may defer and give near-conclusive weight to the state courts' determinations of fact as well as law.

It is seldom articulated, but one reason people with various roles in the system tolerate California's current dysfunctional process may be an expectation that federal habeas courts will fill in the gaps and correct California's mistakes. There is some empirical support for this expectation, since of the California death-sentenced prisoners who have completed the federal habeas process, considerably more have won than have lost. But the Commission would perform a valuable service by disabusing everyone of the notion that routinely passing the buck to the federal courts is in anyone's interest. The limitations enacted by AEDPA in 28 U.S.C. § 2254(d) & (e) now significantly limit the ability of federal courts to correct errors and injustices when they perceive them, all the more so if denials of state habeas corpus begin to be accompanied by findings of fact. As the number of capital habeas cases reaching the federal courts grows, the ability and willingness of the federal courts to fund them adequately has begun to diminish. And financial resources cannot make up for the passage of time. California's lengthy delays in appointing *state* habeas counsel translate, years down the road, into futile attempts to litigate 25-year-old cases in the federal courts after too many witnesses, memories, and documents are irretrievably lost.

Focus Question 4

One of the core functions of government is to determine the allocation of public resources. In good economic times or bad, we all understand that education at the University of California is a good of necessarily finite supply which cannot be offered to all those who, by any set

of objective or subjective criteria, deserve or are entitled to it. The number of students admitted each year takes into account the available resources, not just the number of qualified applicants. The benefits to California and the world would be enormous if all qualified applicants could receive a UC education, but we have proven ourselves unwilling to pay for those benefits, so we do not allow those who administer the University to pretend that they can provide that opportunity.

For those who see it as a good, the death penalty should be perceived no differently. The number of death sentences currently imposed far exceeds the available resources for the Attorney General to defend them, for qualified attorneys to challenge them, and for the courts (both state and federal) to rule on them. We should stop pretending otherwise.

The alternative remedies are more money or fewer death sentences. Even in years without state budget deficits, the past infusions of "more money" have been inadequate. Witness, for example, the growing backlog of death-sentenced inmates without state habeas counsel, and the habeas cases which return from federal to state court to exhaust claims that initial state counsel were not provided the funds to investigate and litigate.

The Commission has heard much about the need, in the face of inadequate resources, to narrow California's exceptionally broad death-eligibility circumstances in section 190.2 of the Penal Code. Narrower sets of death-eligibility criteria are readily available, for instance from the Constitution Project (as presented to you by Justice Kogan) and from the bipartisan Illinois commission. Some have despaired that this remedy is unavailable because the political will to amend the statute is perceived to be lacking. But there are ways it can be implemented in the interim, without waiting for statutory amendment, and the Commission should recommend and encourage them:

1. The Attorney General, like local District Attorneys, is entitled to exercise prosecutorial discretion, setting priorities for the use of the necessarily-limited resources at his disposal. *State v. Superior Court*, 184 Cal.App.3d 394, 397-98 (1986); *State ex rel. Dept. of Rehab. v. Superior Court*, 137 Cal.App.3d 282, 286-87 (1982). Indeed, not only is he entitled to do so, the practical realities of running his office and meeting his budget require it. He could reasonably exercise his discretion by announcing that his office will only defend death judgments in these few categories. Other pending capital appeals could then be transferred to the Courts of Appeal pursuant to a stipulation that, unless reversed, the judgment will be modified to provide a sentence of life without parole. This policy would also facilitate stipulated modification of judgments, if not outright settlement, of cases which have moved beyond appeal into habeas corpus. And it would quickly result in District Attorneys seeking, and Superior Courts imposing, new death judgments only in cases within the narrow categories the Attorney General has indicated a willingness to defend.

2. The same result could be achieved in another way. As part of its power to decide appeals, the Supreme Court has plenary power under section 1260 of the Penal Code to reduce criminal sentences in the interest of justice. While the courts rightly do not advocate for or against legislative proposals to amend the substantive criminal law, they are entitled to use the powers they have under statutes already in existence to further the interests of justice, for instance by reducing the number of death judgments to a level commensurate with the available resources. The Supreme

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Court has chosen not to use this power on a case-by-case basis, *see People v. Hines*, 15 Cal.4th 997, 1080-84 (1997) (maj. opin. & conc. opn. of Mosk, J.), but the power remains available to address the different, systemic, interests of justice which are the subject of the present inquiry. An announcement from the Court that, in cases not within this small number of categories, it will modify death judgments to life without parole would have the same effect as a comparable exercise of discretion by the Attorney General: It would allow transfer of appeals, shorn of penalty phase issues, to the Courts of Appeal. It would similarly simplify the habeas corpus proceedings in these cases by limiting them to guilt-phase claims. It would quickly limit new capital prosecutions, and allow many cases already in the pipeline to settle or to be diverted into a non-capital track.

3. The California Supreme Court should be encouraged to establish a settlement conference program for capital appeals, habeas petitions, or both. Many appellate courts have settlement conference programs. They have found that assistance from a trained neutral whose services have the backing of the court can make a difference, and that a significant percentage of appeals can be settled, conserving resources for the court and for the parties. By definition, all the cases resolved with the help of these programs are ones which did not settle before trial. Parties' perceptions, expectations, and motivations have a way of changing once a jury has returned its verdict. The Ninth Circuit's mediation program has had some success settling capital habeas cases. The California Supreme Court might find similar or greater success.

Conclusion

The Commission is to be commended for taking on these difficult issues. Statutory amendments could deal with some of these issues, but much can be done without waiting for statutes to be amended. I wish you well in pointing the way for us to use our limited resources – by which I mean skilled and motivated people as well as money – in ways that are more likely to be effective to prevent and control crime.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert D. Bacon". The signature is fluid and cursive, with a large, sweeping initial "R".

Robert D. Bacon