November 30, 2007

Professor Gerald Uelmen
Chair, Commission on the Fair Administration of Justice
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Re: Death Penalty Case Backlog

Dear Professor Uelmen:

I am writing to provide you with the comments of the California Appellate Defense Counsel [CADC] organization regarding the current state of affairs in capital case processing.

As you may know, CADC is the largest statewide voluntary bar organization in California whose members accept appellate court appointments in criminal and juvenile cases. CADC members account for the overwhelming majority of all court appointments in the California Court of Appeal system and approximately one third of all current counsel appointments for capital post conviction cases in California. Many CADC members are also qualified to handle the capital habeas corpus proceedings in both state and federal court.

One of the most significant problems in the overall crisis gripping the capital cases process is the inevitable demographic of counsel unavailability. Not only are there insufficient numbers of counsel currently available to assume the capital post conviction caseload in a timely manner, but virtually the entire capital post conviction panel is rapidly approaching retirement. Moreover, by any measurement, the number of younger experienced counsel available to replace them is grossly insufficient.
Even if every other delay in the capital case processing system could be resolved, this looming demographic tsunami will inevitably overwhelm the capital case review process. More important, there are no quick fixes to this demographic issue. This reality has come to pass because the demographics are so far advanced and the planning to deal with them has been virtually nonexistent.

The counsel availability issue has been driven primarily by decades of substantial under-funding of both counsel fees and other resources necessary to maintain the court appointed criminal appellate system. The current compensation scheme is inadequate to sustain the required numbers of post conviction capital counsel and completely unattractive to counsel who might otherwise be inclined to pursue a career in criminal appellate defense. If counsel unavailability is to be mitigated and ultimately reversed, adequate funding is critically important to at least attempt to retain the qualified counsel who are already in the system and to retain and train younger counsel.

Below is an outline of the current problems facing post conviction counsel and a description of the flaws in the system that need to be remedied.

**Counsel Demographics**

There are approximately 667 prisoners on California’s death row. Presently, it takes 4-6 years to find qualified counsel for the direct appeal in a capital case. There are no reliable statistics for the average length of time required to obtain qualified habeas counsel, but at least a decade would be a good guess.

This lengthy time delay has resulted in a backlog of approximately 85 cases where no counsel has been appointed to the direct appeal and a backlog of almost 290 cases where no habeas counsel has been appointed. Overall, there are approximately 140 private practitioners appointed to handle California capital post conviction cases. While the State Public Defender and the Habeas Corpus Resource Center are also appointed to handle post conviction capital cases, their appointments are relatively few compared to the number of cases assigned to private practitioners. These numbers clearly demonstrate an acute shortage of capital post conviction practitioners. In order to understand why this shortage exists, however, it is necessary to understand the composition of the available talent pool.
Initially, the main component of the post conviction capital case bar came from the State Public Defender’s Office after it was downsized under (then) Governor Deukmejian. These former state public defenders were all experienced and well qualified to handle capital post conviction representation. Moreover, the number of capital cases were relatively small.

Within a few years, however, it became clear that the number of post conviction capital cases was quickly outstripping the supply of qualified counsel. After the California Supreme Court assumed control over recruiting capital counsel, there was a concerted push to recruit capital post conviction counsel from the ranks of the senior appellate counsel on the Court of Appeal panel. Presently, almost all new capital case appointments go to counsel who transition from the Court of Appeal panel.

Initially, there were few recruits from the Court of Appeal panel because of the fear that the compensation for capital post conviction work was severely inadequate. That fear was based on widespread stories of well respected capital appellate counsel being driven to the brink of bankruptcy when doing these cases. By the late 1990’s and on into the new century, the number of death row inmates with no post conviction counsel jumped to well over 130. In 1998, the compensation increased to $125/hr for capital post conviction work. Thereafter, more court of appeal counsel began to accept capital appellate appointments. Over the years, the number of unrepresented death row inmates has dropped to the current level of 85. That is the good news. The bad news is that the capital counsel increase jeopardizes the entire court appointed appellate counsel system.

As noted above, the pipeline that provides post conviction capital counsel now comes almost exclusively from the Court of Appeal panel. That panel comprises approximately 800 private counsel. The number of counsel who do court appointed work full time is approximately 500. Parenthetically, CADC membership currently stands at 427. Thus, the vast majority of counsel who do court appointed appellate work are CADC members. In 2004, CADC polled its membership and fully 67% were over the age of 50. In a 2006 speech, the head of the committee appointed by the Chief Justice of the California Supreme Court to oversee the court appointment process in criminal cases estimated that by 2010, 11% of the current criminal appellate practitioners would be eligible for retirement. By 2015, another 14% would be so eligible. Thus by 2015, almost a
quarter of the counsel currently appointed in California criminal appeals will be retirement eligible. Moreover, because those figures were calculated based on the assumption that each panel member was 25 years of age in the year his or her bar number was issued, the retirement projections probably understate the severity of problem. A significant minority of the most experienced criminal appellate counsel came to California from other jurisdictions where they were already experienced counsel. Many other experienced counsel came to the law later in life. Indeed, a significant number of law students work in other fields after college before entering law school.\(^1\) Thus, many bar numbers do not reflect counsel’s actual age when the number was assigned. Instead, they artificially skew the retirement projections towards the younger end of the age spectrum.

While counsel demographics for the Court of Appeal panel present a dire picture, they present a critical situation for the capital case panel. CADC is unaware of any accurate statistics concerning the average age of panel attorneys in the capital post conviction system. Nevertheless, because of the requirement for significantly greater appellate experience to join the capital panel, it is highly likely that capital post conviction counsel are - on average - measurably older than counsel on the Court of Appeal panel.

It is certainly true that statistically, attorneys tend to be older before they retire than people in other professions.\(^2\) Therefore, it might be argued that even though they are older, a substantial number of capital post conviction counsel are likely to be available for some time to come. That argument, however does not take into account the unique nature of capital post conviction representation. The length of time it takes to complete a capital case means that counsel must anticipate winding up his or her capital caseload many years before actually retiring. That is, if it takes an average of ten years for a capital case to move through the state system, a capital counsel who anticipates full retirement at age 70 will have to take his or her last capital case at age 60. Moreover, even if other

\(^1\) The age of 25 was chosen for the calculations based on the assumption that most law students graduated from college at age 22 and then went directly to law school where they graduated in three years at age 25.

\(^2\) See the 2005 Rand Corporation study on the future of the California bar commissioned by the State Bar of California.
improvements in the post conviction system reduced the case completion time to five years; still, most capital post conviction counsel are rapidly approaching the age when they will be faced with taking their last, or next to last capital post conviction appointment.

There is, however, another aspect of this counsel demographic that bodes ill for the future. The panel members recruited from the Court of Appeal panel into the capital case panel are primarily those rated at the highest levels; that is, Level V’s and some senior Level IV’s. Currently, there are approximately 95 level V counsel on the Court of Appeal panel and approximately 250 level IV counsel. Those numbers have been more or less constant for over a decade. There is no mandatory maximum number of counsel at any appellate level. Thus, the constancy of those numbers for so many years demonstrates relatively little movement from the ranks of the less experienced counsel into those of the more experienced.

Because there are so few replacement attorneys moving into the upper ranks of the Court of Appeal panel, the crossover of experienced panel attorneys from the Court of Appeal panel to the capital case panel is simply an appellate version of robbing Peter to pay Paul. Each experienced senior panel attorney on the Court of Appeal panel assumes appointments in approximately 8-12 new criminal appeals per year. A panel attorney in the capital case system assumes only one new capital case every two or three years. Thus, for every new capital post conviction appointment, the Courts of Appeal must search for new counsel to assume 8-12 of the most difficult non capital appeals. While CADC is unaware of any accurate statistics showing how many Court of Appeal panel attorneys have accepted appointments in capital post conviction cases, a survey of its own membership shows that in the last four years the number of such counsel has increased from 16 to 48. As noted above, CADC members now comprise approximately one third of all capital post conviction appointments. Unquestionably, this migration of experienced appellate attorneys to the capital panel has adversely affected the Court of Appeal panel and that situation will only get worse.

In the mid 1990's, Professor Clark Kelso of the McGeorge School of Law was commissioned by the Judicial Council to evaluate the future of the California appellate system. In his report, Professor Kelso noted that the population of the state would likely double by the year 2020. He argued that this population increase
would boost the total appellate caseload dramatically even if the crime rate continued to drop. Further, his report asserted that because of the socio-economic nature of this huge population increase and the advent of alternative dispute resolution in civil cases, the appellate caseload would shift from the current roughly 50/50 mix of civil and criminal appeals to an 80/20 mix with criminal appeals vastly predominating.

That prediction is starting to be borne out. The population is exploding in the Riverside/San Bernardino area. The Fourth Appellate District, which encompasses that area, now handles more criminal appeals than the Second Appellate District; a district that encompasses the entire Los Angeles area. The lack of experienced appellate counsel to handle the increased caseload has forced the appellate project in San Diego to hold its first set of recruiting seminars to try and bolster the ranks of experienced panel attorneys. Similarly, the project managing the panel for the Third and Fifth Appellate Districts recently sent out a mailer to experienced criminal appellate practitioners asking them to join its panel.

The primary reason that retention and advancement of experienced counsel has been so abysmal over time is the persistent under-funding of the court appointed appellate counsel system in general and the capital post conviction appointment system in particular.

**Inadequate Compensation**

Under current California law, the hourly rate for appointed capital counsel is $145/hr. (See Payment Guidelines for Appointed Counsel Representing Indigent Criminal Appellants in the California Supreme Court 13 (1993) (as amended 2007.) This is notably less than counsel representing state capital defendants in federal habeas corpus proceedings. In the Northern and Eastern districts of California for example, experienced lead counsel can receive $166 per hour. (See Comm. on Defender Services., Judicial Conference of the U.S., Report (2006.)

In 1998, the California Legislature recognized that the then current capital counsel compensation rate of $95/hr was inadequate to attract sufficient numbers of qualified postconviction counsel, so the hourly rate was raised to $125/hr. Applying the national inflation adjusted Consumer Price Index, however, just to stay even with the 1998 rate, the present hourly rate would have to be $159/hr.
That is $14/hr above the current hourly rate of $145/hr. Thus, the value of the current capital counsel rate has actually decreased 9% from where it was in 1998.3

Additionally, the current California capital case compensation rate is nowhere near the actual market rate for the skills and experience required of capital counsel. As Judge Alarcon pointed out in his recent law review article in the University of Southern California Law Review, in 2005 and 2006, the average hourly rate given by United States District Courts in California that use the “Lodestar” method for awarding counsel fees in civil cases was $287. Thus, the average hourly rate for a civil attorney practicing in federal court was more than twice that of counsel responsible for postconviction work in a death penalty case. Further, using the Laffey Matrix—a "matrix of hourly rates for attorneys of varying experience levels and paralegals/law clerks" prepared by the Civil Division of the United States Attorney's Office for the District of Columbia, from 2006 to 2007, an attorney with twenty years of experience was awarded $425/hr. An attorney with one year of experience was awarded $205/hr. Under the Laffey Matrix formulation, an attorney with four years of experience [the minimum required for capital post conviction appointment in California], should receive $245 per hour. (80 S.Cal. L. Rev. at p. 718.)4 That is $100/hr more than the current compensation rate for the most highly experienced capital post conviction counsel. Indeed, many capital post conviction counsel have 20-30 years of criminal appellate experience.

Regardless of the actual calculations or the particular amounts involved, these fee awards demonstrate a much more serious moral and ethical problem. Effectively, the government countenances significantly greater reward for counsel involved in protecting property rights than it does for counsel involved in protecting individual rights and liberties. When the state is in the business of executing its own citizens, the exercise of that ultimate power must be scrutinized with great care. The very legitimacy of government rests on the fairness by which

3 The Consumer Price Index excludes energy and food. Since counsel have to eat, drive and use electricity, however, the CPI significantly understates the real impact of inflation on panel members.

4 A more complete description of the “Lodestar” and “Laffey-Matrix” calculations can be found in Judge Alarcon’s article.
that ultimate power is used. To date, more that 120 people have been released from death rows across the nation. Three have been released from death row in California.\(^5\) Every single one of those citizens was convicted beyond a reasonable doubt. These release numbers demonstrate that while the death penalty is absolute, the process by which it is invoked is not. Thus, the integrity of the capital case review process is absolutely critical to protecting the fundamental rights of every citizen. The huge disparity in amounts spent to compensate counsel for protecting property rights as opposed to protecting the fundamental right to life suggests that fiscal expediency may have triumphed over the most basic ethical requirements of both the political and judicial system.

The lack of adequate funding for habeas corpus investigative expenses is perhaps the most extreme example of this ethical problem. Since 1998, the number of death row inmates awaiting appointment of habeas counsel has skyrocketed and continues to climb steeply. As noted previously, that number is now approaching 300, almost half the Death Row population and more than 3.5 times the number of inmates awaiting appointment of counsel on the direct appeal. As noted above, there are no reliable statistics on the average length of time it takes to secure the appointment of qualified habeas counsel. Nevertheless, it is a very long time. Moreover, it is undisputed that a delay of many years ineluctably means that valuable evidence is lost and memories fade. Regardless of that reality, however, the burden is always on the defense to show that the trial was unfair or that the loss of evidence was prejudicial. Given this situation, under-funding the post conviction habeas investigation and then placing the burden on the defense to show prejudice is a practice that borders on the unconscionable.

A brief history of the funding of the habeas corpus investigation demonstrates how this unacceptable habeas delay came about and why it is likely to persist. In 1998, the California Legislature placed a fixed cap of $25,000 on habeas corpus investigative expenses. (California Supreme Court Policies Arising From Judgments of Death, at Policy 2.) Recently, the California Legislature authorized the California Supreme Court to increase that amount to $50,000, but the Court has not yet issued guidelines for obtaining the additional funding.

Perhaps it belabor the obvious, but decreasing compensation over time and lessened assistance is not the way to retain and promote qualified post conviction counsel. This is especially true when the time horizon showing decreasing long term compensation has extended over nearly an entire career.

Moreover, because the compensation rates for Court of Appeal counsel have essentially decreased over time, the most experienced counsel have been effectively forced to accept appointments in capital cases. That is, the capital case rate of $145/hr is a de facto pay raise and the only one available for experienced criminal appellate counsel.

The result of this persistent under funding of the court appointed system is that new counsel, especially those with outstanding large student loans, cannot afford to get into the system at all. Many of those who do enter the system cannot afford to stay in it long enough to gain experience and those who can afford to stay in the system cannot get the assistance they need to advance in expertise. Most counsel eventually come to realize that the longer they stay on the Court of Appeal panel, the poorer they will become. The migration of experienced counsel to the capital panel simply exacerbates the problem by creating a dearth of the most qualified counsel on the Court of Appeal panel.

More important, because the replacements for counsel retiring from the capital panel come from the Court of Appeal panel, it is vitally important to invest in the retention, training and advancement of counsel on that panel. Nothing in the current compensation system deals with those problems in the face of the impending retirement of so many experienced counsel. Because compensation in both the capital and non capital panel has been moving effectively backwards, there is little incentive for counsel to remain on either panel long past retirement age and certainly no incentive for new counsel to join the Court of Appeal panel or to remain on it long enough to gain the experience necessary to advance to the capital panel.

Significantly, there has been no commitment by the California Legislature even to keep counsel compensation equal to inflation, let alone to approximate market rates. Nevertheless, as Judge Alarcon pointed out, "Unreasonably low fees not only deny the defendant the right to effective representation . . . . They also place an unfair burden on skilled criminal defense lawyers, especially those skilled in the highly specialized capital area. These attorneys are forced to work for next
to nothing after assuming the responsibility of representing someone who faces a possible sentence of death. Failure to provide appropriate compensation discourages experienced criminal defense practitioners from accepting assignments in capital cases.” (*Id.* at p. 718.)

Moreover, as the results in California demonstrate, persistent under-funding of counsel compensation and training systematically reduces the available talent pool for appointment in post conviction capital cases and increases the time it takes to locate qualified counsel who will accept appointment. Without adequate funding, the talent pool of competent counsel will eventually evaporate - as it is already doing- and experienced competent capital counsel will not be available at any price.

Finally, time after time, the California legislature has determined that contracting for private counsel is the most cost effective way to deliver high quality services to indigent criminal defendants. That said, the failure to adequately fund the system that produces and uses those counsel is creating unacceptable delays that increasingly degrade the protection of individual rights and liberties guaranteed to citizens under both the state and federal constitutions. Significant change in the way the court appointed counsel system works is necessary to bring it back to full functionality.

CADC believes the foregoing comments will assist the Commission as it evaluates the current problems in the capital case system. CADC also welcomes the opportunity for dialogue and to address any further questions or concerns that the Commission may have on these matters.

Sincerely,

[Signature]

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Subject: CADC letter to the Commission on the Fair Administration of Justice

Dear Professor Uelmen,

As the chair of the California Appellate Defense Counsel (CADC) Death Penalty Committee, I recently sent the Commission a letter concerning counsel issues. One of my colleagues who read a copy of the letter a few days ago noted a typographical error that was serious enough error that I thought I should bring it to your attention. At the top of page 5 of the letter, I noted that there were approximately 95 Level V counsel on the Court of Appeal panel and approximately 250 Level IV counsel. These are the counsel tapped for capital post conviction work.

The typographical error is that there are only approximately 150 Level IV counsel on the Court of Appeal panel, not 250. The reason the error is so noteworthy is because even if all the Level IV and Level V counsel on the Court of Appeal panel could be persuaded to accept appointments in capital cases, there would still not be enough qualified counsel to staff the backlog of existing capital cases, particularly capital habeas cases. Moreover, if all of the senior counsel on the Court of Appeal panel actually accepted capital cases, that result would be an absolute disaster for the Court of Appeal panel. The senior people on the Court of Appeal panel accept the bulk of the appointments to that panel and the Court of Appeal panel is already facing a significant shortage of these most experienced counsel. Moreover, the Administrative Office of the Courts considers those senior counsel to be the most cost efficient by a significant margin. Thus a loss of significantly more of these counsel would be very expensive indeed.

Additionally, the appellate projects that administer the Court of Appeal panel estimate that it takes about 7 years for a new panel attorney to gain enough experience to advance to a Level V status. Since approximately one quarter of the Court of Appeal panel - and probably a significantly larger portion of the capital panel - will be retirement eligible by 2015, the demographics of panel attrition have already passed the threshold crisis point. Because of the long lead time necessary to develop qualified replacement counsel, the backlog of capital post conviction cases awaiting counsel appointment likely will get considerably worse before it gets better. Moreover, unless a viable plan is developed to recruit, train and retain these experienced counsel, the backlog will not get significantly better under any circumstances.

While it is certainly true that the backlog of capital direct appeals has decreased because the number of qualified capital appellate counsel has increased, as CADC pointed out in its December letter, that increase is driven largely by the fact that capital appellate work involves a de facto pay increase for appellate counsel who would otherwise remain on the Court of Appeal panel. Compensation for appellate counsel on the Court of Appeal panel has been moving steadily backward for 18 years, thus there is a significant market incentive for qualified counsel to apply for the direct appeal in capital cases. Nevertheless, the number of private counsel seeking to do capital habeas has not increased and that backlog continues to rise steeply. There is a strong deterrent to capital habeas work because the reimbursement for capital habeas expenses is still so low. Further, the skill set required for a habeas counsel is much greater than that required for counsel on the direct appeal.
Not only are appellate skills required, but a strong background in trial investigative techniques is essential. Further advanced training in social and psychological history evaluation is necessary as well. Thus, the people who are comfortable with those requirements comprise a much smaller subset of the already small talent pool of qualified capital post-conviction counsel.

For these reasons, even if review of fully briefed capital cases is speeded up, there will be no meaningful improvement on the overall progress of capital post-conviction cases. With nearly half of death row awaiting the appointment of habeas counsel and no large talent pool of such counsel readily available - plus the attrition of that already small talent pool through retirement - the capital case post-conviction process inevitably will grind to a virtual standstill. If I may draw an analogy with the automobile industry, speeding up the assembly line will produce cars faster. Nevertheless, unless the inflow of raw materials keeps pace, the overall production of automobiles will not increase significantly. The same problem exists here. Regardless of any change in capital post-conviction processing speed, without a significant increase in the availability of qualified counsel, particularly capital habeas counsel, the overall progress of the capital post-conviction process will not improve significantly. In fact, it will get worse.

CADC hopes the foregoing note and its letter will assist the Commission in its deliberations concerning the capital post-conviction system.

Sincerely

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