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February 22, 2008

Gerald F. Uelmen
Executive Director
Chris Boscia
Executive Assistant
California Commission on the Fair
Administration of Justice
900 Lafayette Street, Suite 608
Santa Clara, CA 95050

Re: **Philipsborn testimony re capital cases/recommendations**

Dear Jerry and Dear Chris:

Thank you both for your invitation, and thanks to the Commission as well for the opportunity, to address the thorny issues revolving around the use of the death penalty in California. At the end of my remarks on February 20, 2008, Chris was kind enough to suggest that I might want to send in an addendum to my February 12, 2008 submission.

With your indulgence, I do so to ensure that my digressive remarks to the Commission of the 20th are more succinctly set down. I note in having conferred with a number of the witnesses who testified, that my information is based on an unusual 'foundation'. I do not believe that anyone else presenting to the Commission was in the position of having to address in litigation over a number of years, in over 15 counties, legal questions concerning: funding of defender offices; the decision-making formats for Public Defenders who also administer the alternate defender offices; contract systems; the rights of contractors; the right to two lawyers; the right to ancillary funds; the right to judicial, rather than administrative, decisions on funding, etc.

As noted, over the years I was approached by Public Defenders, alternate defenders, Bar groups (sometimes county-wide), contractors, individual lawyers, paralegals, and clients (defendants in pending cases) with problems involving the sorts of issues just described.

My additional recommendations to the Commission were as follows:

a) **The appointment of qualified lawyers**

1. Recommend requiring each lawyer appointed on a case to make a record of qualifications, either through the lodging in a sealed portion of the file of a standardized qualifications and continuing education reporting form, or through the depositing with the court of a certificate evidencing: longevity of practice; areas of specialization; numbers of homicides tried through verdict (jury and non-jury); number of capital cases; number of capital cases tried to a jury; number of capital appeals and/or post-conviction litigation efforts; continuing education. On the latter score note that San Francisco requires lawyers to report continuing education efforts and will disqualify lawyers from remaining on the Special Circumstance Panel if they do not have the required continuing education - ironically, the Public Defender's Office in the same county does not have the same exact requirements. The requirements should be the same for all, and a rule of court should be recommended at the very least.
2. The 2003 *ABA Guidelines* pertinent to qualifications should be adopted as the standards pertinent to the qualifications, and as suggested by Chairman Van de Kamp, the State Bar should be encouraged to incorporate the *ABA Guidelines* into its practice standards.
3. Lawyers should not be deemed 'qualified' simply based on their willingness to accept employment, which is the case in a number of counties now.

b) **Quality of representation, and ensuring adequate funding as well as effective representation**

1. Again, under this rubric the Commission should encourage adherence to the *ABA Standards*.

2. The adequacy of the funding of the defense function should also reflect Penal Code §987.3, which sets forth six elements in considering the compensation of court-appointed counsel, including: customary fees in the community for similar services rendered by privately retained counsel; the degree of professional ability, skill and experience called for, the professional character, qualification and standing of the attorney. Qualified lawyers would be easier to find if adequate fees were paid using something other than the expediency of unit cost that disregards fair compensation.
3. The Commission should urge California courts to strictly enforce the California statutory scheme, as well as adherence to *ABA Guidelines*, which will mean reconsidering case law that allows California courts to bypass steps (two lawyers, for example) aimed at ensuring quality of representation.
4. The Commission should recommend enactment of a statute, or at the very least promulgation of a rule of court, requiring the filing of a formal notice by the prosecution that death will be sought within a reasonable period of time after a preliminary hearing or after indictment - 15 days in a no-time waiver case (of which there are mercifully few), and no more than 30 days after arraignment in Superior Court. The filing of the notice would be aimed in part at ensuring that all concerned are aware of the need for two lawyers, and adequate ancillary funding, in connection with the defense of a capital case.
5. The Commission should discourage the increasingly popular use of capped fee contracts (regardless of possible escape clauses); different pay for first and second counsel; contracts that encourage appointed counsel to delay use of second counsel, etc. The *ABA Guidelines* are clear that fixed fee contracts, block grants, presumptive fee arrangements, are all impermissible for the reasons stated in the comments. In California not only do these exist, but they are often administered through an office within the Executive Branch, on occasion County Counsel, or through an administrator whose concerns about budget constraints and the implications of

seeking refreshers of the budget have proven devastating in certain counties.

6. The Commission should strongly recommend that the Legislature should provide a fund to ensure that all California counties in which death penalty cases are pursued have the budgets to sufficiently fund the defense function, including the required ancillary services. Our courts often forget that in *Corenevsky v. Superior Court* (1984) 36 Cal.3d 307, 319-320, the court reminded all concerned of its prior pronouncement (from *Keenan v. Superior Court* (1982) 31 Cal.3d 424) that: "The right to effective counsel also includes the right to ancillary services necessary in the preparation of a defense." *Id.* at 428. This reminder was ordained by the Ninth Circuit's reiteration that the effective assistance of counsel requires where necessary "... the allowance of investigative expenses or appointment of investigative assistance for indigent defendants...." *Mason v. Arizona* (9th Cir. 1974) 504 F.2d 1345, 1351. The 2003 *ABA Guidelines* also require this adequacy of funding.
7. In this connection, the Commission should specifically sound a cautionary note, and an objection, about the offloading of judicial decision-making on ancillary costs (mandated by Penal Code §987.9) to county administrators and contractors - see number 4, above.

c) **Geographical differences**

1. The Commission should make it clear that there are geographical differences in the way death penalty cases are dealt with, which is why as a representative of the Mexican Capital Legal Assistance Program presenting information to the Commission, I noted in my written materials the unexplained high rate of Mexican nationals convictions (and of capital charges) from Tulare County, for example - which, together with other statistical analyses would justify the maintenance of better records on the implementation of the death penalty statutes. In this connection, the Commission might consider encouraging the Legislature to pass a statute similar to that which is part of the 1994 Federal Death Penalty Act (see 18 U.S.C.

3591 *et seq.*).

2. The geographical differences in the defense function are highly significant, and the issues addressed in this letter vary county by county. In the San Francisco Bay Area, for example, the indigent defense function relevant to death penalty defense is different in: Contra Costa, Alameda, Marin, San Francisco, San Mateo, and Santa Clara Counties. Alameda, Marin and Santa Clara Counties have used contract systems to compensate private counsel, and depend on the Public Defender and alternate defender budgets to defray the costs of 'public defender' cases. There are highly variable practices in staffing cases, and variabilities in the timing of the decision to consider a case (from a funding perspective) a 'real' capital case. The same is true in Fresno; Kern; San Bernardino; San Diego; Los Angeles, and Riverside Counties - all counties in which both CACJ and MCLAP have had experience (and have received various complaints about the performance of the system).

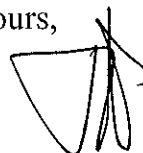
3. Some counties, Tulare among them, still rely, especially with appointed counsel, on pools of lawyers who will handle a potential capital case through preliminary hearing, and then another pool will handle the cases by individualized appointment thereafter (this is not always the case, but it does occur under the current Tulare system). This formula has devastating impact for an individual whose capital case could have been adequately prepared prior to the preliminary hearing, but whose case was assigned to a lawyer who is not death-qualified, and has very few resources prior to the preliminary hearing. By the time the case 'graduates' to the trial court, the lack of vertical representation has had dramatic impact. Other counties use different formats of representation, and encourage vertical representation both by the Public Defender and by privately appointed counsel.

I am more than happy to discuss with you, or with any member of the Commission, any matters brought up here. I believe that what I have written above is generally faithful to the points made during the course of the February 20, 2008 Commission hearing.

Gerald F. Uelmen
Chris Boscia
Feb. 22, 2008
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Thanks again for providing me with this valuable opportunity.

Sincerely yours,

A handwritten signature in black ink, consisting of several loops and a final flourish that extends to the right.

JOHN T. PHILIPSBORN

JTP:sg