February 21, 2008

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

Re: Additions to my testimony

Dear Mr. Van de Kamp:

Thank you again for inviting me to testify before the Commission at your January 10 hearing and for your courtesy in accommodating my teaching schedule. I also again want to express my support for the Commission’s willingness to undertake a long overdue examination of the overbreadth of California’s death penalty statute. The thrust of my testimony at the hearing was that Penal Code § 190.2, which defines death-eligibility for those convicted of first degree murder, is so broad that it sweeps more than 90% of adult first degree murderers into the death-eligible class (see Attachment #5 to my Summary of Testimony). Consequently, at present death sentencing rates, the death penalty is being imposed on less than 5% of death-eligible murderers (see Attachment #6 to my Summary of Testimony).

In the questioning period, we moved on to a discussion of possible approaches to narrowing the statute, and it is on that issue that I would like to provide additional information from my two data sets. In this letter, I attempt to answer for the Commission the following question: how many convicted first degree murderers would be death-eligible each year under various proposals to narrow the California death penalty statute?

To begin with, one must know the current number of death-eligible convicted first degree murderers, in order to compare the impact of various hypothetical narrowing schemes. As was noted at the hearing, no one in California systematically tracks the number of murder cases where special circumstances were found or present and therefore where the defendant was factually death-eligible. Thus, we do not have actual numbers to use for comparison. From my data sets, however, I have been able to calculate an estimate of the annual number of death-eligible defendants under the current system. My data reveals that:

- An average of 415 defendants are convicted of first degree murder each year in California.²

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¹ In the following discussion and calculations, since the “heinous, atrocious, or cruel” special circumstance (P.C. § 190.2(a)(14) has been declared unconstitutional, I ignore it and address only the other 32 separately enumerated special circumstances. (I adopted this same approach in the law review articles on my two studies.) The numbers given below constitute averages from the two data sets.

² This number is an average from the period 2002-2006.
• Approximately 351 are death-eligible.\textsuperscript{3}
• An average of 17 are sentenced to death.\textsuperscript{4}

Below I calculate the number of death-eligible defendants under four hypothetical narrowing schemes

1) Eliminating five “ordinary” circumstances (leaving the statute with 27 special circumstances) - In my testimony, as in my Florida Law Review article,\textsuperscript{2} I argued that two groups of special circumstances – multiple murder circumstances (encompassing multiple murder and prior murder circumstances) and additional serious injury circumstances (encompassing torture, kidnapping, mayhem and the five sexual assault circumstances) produced death sentences at a substantially higher rate than five “ordinary” circumstances: robbery, burglary, carjacking, lying in wait, shooting from a car (see Attachment #7 to my Summary of Testimony\textsuperscript{6}) and that a first step to narrowing the death penalty statute would be to eliminate the latter group of five circumstances. Under such a statute:

• Roughly 31\% of first degree murder cases would be special circumstances cases.
• As a result, 120 defendants a year would be death-eligible.

I also suggested that eliminating death eligibility for accomplices (“non-triggermen”) and for those who did not intend to kill would further the goal of narrowing the statute to the “worst of the worst.” In my Statewide study, I did not code for the defendant’s role in the crime. However, based on the Alameda study, eliminating accomplice liability (in addition to eliminating the five circumstances) would result in a statute under which:

• 28\% of first degree murder cases would be special circumstances cases.
• This would make 110 defendants a year death-eligible.

As I indicated at the hearing, requiring an “intent to kill” would further narrow, but there is no way to tell how much. In more than a few cases in the data sets it appeared to me that the defendant did not intend the killing, but whether a reasonable jury would have so found I cannot say.

\textsuperscript{3} Since juveniles are not death-eligible, in this, and subsequent calculations, I have discounted the number of convicted first degree murderers by 7.1\%, the percentage of juveniles in my Alameda study. This figure is almost certainly higher than the current figure because the Alameda study captured the significant spike in juvenile murders during the ‘90s.

\textsuperscript{4} This figure also is an average from the period 2002-2006.

\textsuperscript{5} Steven Shatz, The Eighth Amendment, the Death Penalty, and Ordinary Robbery-Burglary Murderers: A California Case Study, 59 FLA. L. REV. 719 (2007)

\textsuperscript{6} I included this attachment to set out the comparative egregiousness of the groups of circumstances, and it cannot be read to indicate what the death sentencing rates would be if the statute were to be narrowed to those particular circumstances. The death sentencing rates set out in the attachment were drawn from time periods when the overall statewide death sentencing rate for death-eligible murderers was twice what it has been recently (2002-2006), so the death sentencing rate for murders with even the most egregious special circumstances might today be significantly lower than the 27.9\% rate appearing in the attachment.
2) Eliminating all circumstances except the multiple murder and additional serious injury circumstances (the statute would have 10 special circumstances) - At the hearing, I was asked about the effect of eliminating the 18 circumstances which I disregarded in Attachment #7 because they occur rarely and are dissimilar to the more commonly occurring circumstances. Presuming the unconstitutionality of the "heinous, atrocious, or cruel" circumstance, the other 17 to be eliminated would be: (1) financial gain; (2) destructive device - hidden; (3) avoiding arrest; (4) destructive device - sent; (5) peace officer victim; (6) federal law enforcement officer victim; (7) firefighter victim; (8) witness victim; (9) prosecutor victim; (10) judge victim; (11) elected or appointed official victim; (12) hate motive; (13) arson; (14) train wrecking; (15) poison; (16) juror victim; (17) street gang motive. Under such a statute:

- Roughly 24% of first degree murder cases would be special circumstances cases.
- As a result, 93 defendants a year would be death-eligible.

3) Narrowing to circumstances analogous to those proposed by Professor David Baldus (the statute would have 10 special circumstances) - In the law review article reporting on my first empirical study of the California death penalty, I noted that Professor David Baldus, the person who has conducted the most thorough empirical studies of the death penalty, had proposed limiting death penalty schemes to first degree murders with six aggravating factors. The analogs in the California statute would encompass ten circumstances: (1) financial gain; (2) prior murder; (3) multiple murder; (4) peace officer victim; (5) rape; (6) forcible sodomy; (7) lewd act on child; (8) forcible oral copulation; (9) rape by instrument; and (10) torture. Under such a statute:

- Roughly 26% of first degree murder cases would be special circumstances cases.
- As a result, 100 defendants a year would be death-eligible.

4) Narrowing to circumstances with analogs in the Mandatory Justice factors (the statute would have 9 special circumstances) - At the hearing, there was a good deal of discussion about the Mandatory Justice factors. The California statute has nine circumstances which are rough analogs of the Mandatory Justice factors: (1) peace officer victim; (2) avoiding arrest; (3) multiple murder; (4) torture; (5) federal law enforcement victim; (6) witness victim; (7) prosecutor victim; (8) judge victim; (9) juror victim. Under a statute with such circumstances:

- Roughly 17% of first degree murder cases would be special circumstances cases.
- As a result, 66 defendants a year would be death-eligible.

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8 See David Baldus, When Symbols Clash: Reflections on the Future of the Comparative Proportionality Review of Death Sentences, 26 SETON HALL L. REV. 1582, 1605 (1996). The six factors proposed were: (1) multiple murder; (2) prior murder; (3) contract killing; (4) police officer victim; (5) extreme torture; and (6) sexual assaults with particular violence and terror.

9 A California statute with these ten circumstances, as currently defined, would be broader than that proposed by Professor Baldus because the five sexual assault circumstances in California are not limited to assaults “with particular violence and terror.”
To reiterate what I said at the close of the hearing, I have two data sets of special circumstances in California murder conviction cases, and I would be happy to provide the Commission with any other information the Commission may want to derive from the data.

Sincerely,

Steven F. Shatz

Philip and Muriel Barnett
Professor of Law