



LAW OFFICES OF THE PUBLIC DEFENDER County of Tulare

Michael Sheltzer
Public Defender

Main Office Division

Courthouse Room G-35
221 S. Mooney Blvd.
Visalia, CA 93291
(559) 733-6693
Fax: (559) 733-6113

Juvenile

Juvenile Justice Division
11200 Ave. 368, Room 103
Visalia, CA 93291
(559) 713-3200
Fax: (559) 713-3229

March 5, 2008

John Van De Kamp, Chairman
Gerald Uelmen, Executive Director
California Commission on the Fair Administration of Justice
900 Lafayette Street, Suite 608
Santa Clara, CA 95050

Gentlemen:

I am writing to express my strong disagreement with the conclusions made by Mr. John Philipsborn in his testimony before your commission on February 20, 2008 as it related to the Tulare County Public Defender. Just yesterday, I came into possession of the summary of his testimony and this is my first opportunity to comment.

Not to quibble, at the outset, but the Tulare County Public Defender system is not "small," we currently have 43 attorneys on staff, nor are we unsophisticated, poorly trained or incompetent. Funding has never been an institutional issue on capital cases. The County has never denied any requested funding for professional and specialized services related to the defense of capital cases and no expert services on these cases has ever been declined based on funding alone.

Frankly, I do not know how Mr. Philipsborn is arriving at his conclusions, especially as it relates to the Vidal case. His claims are outrageous. It seems that many of his comments on this case are at best self-serving, and not reflective of the reality of the defense of this still-on-going litigation. While we have taken advantage of alternate, non-general-fund funding sources, where they are available, lack of county resources would not have prevented appropriate expenditures for the defense.

Further, in every capital case in my office where 2nd counsel is requested by the lead attorney, one is provided. I cannot comment on the Tulare County contract provider, but the Tulare County Public Defender has an excellent record in the defense of capital cases and I am unhappy about my office being paraded around as an example of

ineffective or less than excellent defense work in this area. Our record of death sentences in proportion to the number of death eligible cases is quite low and in my view unrelated to resources.

Many of the statements regarding the Tulare County Public Defender are false, misleading and inaccurate. Because we practice in an economically impoverished Central Valley county, I guess that we were an easy target. We essentially do comply with the ABA Guidelines; educational opportunities in this area abound and are mandatory for attorneys, investigators and paralegals handling these cases-- dozens of employees attend the CACJ/CPDA Capital Case Seminar each year at office expense, as has been the practice for decades; every attorney who has requested to attend the Death Penalty College has been sent at office expense.

Mr. Philipsborn needs to get the facts straight. Our office provides excellent, sometimes cutting edge representation to capital clients in a climate where the district attorney tends to file special circumstances in every case possible and capital juries are frequently very death prone. We have unfortunately become quite expert in this area of criminal defense. I am not aware of any Tulare County Public Defender capital case that has been reversed for ineffective assistance of counsel and there have been "only" 5 death verdicts out of many dozens of death eligible cases handled by this office over the last 25 years.

The Tulare County Public Defender has been unfairly and publicly held out as the poster child for inadequate, unprofessional defense in capital cases, without the benefit of any prior investigation, notice, discussion or consultation. We can always use additional funding and additional resources, but lack of resources has never compromised the effective defense of capital cases handled by the Tulare County Public Defender.

Respectfully submitted,

Michael Sheltzer
Tulare County Public Defender

JOHN T. PHILIPSBORN

LAW OFFICES

CIVIC CENTER BUILDING

SUITE 350

507 POLK STREET

SAN FRANCISCO, CALIFORNIA 94102

(415) 771-3801

FAX (415) 771-3218

JPHILIPSBORN@AOL.COM

OFFICE

CHRISTINE MAROLE

STEVEN GRAY

KATHERINE PULIDO

JPHOFFICE@AOL.COM

JOHN T. PHILIPSBORN

March 6, 2008

John Van de Kamp
Chairman
Gerald Uelman
Executive Director
California Commission on the
Fair Administration of Justice
900 Lafayette St., Suite 608
Santa Clara, CA 95050

Re: **Michael Sheltzer's March 5, 2008 letter addressing my Commission testimony**

Dear Mr. Van de Kamp and Mr. Uelman:

This is my response to Tulare County Public Defender Michael Shelter's May 5, 2008 letter to you. First, I think it fair that Mr. Sheltzer be given the opportunity to be heard, in view of the fact that I sent you my written comments, and provided in-person testimony about Tulare County. Second, Mr. Sheltzer did not inform you in his letter that I had the opportunity to exchange comments with him about the information that I presented to the Commission prior to his transmission of his letter. Enclosed are the email exchanges I had with Mr. Sheltzer. Third, Mr. Sheltzer's admirable defense of his office, and amusingly unsupported accusations of me, are a distraction from a considered assessment of the information presented to the Commission.

A few matters need to be set straight in view of Mr. Sheltzer's zealous but imprecise retorts. It is clear that most of my remarks about Tulare County dealt with the contract system there. Though Mr. Sheltzer defends the Public Defender system that he administers, in the second full paragraph of his letter he indicates that "the County" has never denied any requested funding for capital cases, etc. That unqualified statement is incorrect, and more than one witness before the Commission is aware of the denial of requested funding in Tulare involving capital case contractors who have represented Mexican nationals. Had Tulare County never denied funding for ancillary services in any capital case, the founding Executive Director of the Mexican Capital Legal Assistance

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Program (Sandra Babcock) would not have focused some of her Program's resources on Tulare County. Later Mr. Sheltzer only obliquely addresses the contract situation in the fourth paragraph of his letter: "I cannot comment on the Tulare County contract provider...." Part of what CACJ and MCLAP did, through my appearance before the Commission, was to provide such commentary. Indeed, given Mr. Sheltzer's references to Tulare as a comparatively poor and rural county, it seems unusual that he, as the County's Public Defender, would not be aware of the local contract system. More likely, Mr. Sheltzer is diplomatically letting others from outside of the County address the reported problems.

If my written comments to the Commission have been considered by the Commission an attack on the Tulare County Public Defender's performance in capital cases generally, then I owe an apology to Mr. Sheltzer and his office, and to the Commission. That was not my intent. As I explained to Mr. Sheltzer in my email exchanges with him, neither CACJ or MCLAP (insofar as I have been involved with them) has received specific complaints about the Tulare County Public Defender Office of the type received in relation to the contract system. Moreover, while my claims about the *Vidal* case (which is being handled by the Public Defender) may be "outrageous" and "self-serving", as characterized by Mr. Sheltzer, as I believe he knows, I volunteered my time as an amicus lawyer to consult with his office's lawyers in their defense of Mr. Vidal. I spoke with them by phone. I met with one of them in Visalia. While that may be outrageous, it is likely not self-serving. My contact with the case spanned several years. I wrote amicus briefs in the case once in the trial court, twice in the Court of Appeal, and once before the State Supreme Court. I conferred with the defense experts who testified on behalf of the Public Defender's office about his participation in the case. I read the record of proceedings. I was informed by the former Executive Director of the Mexican Capital Legal Assistance Program about the nature of some of the assistance provided in the litigation of that case. The Deputy Public Defender with whom I had the most contact in the matter, Bill Muetting, did a fine job for his client before the reviewing courts. But for Mr. Sheltzer to argue that my comments about *Vidal* are uninformed is inaccurate. I clearly explained to the Commission that I viewed *Vidal* as a significant Tulare capital case contact, and from there, as I explained, I then was asked to deal with a series of other Tulare matters either by MCLAP or by CACJ.

Mr. Sheltzer's defense of his office and bombastic attack on me has little to do with what information I was conveying to the Commission. My remarks, as you know, were generally focused on the problematic operation of contract systems in California.

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On that score, Mr. Sheltzer's silence, particularly in the context of my reiterated invitations for him to correct inaccuracies in my written comments (see attached emails) is significant.

Frankly, since Mr. Sheltzer was gentlemanly in our email interactions, I would have thought that his sense of fairness might have extended to acknowledging that neither his office, nor any other Public Defender office, was the focus of my remarks.

Some Public Defenders and Deputy Public Defenders defending capital cases complained to me over my years as CACJ's Amicus Chair seeking assistance with funding or second counsel issues in capital cases. None was from Tulare. In sum, I have no personal information, nor did I represent that I had any information generally, about the Tulare County Public Defender's handling of any capital case other than *Vidal*.

I stand by the comments made to the Commission that I have information, from my review of the Tulare contract(s), my contacts with several Tulare County contract lawyers, and from my review of paperwork complaining about ancillary funding problems related to specific Tulare cases about reported problems in the operation of the Tulare contract system. I have participated both as an amicus, and as a consulting lawyer, in several Tulare County capital cases which underscored to me the legitimacy of expressing concerns before the Commission about the operation of that contract system as a part of a larger discussion of contract defense systems and other systemic problems related to California death penalty litigation.

It is precisely because Tulare County is not particularly well known to those who practice in urban areas (which might have been the reason why Mr. Van de Kamp asked me what drew my interest to the County as we closed out my testimony) that I used it as an example of one of many places that may not be on the radar of those making inquiry into the operation of the death penalty in California. Nothing in Mr. Sheltzer's vigorous counter-punch reaches that point.

Thank you for your consideration of this information. I also want to thank Mr. Sheltzer for being gracious enough to send me his initial email, and for sending me a copy

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of his letter to you. Please do not hesitate to contact me should you have any questions.

Sincerely yours,

A handwritten signature in black ink, appearing to read "John T. Philipsborn". The signature is stylized with a large, looped initial "J" and a trailing flourish.

JOHN T. PHILIPSBORN

encl.

cc: Michael Sheltzer, Public Defender, Tulare County
Michael Cantrall, Executive Director, CPDA
Greg Kuykendall, Executive Director, MCLAP
Marcia Morrissey, Co-Chair, CACJ Death Penalty Committee
James Thomson, Co-Chair, CACJ Death Penalty Committee



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Juvenile

Juvenile Justice Division
11200 Ave. 368, Room 103
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Fax: (559) 713-3229

March 7, 2008

John Van De Kamp, Chairman
Gerald Uelmen, Executive Director
California Commission on the Fair Administration of Justice
900 Lafayette Street, Suite 608
Santa Clara, CA 95050

Re: John Philipsborn's response of March 6, 2008

Gentlemen:

My intent in writing to you earlier this week in response to Mr. Philipsborn's summary of testimony was neither to be "amusing" nor "bombastic." A few clarifications need to be made:

- I specifically did not reference my e-mail communications with Mr. Philipsborn because I was directly responding to his published summary of testimony and it is clear that we disagree about its message. I am satisfied with his apology and written clarification that his focus was not the Tulare County Public Defender Office.
- My office has consulted with Mr. Philipsborn on a number of cases over the years, including the *Vidal* matter. As I expressed to him, I am appreciative of his efforts on *Vidal* as a representative of CACJ, an organization of which I have been a member since 1985. However, I do find his statements about funding for that case at best misinformed and at worst "outrageous." He testified that "[w]ithout the assistance of MCLAP, at the request of the Public Defender's Office, this case would likely have resulted in a miscarriage of justice. Prior to the intervention of MCLAP, Mr. Vidal was not provided necessary ancillary funding for experts with sufficient expertise in the area of mental retardation...." The first statement is outrageous; the second is just plain false.

- Finally, all of my comments have related only to my operation. I do not have any connection with or oversight of the contract system in Tulare County. It may very well have faults; however, I am not in a position to evaluate their performance, other than anecdotally. It would be improper and probably impossible for me to comment on the quality of their representation because by definition they handle cases in which my office has a legal conflict of interest. I reiterate, that while funding is always tight, salaries for attorneys hardly competitive on a statewide basis, and charging practices by the District Attorney sometimes draconian, Tulare County has never withheld funding to my office for professional and specialized services for the defense of capital cases nor have they declined supplementing those funds when I have requested.

As I mentioned in my prior communication, this office has unfortunately become quite expert in the defense of capital cases. If the Commission is really interested in learning about the reality of death penalty practice in the Central Valley, I would readily accept an invitation to address them.

Respectfully submitted,

Michael Sheltzer
Tulare County Public Defender