

CCFAJ Report on the Death Penalty: Summary of Highlights

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I. Summary of Recommendations

A. Statement of the Problem

- Commission is in full agreement with the Chief Justice's characterization of California's death penalty system as "dysfunctional." (p. 3)
- Most significant problems are excessive delay in appointment of counsel, backlog in review of post-conviction cases, and the high rate of reversal in federal court, frequently due to IAC. (pp. 3-4)
- The Chief Justice stated that if nothing is done, "the system will fall of its own weight." The Commission believes that this is the "worst possible course." (p. 4)

B. Unanimous Recommendations

The 20 Commissioners, including 10 prosecutors and law enforcement officers, recommend:

- 1) Address the backlog of post-conviction cases by expanding funding for OSPD, HCRC and the AG, and by providing sufficient funding for private attorneys to adhere to the ABA Guidelines, including compensation at prevailing rates. Prohibit flat fee contracts unless an hourly alternative available. (pp. 8-9)
- 2) Reinstate full funding for 987.9 fees. (p. 9)
- 3) Expand reimbursement to small counties for homicide trials. (p. 9)
- 4) Provide sufficient funding at the trial level for counsel to adhere to the ABA Guidelines. Prohibit flat fee contracts that do not separately reimburse expenses and have an hourly alternative. Compensate at rates that are commensurate with requirements of the Guidelines. (pp. 9-10).

AG Jerry Brown and Chief Bratton abstain from official recommendations but file separate statements that generally concur with these recommendations.

C. The Alternatives—Not Endorsed

In case the state cannot fund these required reforms, the Commission identified the following two alternatives for policymakers and voters to consider:

- 1) Narrow list of specials. The Commission cites Professor Shatz for the conclusion that under CA's current law, 87% of those charged with murder are eligible for the death penalty but less than 10% of those are sentenced to death. (p. 32) The Commission reviews the narrowing proposals of the Constitution Project and the Illinois Governor's Commission without endorsing a particular list of special circumstances. (p. 10)
- 2) Replace the death penalty with permanent imprisonment. (p. 10)

The Commission then reviews the estimated costs of each alternative (p. 10):

- Current cost of death penalty is \$137 million per year, including \$117 million at the post-conviction level and \$20 million at the trial level.
- Needed reforms will cost minimum of \$95 million per year more.
- Total projected cost is \$232 million per year.
- Reducing the list of special to those recommended by the Constitution Project would reduce the annual required expenditure for the system to \$130 million per year (including needed reforms).
- Replace the death penalty with permanent imprisonment would reduce costs to \$11.5 million per year.

D. Other Recommendations for Reform

The Commission stated that all the above, unanimous recommendations must first be implemented. If that happens, then a majority also recommends:

- 1) Consider shifting direct appeal cases from the Supreme Court to the Courts of Appeal. (pp. 12-13)
- 2) Consider filing habeas petitions in the Superior Court rather than the Supreme Court. (p. 13)
- 3) Create a permanent death penalty review commission. (p. 13)
- 4) Mandate systematic data collection on all charging decisions in murder cases, on all dispositions, and on the costs of the system. This data should be reported to the review commission to determine influence of race and

geography on death sentencing and to report to the public on costs. (pp. 13-14)

- 5) Require District Attorney's Office to adopt written policies on death penalty decisions, allowing input from the defense. (p. 15)
- 6) Reform the clemency process by amending the California Constitution to require the Governor to report to the Legislature each commutation and denial, deleting language requiring a statement of reasons. Amend the Penal Code to make it discretionary that requests for clemency by twice convicted felons be referred to the Board of Prison Terms. (p. 16)

II. Highlights from Findings, Section by Section

A. Findings in Part A: Problems and Unanimous Recommendations

Sec. 1: California's Death Penalty System

This section describes the statutory scheme in California.

Sec 2: Post-Conviction Delay

Since 2000, the average number of new death judgments has declined to 20 per year. (p. 18)

From 1977-2007, 822 death sentences were imposed on 813 different defendants. There are currently 670 people on death row, a difference of 143 individuals. These individuals are no longer on death row because of: death by natural causes (14), executions (13), and reversals not reinstated on remand (98). (p. 20)

The current backlog is so severe that CA would have to execute 5 people a month for 12 years to execute all 670. (pp. 20-21)

The average time from judgment to execution in CA is 17.2 years. (p. 22).

The average time from judgment to reversal for cases from 1987-2005 was 11 years. The average wait for federal relief was 16.75 years. (p. 23)

Main causes of delay:

- 1) Appointment of appellate counsel. There are 79 people on the row currently without counsel. The current wait is 3-5 years. (p. 23)

- 2) Scheduling argument on direct appeal. There are 80 fully briefed automatic appeals awaiting argument, wait averages 2.25 years. (p. 23)
- 3) Appointment of habeas counsel. There are 291 people on the row have no habeas counsel. The current wait is 8-10 years. (pp. 23-24)
- 4) Deciding state habeas petitions. There are 100 fully briefed cases awaiting decision. The average delay is 22 months between filing and decision. (p. 24)
- 5) Deciding federal habeas. From filing to decision in district court, the average time is 6.2 years. An additional 2.2 years elapses before the 9th Circuit decision. Much of this delay is due to the small number of published opinions and lack of evidentiary hearing in state habeas cases. (p. 24.)

As a result, the total average lapsed time is actually 20-25 years. (p. 25)

The Commission's unanimous recommendations may bring CA closer to the national average of 11-14 years. (p. 26)

Sec. 3: Problem of IAC

Federal courts are granting relief in 70% of cases, 38 out of 54 cases fully decided; IAC is the most frequent reason. (p. 27)

The ABA Guidelines recommend 2 attorneys on each case. This is not done in all counties. In some counties, appointment is delayed until the prosecution decides to seek death and/or the second attorney is paid significantly less. The failure to appoint two attorneys from the beginning delays the mitigation investigation, preventing some cases from settling. (pp. 28-30)

Flat fee contracts create conflicts of interest. (p. 29)

As a result of insufficient funding, there is a declining pool of lawyers willing to take these cases. (p. 30)

Sec. 4: Risk of Wrongful Convictions and Executions

While there is no evidence that CA has executed an innocent person, the factors previously identified by the Commission as enhancing the risk of wrongful convictions exists in capital & non-capital cases. (p. 30)

14 of 205 DNA exonerations are CA cases. Since 1979, 6 people sentenced to death have been acquitted or had all charges dismissed after reversal of their death sentences. (pp. 30-31)

In addition to wrongful convictions, there is a risk of wrongful death sentences. These are death sentences that result from discriminatory charging, inadequate resources to the defense, IAC, suppression of exculpatory evidence relevant to punishment, etc. The Adam Miranda case demonstrates this: the DA suppressed evidence that another person may have been the actual killer in a homicide used to make Miranda death eligible and used as aggravating evidence. (pp. 32-33)

According to Liebman's study of reversals from 1973 to 1995, 82% of death sentences reversed resulted in sentence of less than death—in 7%, the defendant was found not guilty. (p. 34)

Sec. 5: Recommendations Related to Capital Trials

There is little available data on the number of capital trials taking place. In the 1980's, OSPD found for every 100 cases charged: 40 went to trial on guilt, 20 on penalty, 10 resulted in death judgments. Using this to extrapolate from the current average of 20 death judgments per year, it is likely that 200 death eligible cases are charged, 80 cases go to trial, and 40 go to penalty phase each year. (p. 35)

The state has not funded 987.9 fees for more than 15 years. As a result, there are huge variations in access to resources county-to-county. The cost to LA County for 987.9 fees in 2007 was \$4.5 million. LA has about one third of the death penalty cases in the state. Thus, annual cost to the state of funding 987.9 would be about \$13.5 million. (p. 36)

Reimbursements to small counties for the costs of 187 cases should also be expanded. (p. 38)

CA trial cases don't meet the ABA Guidelines in several respects: flat fee contracts are used, there is no independent appointing authority, and counties fail to appointment a full team including 2 attorneys. (pp. 39-41)

"The Guidelines should be met in every potential capital case from the outset." This means about 200 cases a year. This may actually save money in the long run by resulting in more dispositions. (p. 43)

Sec. 6: Recommendations Related to Direct Appeals

The average time between judgment and decision of the automatic appeal is 11.7-13.7 years. In 1978-89, it was 6.6 years. (p. 45)

The delay in appointment of counsel is caused by the declining pool of attorneys willing to take these cases. (p. 45)

Budget cuts to OSP exacerbate the backlog. (pp. 46-47)

The current pay rate for appeals is \$145 per hour. Lawyers report that the benchmarks for reimbursements are too low, resulting in underpayment. 20 direct appeal attorneys are living outside of CA because they cannot afford to live within the state. Payment in the 9th Circuit, for comparison, is \$135-170 per hour. (pp. 47-48)

Sec. 7: Recommendations Related to State Habeas

There are 291 people on death row without habeas counsel. The average wait for counsel is 8-10 years. The average delay between filing and decision is 22 months. (pp. 50-51)

Of 689 cases filed in the Supreme Court since 1978, the Court has issued an order to show cause in 56 cases and held only 31 evidentiary hearings. (p. 52)

HCRC's annual budget is \$14.9 million. The agency has had 70 clients. Private counsel now have 141 habeas cases. (p. 53)

The \$50,000 available for expenses and investigation can easily be exceeded. (p. 53)

The Supreme Court allocates half of its \$15.4 million annual budget to habeas counsel, or \$7.5 million. It cannot meet the needs of the 291 unrepresented people on this budget. (pp. 53-54)

CA Appellate Defense Counsel conducted a survey of its members and found that even if expenses increased, only 1 would take habeas cases. (p. 54)

Outside of HCRC, representation doesn't meet the ABA Guidelines. (p. 54)

HCRC staff should be increased to 150 attorneys, with an annual budget of \$14.9 million, or five times the current budget. (p. 55)

Sec. 8: Recommendations Related to Federal Habeas

Nationwide, the rate of state courts affirming death sentences is 73%. In CA, the rate is over 90% for automatic appeals and higher for habeas. Nationwide, the reversal rate for federal habeas cases is 40%. For CA, it is 70%. (p. 57)

The average delay from filing a federal habeas to district court decision is 6.2 years. But the need to exhaust claims in state court increases the delay by 2 years. 74% of federal petitions are stayed for exhaustion. According to Alarcon, under-funding shifts the burden to the federal courts. (pp. 57-58)

From the district court decision to 9th Circuit decision, the average time is 4.2 years (including cert petition). (p. 58)

While continuity of counsel from state to federal court is preferred, it can't be assured if private counsel handles the habeas. This can be done if HCRC handles the case. (pp. 58-59)

III. Findings in Part B: The Alternatives

1) Narrow List of Special Circumstances

If CA limited the list of special circumstances to the five recommended by the Constitution Project and the Illinois Governor's Commission, it would have 368 people on death row, instead of 670. (p. 64)

Commissioner Streeter proposes further limiting death eligibility to crimes that affected all citizens of state. (pp. 67-68)

If the statute is narrowed, those who's crimes fall outside should not be executed. 10 of the 13 already executed in CA would have met the multiple murder special under the Constitution Project proposal. (p. 69)

This reform would have little impact on most people on death row because most won't be executed anyway. The state would save \$27 million per year just on housing costs alone. (p. 69)

The current cost of housing individuals on death row is \$90,000 per year per inmate, or \$63.3 million annually. Reducing to 5 specials would reduce this amount to \$35 million per year. (p. 70)

The Commission expects there would be 11-12 new death judgments per year under this limited system, rather than 20 under the current system. (p. 70)

2) Abolition

There are 3,622 currently serving LWOP in CA. Each year, about 120 new people are sentenced to LWOP. (p. 72)

Eliminating death penalty would reduce trial costs. (pp. 72-73)

Eliminating death penalty would reduce appellate costs. The Courts of Appeal decided 100 LWOP appeals in 18.6 months. (pp. 73-74)

Eliminating the death penalty would reduce habeas costs. There is no right to appointed counsel in habeas in LWOP cases. (p. 75)

Total estimated savings: more than \$100 million per year. (p. 76)

In addition, this alternative would avoid the one time cost of constructing a new death row, currently estimated at close to \$400 million. Operating the new facility will cost an estimated \$1.2 billion over next 20 years. (pp. 76-77)

3) Estimating the Costs of the Alternatives

This section summarizes many of the cost figures cited above, with chart. (pp. 79-84).

IV. Findings in Part C: Other Recommended Reforms

1) Reducing the Supreme Court Backlog

The majority of the Commission recommends that “consideration be given to” transferring cases from the Supreme Court to the Courts of Appeal, if the unanimous recommendations above are implemented. (p. 87) Dissenters are: Bellas, Cottingham, Hill, Hing, Moulds, Ridolfi, and Totten (p. 12).

The Commission unanimously recommends allowing habeas cases to be filed in the Superior Court, if the unanimous recommendations above are implemented, with more evidentiary hearing to be conducted and written findings. (pp. 89-90)

2) Explaining Racial and Geographic Disparities

Further study of these problems is needed. Although evidence of “variation” in death sentencing based on race and geography was presented, the Commission

is not ready to recommend comparative proportionality review or statewide charging standards without additional data. (p. 96)

3) Comprehensive Data Collection & Monitoring

The Pepperdine survey sought information about the charging process from DAs in 58 counties. 20 counties never responded, including 5 of the top 10 death penalty counties. (pp. 96-97)

Rand had a similar experience trying to study costs of the death penalty, with attorneys from both the defense and prosecution failing to provide needed data. (p. 99)

A majority of the Commission believes a Death Penalty Review Panel should be created to track and report annually on the costs, demographic effects, and other issues related to administration of the death penalty. (pp. 100-102)
Dissenters are: Hill, Mayorkas, and Totten (p. 13)

A majority of the Commission also believes that mandatory data collection should be implemented. (p. 102) Dissenters are: Boscovich, Cottingham, Dunbar, Hill, Mayorkas, Fox, and Totten (p. 15)

4) Need for Greater Transparency in Exercise of Prosecutorial Discretion

The ACLU surveyed defense lawyers on prosecutor charging practices and found significant variation in how and when decisions are made. (pp. 103-04)

The Commission unanimously recommends that all District Attorneys should adopt office policies on when and how the decision to seek death is made, allowing input from the defense. (p. 104)

5) Clemency Reforms

Denials of clemency should be preserved in records of the Legislature. (p. 106)

The requirement for the Supreme Court to concur in clemency for a twice convicted felon should be repealed. (p. 106-07)

The Governor should receive information from attorneys for the defendant and meet with them. (p. 107)