

Supplemental Statement on Repealing the Death Penalty

by the following Commissioners:

Diane Bellas, Alameda County Public Defender
Rabbi Allen I. Freehling, Executive Director, City of Los Angeles Human
Relations Commission
Michael Hersek, California State Public Defender
Bill Ong Hing, Professor, U.C. Davis School of Law
Michael P. Judge, Los Angeles County Public Defender
Michael Laurence, Executive Director, Habeas Corpus Resource Center
Hon. John Moulds, Magistrate Judge, U.S. District Court – Eastern District
Douglas Ring, Businessman, The Ring Group

June 30, 2008

Introduction

We support the recommendations of the Commission if Californians elect to continue the death penalty. However, we write separately because, after carefully considering all the information and evidence put before the Commission, we believe that the death penalty should be repealed. The death penalty is too costly, the possibility is high that a person who has been wrongfully convicted will be put to death, capital punishment inordinately affects communities of color, the imposition of the death penalty varies greatly from county to county, a low income defendant faces a troubling disadvantage when charged with a capital offense, the death penalty forecloses any possibility of healing and redemption, the death qualification juror requirement inherently and unjustly biases the process against the defendant, and California should follow the lead of other civilized societies who have concluded that the death penalty be abolished.

The Commission's report is the product of serious deliberations over the fairness of the death penalty in California. All members took their responsibilities seriously, with a deep commitment to justice. We are convinced that when it comes to the death penalty (and indeed punishment for any crime) every member of the Commission wants to make sure that the convicted person is the actual perpetrator, in other words, that no innocent person is convicted of a crime.

We submit this separate statement with the greatest respect for our co-commissioners who have chosen not to comment more broadly. However, we present these additional views out of a sense personal duty to the public for whom we pledged responsibility when we agreed to serve. The Commission report is the result of hard, collaborative work aimed at outlining how the death penalty can be administered in a fair and just manner; in short, the recommendations address how to make the system functional. However, as we listened to testimony, read written submissions and research, and participated in Commission discussions, it became clear to us that the question of whether to

continue the death penalty at all had to be considered; we felt that the public should know that there are good reasons to consider abolishing the death penalty beyond the system's dysfunctionality.

Summary of Reasons

Here is a brief summary of the reasons that have convinced us that the people of California ought to repeal the death penalty.

Costs. The resources that go into a death penalty case are enormous. The pursuit of execution adds millions at each phase of the process, from trial, to appeal, and habeas proceedings. For example, a death penalty trial costs counties at least \$1.1 million more than a conventional murder trial. The state spends at least an additional \$117 million a year on capital punishment, about half of it on prison expenses that exceed the usual costs of housing inmates and the rest on arguing and judging death penalty appeals. The costs mount because death penalty trials and appeals take far longer than others, involve more lawyers, investigators and expert witnesses, and displace other cases from courtrooms. In contrast, adopting a maximum penalty of life without possibility of parole (for which there is growing sentiment) would incur only a fraction of the death penalty costs, including prison expenses. Our personal view is that funds spent administering the death penalty would be better spent on other California priorities like health, education, and infrastructure, or for providing direct financial and social services to the relatives of crime victims.

Racial and geographic variation. The Commission considered research by Professors Glenn Pierce and Michael Radelet on variations in the death penalty related to race and geographical location. The counties with the highest death penalty sentencing rates tend to have the highest proportion of whites in their population and are more rural. Also, those who kill African Americans and Latinos are less likely to be sentenced to death than those who kill whites. The Commission was not willing to recommend comparative proportionality review in death penalty cases, as required in some states, and thought that the racial data was insufficient on which to base recommendations. In other words, the good faith of local prosecutors should be given deference. In our view, the Pierce and Radelet data and similar research are good cause to recommend termination of the death penalty. The data are troubling, and leaving these important determinations to the good faith of local prosecutors, who are subject to political winds, is fraught with potential inconsistency and danger. The Commission came across no evidence of intentional racial motivation on the part of prosecutors who seek the death penalty. Yet, persons of color have been sentenced to death at rates far exceeding their numbers in the population. Why? Our society has not reached the point where unconscious racism and institutional bias based on past processes and beliefs have been eliminated. We fool ourselves if we believe that we have evolved beyond institutional racism in our state and country. Consider the fact that the homicide rate for black and Latino victims is much higher than white victims. Violent crime in low-income Southeast Asian communities is on

the increase as well. Poverty and socioeconomic challenges in those communities create racial impact whether we like it or not. The correlation between poor communities (that are comprised of many blacks, Latinos, and Southeast Asians) and crime and inadequate representation is just too high to accept capital punishment as a potential penalty.

Economic disadvantage. Another regrettable feature of the death penalty is that it disproportionately punishes the poor. In *Furman v. Georgia*, Supreme Court Justice William Douglas noted, “One searches our chronicles in vain for the execution of any member of the affluent strata in this society.”¹ Economically deprived, marginalized Californians are particularly vulnerable in society and within the judicial system. Over 90 percent of defendants charged with capital crimes are indigent, and as a result the vast majority of death row inmates in California are poor. In our view and experience, a poor defendant initially may be at a disadvantage primarily because poverty fractures his or her past. How can a picture be painted of such an individual who rarely went to school or saw a doctor, whose own parents might be unknown to him or her, whose illiteracy compromises the ability to participate fully as a member of the defense team, whose “neighbors” were transient? A jury can be made aware of these things, but they do not “mitigate” in the common sense of that word. A person who can finance a death penalty defense will have no trouble establishing history as a student, family member, patient, neighbor, employee or even employer. Thus, poverty creates serious disparities in the administration of justice as well. A person of means can afford to employ forensic experts with the most impressive resumes who may have access to nationally acclaimed labs. In contrast, those of modest means are often limited to experts on a court-appointed list who have agreed to work at the lowest end of the compensation scale who are likely to lose the battle of curricula vitae. Furthermore, the indigent accused may not be fortunate enough to be represented by an institutional Public Defender team with the experience, skills, and resources to provide high quality, zealous advocacy. Instead, such an indigent may be saddled with an appointed lawyer who lacks those essential qualities. Such a defendant lacks the sophistication to know whether the appointed lawyer is properly preparing the guilt and penalty defenses and no one is monitoring the preparation. A person of means can afford to hire a team and, with money as leverage, is in a better position to insist that the entire team explain all the alternatives and strategies that are available. The person who can hire a ten-person defense team is an aberration. The more likely scenario involves the middle class defendant who pools all the family resources and puts up the house to pay an attorney who, it turns out, has never tried a capital case. In those cases, the client may have been better off in a California county with a Public Defender office where death penalty cases generally are well handled (with the defendant assigned two attorneys at the outset, unlike court-appointed systems where second chair is appointed after the preliminary hearing and after the district attorney has made the final decision regarding whether to seek death). Most county Public Defender offices have defense investigators and

¹ 408 U.S. 238 (1972).

in-house expertise on a myriad of issues and topics. The problem is that depending on where the crime occurs in California, the defendant could have all of this or none of it, and that is the travesty caused by poverty. In short, the death penalty has a troubling, disparate impact on the poor.

Risk of error. While the Commission found no conclusive evidence that any wrongfully convicted person has ever been executed in California since 1977, the risk is unmistakable. Many jurists and researchers are convinced that the likelihood of wrongly convicted defendants having been executed in the United States is high. Unfortunately, in our criminal justice system, wrongful convictions arising from such factors as faulty eyewitness identification, false confessions, police mistake or misconduct, and prosecution mistake or misconduct occur with unacceptable frequency. Inept defense representation, lack of defense resources, and shoddy investigations also increase the risk of error. Many individuals on death row have been exonerated or otherwise have had their convictions set aside. That means that now or in the future, a person improperly sentenced to death will likely be sitting on California's death row. We have experienced advances in DNA science, but the problem is that in the vast majority of criminal cases, DNA evidence is not available. This all raises the grim prospect that someday a mistake will be made (if one has not already been made of which we are unaware), and an innocent person or one wrongfully sentenced will be put to death in California. There is good reason why experienced Supreme Court justices from Douglas and Blackmun to O'Connor and Ginsburg, as well as other jurists across the country, have expressed great skepticism about the accuracy and fairness of the implementation of the death penalty.

Closing off other options. Another major concern that the death penalty raises for us is that it closes the door on any possibility of redemption and healing, something that we should all care about as a civil society. We heard testimony from relatives of murder victims who had the opportunity to meet with the murderers of their loved ones. Several were convinced of the sincerity of remorse that the perpetrators expressed and believed in their redemption. Those experiences have convinced many such relatives that capital punishment must be abolished. Loved ones of murdered victims have shared with us their poignant experiences of finding a comforting balm, produced by extolling life over death by virtue of their advocacy of a sentence of imprisonment until death without execution, for those convicted of such crimes. Moreover, some of those who have lost family members report they have benefited as a result of participating in what are essentially strength-based therapeutic sessions together with prisoners who demonstrated honest remorse. In addition, there are some loved ones who receive spiritual validation and fulfillment by assisting those convicted who genuinely pursue redemption in their own penitential journey toward the ultimate judgment of their savior. Are some individuals beyond redemption or rehabilitation? Probably. But being sentenced to life without the possibility of parole addresses that problem. A civil and compassionate society should embrace the opportunity to develop the humanity in these individuals through our own humanity, but the death penalty forecloses that option.

Death qualification. We are also deeply troubled by the death qualification requirement for jurors. As the Commission report points out, during jury selection, potential jurors in capital cases are questioned about their views regarding capital punishment in order to determine whether they will be able to follow the law in deciding what sentence to impose. In order to be "death-qualified" to serve on a capital jury, a person must be willing to consider all of the sentencing options - usually death and life imprisonment without parole. If their opinions would prevent them from considering any of the sentencing options, then they are not "death-qualified" and are barred from serving on the jury. This culling of potential jurors based on their moral views may produce a jury that looks quite different from the community at large and also, as some studies show, may bias the jury toward a verdict of guilt for the defendant. Capital juries tend to be less representative with respect to gender and race because women and African Americans are more opposed to the death penalty than white men. Researchers have found that the jury in capital trials is more biased toward the prosecution and a guilty verdict as compared to the juries in robbery trials or non-capital murder trials. There is evidence that death qualification biases the jury in two different ways. First, it tends to select jury members who are "conviction prone." Second, the very process of death qualification may further bias the jurors. A credible argument can be made that questioning the jurors intensively about punishment, before the trial even starts, suggests that there will be a sentencing phase of the capital trial – implying that the defendant is probably guilty. Death qualified juries deliberate less thoroughly and possibly less accurately than juries that better represent the whole population. This is borne out by a study that reported that over 40 percent of jurors in capital cases surveyed admitted they had already decided on the penalty before the guilt phase had concluded. Thus, the requirement of a death qualified jury in itself causes unfairness.

Evolving standards in other countries. Capital punishment has been abandoned by a majority of the countries of the world. The list includes allies and many with whom we share a common heritage like the United Kingdom, Germany, France, Spain, Mexico, Ireland, the Philippines, and Canada. Even countries like Russia and Myanmar have a de facto ban on the death penalty. In Israel, capital punishment is illegal in almost all circumstances; the death penalty was abolished there in 1954 with the exceptions of conviction for genocide, war crimes, crimes against humanity, crimes against the Jewish people, and treason in wartime. As a death penalty jurisdiction, California is in the company of such countries as North Korea, China, Iran, Saudi Arabia, Libya, Kuwait, Pakistan, Afghanistan, Cuba, and Egypt.

The Commission report points out that New Jersey abolished the death penalty this past December. In doing so, New Jersey joined thirteen other states (Alaska, Hawaii, Iowa, Maine, Massachusetts, Michigan, Minnesota, New York, North Dakota, Rhode Island, Vermont, West Virginia, Wisconsin), plus the District of Columbia and Puerto Rico, to ban capital punishment. Illinois has had

a moratorium on the death penalty for several years. New Jersey's ban came on the heels of a state Death Penalty Study Commission report that concluded that the death penalty did not fit with evolving standards of decency, was more costly to the state than life in prison, did not effectively prevent violent crime, and could lead to innocent people being executed. The commission – comprised of prosecutors, law-enforcement, victims, religious groups, and individuals – also reported that the death penalty law had not resulted in an execution since 1963 and was unfair for victims' families seeking swift justice.

Voices of Relatives of Victims

We can understand the desire of relatives of murder victims to see the murderers put to death by the state. Revenge, retaliation, and retribution are natural responses for many human beings. The Commission received some testimony to this effect. But in the words of former Missouri Supreme Court Justice Charles B. Blackmar, “The relatives of the victim have the right to demand swift and sure punishment, but they do not have the right to demand death when the process is so severely flawed.”² We sincerely wish that victims' families who are looking for revenge or closure through the death penalty could find peace for their pain and agony through some other means.

In contrast, the Commission heard the words of other relatives of victims who are opposed to the death penalty. We admire all of the courageous relatives of victims who came before the Commission (both for and against the death penalty) to testify. However, we were particularly moved by those who spoke in opposition to the death penalty; we honestly do not know if we would have the ability to find forgiveness and compassion in our hearts under the same circumstances. It would be so much easier to hate and to lash out at the perpetrator. But knowing what we now know about the death penalty and why we think it should be repealed, we pray that we would have the ability and capacity to choose forgiveness over retribution if a loved one were murdered. Here are examples of those relatives of victims who demonstrated such remarkable capacity:

- Aba Gayle spoke of her twelve years of anger and rage, until she wrote to the murderer of her daughter. She now has visited the man in San Quentin many times, and she has forgiven him. He has expressed deep remorse and has wept while he apologizes. The man who murdered Aba's daughter no longer exists in her opinion. She feels that state-sanctioned capital punishment would tarnish the memory of her daughter.
- Dawn Spears' daughter was murdered, leaving three children. Dawn does not want the children growing up with hate in their hearts. She feels that if she wanted death for the murderer, the message she would be conveying

² Charles B. Blackmar, *Death Penalty Process is Full of Fatal Flaws* (Letter to the Editor), ST. PETERSBURG TIMES, Feb. 15, 2003, available at: http://www.sptimes.com/2003/02/15/Opinion/Death_penalty_process.shtml

to the children is that it's okay to react violently. She cannot live with that in her heart, and she does not want her grandchildren to live with that in their hearts.

- The murderers of Barbara Zerbe Macnab's father were executed even though her mother pleaded with the court to spare their lives. Barbara testified that capital punishment does not lessen the pain of the victim's family. Revenge is not beneficial to those who have lost a loved one.
- The daughter of Amanda and Nick Wilcox was murdered by a deranged gunman who went on a rampage. Mr. and Mrs. Wilcox urged the prosecutor not to seek the death penalty. They knew that their daughter would not have wanted the broken, expensive, and violent practice of capital punishment administered in her name. They believe that life without possibility of parole is appropriate for holding murderers accountable and keeping society safe.
- Aundre Herron's brother was murdered, Herron first had a violent reaction to seek revenge. But she then realized that doing so would have forever tied the memory of her brother to an act that was antithetical to whom she was. Herron testified that if the state really cared about relatives of victims, then money should be spent on grief counseling, funeral expenses, loss of income, and other resources that will actually help them heal.
- Lorrain Taylor's twin boys were gunned down in Oakland. She knows that her sons would not want any other mothers to feel the pain that she felt by imposing the death penalty on the perpetrators. She feels that revenge is not justice.

These individuals mirror the sentiment of Coretta Scott King, widow of Dr. Martin Luther King, Jr.: "As one whose husband and mother-in-law have died victims of murder assassination, I stand firmly and unequivocally opposed to the death penalty for those convicted of capital offenses. An evil deed is not redeemed by an evil deed of retaliation. Justice is never advanced in the taking of a human life. Morality is never upheld by a legalized murder."³

Closing

Why consider the repeal of the death penalty? No government action taken against an individual is more serious than the imposition of the death penalty. Nothing is more severe. Nothing is more final. Our position on the death penalty says much about us as a people.

After full consideration of the information that has been brought to the attention of the Commission, we are compelled to conclude that the death penalty should be repealed in California. Its process and administration are inherently flawed. Its costs are too high.

³ See *Archbishop O'Malley: Death Penalty*, THE PILOT, May 7, 2004, at <http://www.rcab.org/Pilot/2004/ps040507/OMalley.html>