

Out of Commission

By Stephen F. Rohde

At a pivotal moment in the debate over capital punishment, a new report finds that California's death penalty system is "dysfunctional" and "close to collapse."

For decades, opponents of capital punishment have been saying just that: The death penalty doesn't work, it risks executing innocent people, it's riddled with (literally) fatal errors and it costs far more than the alternative of permanent incarceration.

Finally, the independent, nonpartisan California Commission on the Fair Administration of Justice, following a comprehensive four-year study, agrees.

The 22-member commission was chaired by John K. Van de Kamp, and included prosecutors, public defenders, law enforcement officials, academics and others. It concluded that the "system is plagued with excessive delay in the appointments of counsel for direct appeals and habeas corpus petitions, and a severe backlog in the review of appeals and habeas petitions before the California Supreme Court. Ineffective assistance of counsel and other claims of constitutional violations are succeeding in federal courts at a very high rate."

Those of us who oppose the death penalty have been decrying the extent to which California's system fails to produce reliable results. Now the commission has found that federal courts in 54 habeas corpus challenges to California death penalty judgments granted relief in the form of a new guilt trial or a new penalty hearing in 38 of the cases, or an alarming 70 percent.

Even California's Chief Justice

lawyers actively engaged in the administration and operation of California's death penalty law, as well as academics, victims of crime, concerned citizens and representatives of advocacy organizations. The commission also conducted independent research and received 66 written submissions.

While abolitionists often speak out against the death penalty on deeply moral grounds, we rarely rely on pragmatic reasons. But for the wider community, the astronomical cost of capital punishment may prove to be its undoing. The commission found that "by conservative estimates, well over \$100

million" is spent on capital punishment annually. "The strain placed by these cases on our justice system, in terms of the time and attention taken away from other business that the courts must conduct for our citizens, is heavy."

Yet, to reduce the average lapse of time from sentence to execution by half, to the national average of 12 years,

the commission estimated that taxpayers would have to spend nearly twice what we are spending now.

Critics of the death penalty have warned for decades that we are sending innocent people to death row. Although the commission stated that it had learned of no credible evidence that the state of California has actually executed an innocent person (and we believe it has), it could not conclude "with confidence that the administration of the death penalty in California eliminates the risk that innocent persons might be convicted and sentenced to death."

While nationally, there were 205 exonerations of defendants convicted of murder from 1989 through 2003 (74 of whom were sentenced to

the commission made interim recommendations to reduce the risks of wrongful convictions resulting from erroneous eye-witness identifications, false confessions and testimony by in-custody informants, although bills were passed by the Legislature, they were all vetoed by Gov. Arnold Schwarzenegger. If there is not the political will and determination to heed the recommendations of the commission to "fix" the system, doesn't it follow that capital punishment itself should be abolished?

The commission concluded that the "time has come to address death penalty reform in a frank and honest way. To function effectively, the death penalty must be carried out with reasonable dispatch, but at the same time in a manner that assures fairness, accuracy and non-discrimination." Accordingly, first and foremost, the commission unanimously recommended a series of reforms to address ineffective assistance of counsel, which it estimated would cost at least \$95 million more per year than is presently including that.

The California Legislature immediately address the unavailability of qualified, competent attorneys to accept appointments to handle direct appeals and habeas corpus proceedings in California death penalty cases by expanding the Office of the State Public Defender to an authorized strength of 78 lawyers, a 33 percent increase in the OSPD budget, to be phased in over a three-year period, by expanding the California Habeas Corpus Resource Center to an authorized strength of 150 lawyers, a 500 percent increase to its current budget, to be phased in over a five-year period; that the staffing of the offices of the attorney general, which handle death penalty appeals and habeas corpus proceedings be increased as needed, and that funds be made available to the California Supreme Court to ensure that all appointments of private counsel to represent death

If there is not the political will and determination to heed the recommendations of the commission to 'fix' the system, doesn't it follow that capital punishment itself should be abolished?

Even California's Chief Justice Ronald George told the commission that if nothing is done, the backlogs in post-conviction proceedings will continue to grow "until the system falls of its own weight."

The commission pointed out what abolitionists have been saying for years that the "failures in the administration of California's death penalty law create cynicism and disrespect for the rule of law, increase the duration and costs of confining death row inmates, weaken any possible deterrent benefits of capital punishment, increase the emotional trauma experienced by murder victims' families, and delay the resolution of meritorious capital appeals."

Supporters of capital punishment have dismissed our criticisms as biased, ill-informed and lacking in evidence. But the commission's report is based on three public hearings, in Sacramento, Los Angeles and Santa Clara, where 72 witnesses testified, including judges, prosecutors and defense

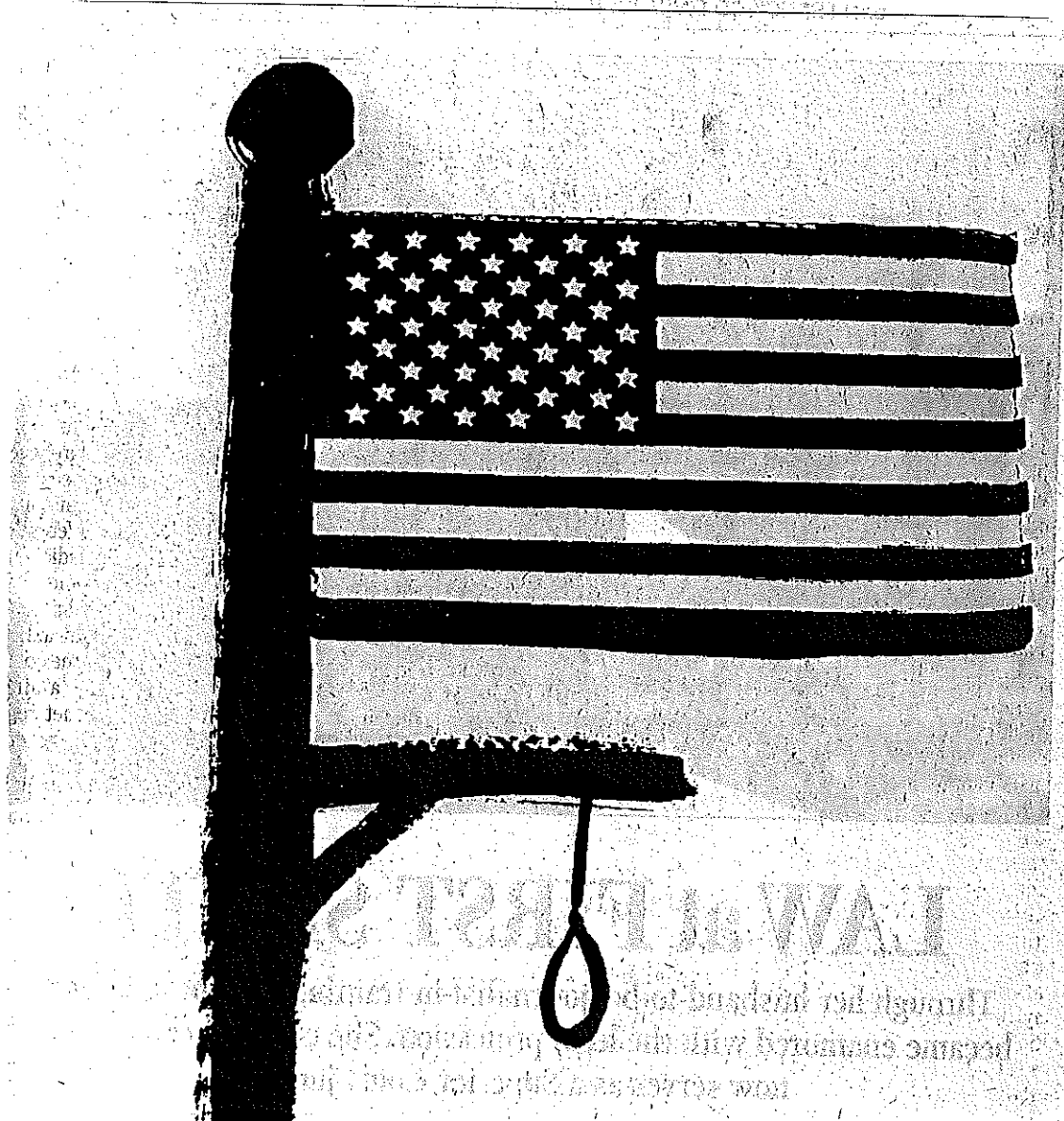
2003 (74 of whom were sentenced to death) 14 of the 205 murder cases took place in California. Since 1979, six defendants sentenced to death in California, whose convictions were reversed and remanded, were subsequently acquitted or had their murder charges dismissed for lack of evidence.

Two of the most dangerous flaws in the criminal justice system are erroneous eyewitness identifications (which the commission found have been identified as a factor nationwide in 80 percent of exonerations), and false confessions (where it is a factor in 15 percent of exonerations). California State Public Defender Michael Hersek reported to the commission that of the 117 death penalty appeals currently pending in his office, 17 featured testimony by in-custody informants, and another six included testimony by informants who were in constructive custody.

Yet over the last two years, when

private counsel to represent death row inmates on direct appeals and habeas corpus proceedings, comply with ABA Guidelines, and are fully compensated at rates that are commensurate with the provision of high quality legal representation and reflect the extraordinary responsibilities in death penalty representation.

The commission also recommended that funds be appropriated to fully reimburse counties for payments for defense services and reexamine the current limitations on reimbursement to counties for the expenses of homicide trials, that California counties provide adequate funding for the appointment and performance of trial counsel in death penalty cases in full compli-



ance with ABA Guidelines.

Without taking sides, a majority of the commission presented detailed information on replacing the death penalty with a maximum sentence of lifetime incarceration or narrowing the "special circumstances" justifying the death penalty, to assure a fully informed debate.

Framing the debate in terms of the total cost of four alternatives, the commissioners estimated that California could annually spend \$137.7 million to maintain its current dysfunctional system, \$216.8 million to reduce the length of the process to 12 years, \$121 million for a more narrow death penalty or \$11.5 million by replacing the death penalty with a policy of terminal confinement.

Leaving no doubt that the report is a stern rebuke to the whole system, five commissioners from

the law enforcement community lodged an angry dissent, claiming it will "undermine public confidence in our capital punishment law and procedure," that it failed to adequately discuss arguments in favor of the death penalty, that uniformity among counties in seeking the death penalty for comparable crimes is not mandated and that capital punishment reflects the will of the people.

But a far larger group of 10 commissioners took the unprecedented step of filing two supplemental statements calling for an outright repeal of the death penalty based on various factors including its cost, the risk of wrongful executions, the disproportionate impact on communities of color, geographic disparities, disadvantages facing poor defendants, the unjust bias triggered by allowing only "death qualified" jurors, how the death penalty forecloses the possibility

of healing and redemption and the example set by other civilized societies that have abolished the death penalty.

The last time a state, New Jersey, undertook such a comprehensive examination of its death penalty system, it led to its abolition. Justice Harry Blackmun ended his career on the Supreme Court by declaring that he would no longer "tinker with the machinery of death." Unless California is prepared to divert hundreds of millions of dollars year in and year out to fund the recommended reforms, the time has come for this state to end the death penalty once and for all.

Stephen F. Rohde, a constitutional lawyer in Los Angeles, is a vice president of Death Penalty Focus and has represented two death row inmates, including Stanley Tookie Williams in his unsuccessful clemency petition.