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From the Los Angeles Times

Judge takes on death row gridlock

Federal appeals jurist urges reforms, saying heavy backlog and a dysfunctional system make capital punishment an illusion.

By Henry Weinstein

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The death penalty system in California is so backed up that the state would have to execute five prisoners a month for the next 10 years just to clear the prisoners already on death row.

The average wait for execution in the state is 17.2 years, twice the national figure. And the backlog is likely to grow, considering the trend: Thirty people have been on death row for more than 25 years, 119 for more than 20 years and 408 for more than a decade.

These statistics were cited by an influential judge in a recent article, one in a small but growing number of critiques of California's death penalty machinery, which has proved to be so clogged that one jurist has called capital punishment in the state an illusion.

Arthur L. Alarcon, a veteran judge on the U.S. 9th Circuit Court of Appeals in Los Angeles, supports capital punishment and has voted in favor of death sentences more often than he has voted against them. His article in the *Southern California Law Review* is drawing considerable attention, not least because, unlike many critics, he does not blame delays on defense lawyers or liberal judges.

Rather, he has called for a radical overhaul of what he described as systemic problems, including a critical shortage of defense lawyers to represent death row inmates on appeal and an inefficient use of judicial resources.

Alarcon suggested a major infusion of cash to attract lawyers to the difficult cases. He also proposed shifting automatic judicial review of death penalty cases to the state's appeals courts.

Taking sole jurisdiction from the California Supreme Court, which has had exclusive oversight since California became a state in 1850, would require a constitutional amendment, a tall order. Alarcon, however, said the alternative could be dire.

"The delays in reviewing capital cases will continue to grow in California to the point where the United States Supreme Court may someday hold that such imprisonment is, in and of itself, cruel and unusual punishment," he argued.

Alarcon, 81, has a long history with the death penalty. A former prosecutor who tried death penalty cases, he served as the clemency secretary to Gov. Pat Brown when Brown was considering requests to commute death sentences. More recently, he cast a key vote paving the way for the 1992 execution of Robert Alton Harris, the first inmate put to death by the state in 25 years.

The veteran jurist's article is being studied in legal circles at the same time the U.S. Justice Department is putting the final touches on regulations to give the attorney general increased sway over death penalty cases, including the power to shorten death row inmates' time to appeal convictions to federal courts.

A legal challenge to the constitutionality of execution by lethal injection has put California executions on hold for the last 18 months.

Alarcon does not offer an opinion on either the Justice Department proposal or the lethal injection moratorium. Rather, his statistics-heavy article is a dark assessment of how the death penalty, under normal circumstances, works -- or doesn't.

California's death row, with 667 inmates, is the nation's largest.

While more than 50 condemned prisoners have died of old age, suicide or prison violence in the last three decades, only 13 have been executed since capital punishment was reinstated in 1978.

In an interview, Alarcon said he believes neglect by politicians and particularly the failure of the Legislature and the governor to put more money into the process are at the root of the dysfunction.

"There may be no interest on the political side in doing something," Alarcon said. "They may be comfortable with a de facto abolition of capital punishment."

"We have found a way of honoring our ambivalence about the death penalty," said UC Berkeley law professor Franklin Zimring, who has written about capital punishment. "We

hand out a lot of death sentences and then, in many ways, are relieved when the system slows down."

Alarcon listed 20 procedural hurdles to execution, including years-long delays in preparing trial transcripts and in appointing lawyers for appeals and drawn-out deliberations by state and federal courts, including the U.S. Supreme Court.

The California Supreme Court's seven justices spend about 20% of their time and resources on death penalty cases, Alarcon said.

He argued that it would be wiser to spread review among the 105 justices seated in the state's six appellate districts, subject to review by the state high court.

The dearth of lawyers to handle death penalty appeals, which are automatic under state law, stems from the state's serious under-funding of such work, Alarcon said.

The hourly rate for court-appointed attorneys in capital cases is \$140, less half the average awarded by federal courts in California to lawyers appointed in some kinds of civil cases, Alarcon said.

Alarcon said that in a recent 9th Circuit case, a lawyer representing an insolvent company was paid \$540 an hour.

"I would be hard-pressed to explain to a bartender or a non-lawyer acquaintance how it is appropriate that an appellate lawyer who is attempting to save a human being's life is compensated at the rate of \$140 per hour while the same lawyer could receive as much as \$540 per hour to represent an insolvent corporation in bankruptcy proceedings," the judge wrote.

The California Legislature, Alarcon said, also has failed to adequately fund investigation costs for complicated capital appeals. The current cap on expenses is \$25,000 a case.

Elisabeth Semel, who runs the death penalty clinic at UC Berkeley's Boalt Hall School of Law, said some private firms spend \$500,000 or more representing inmates in post-conviction cases, including hunting down and interviewing witnesses and experts.

Currently, 88 inmates on death row have no lawyer for either their mandatory direct appeals or the habeas proceedings that follow, according to Michael Laurence, executive director of the state's Habeas Corpus Resource Center, who was interviewed by Alarcon. And 197 have lawyers for the direct appeal but not for the more complex habeas cases, he said.

Alarcon predicted that the situation will get worse. No lawyers have been appointed for any death row prisoner sentenced since 2003, he said. Of the 17 sentenced to death in 2002, two have lawyers.

California Chief Justice Ronald M. George said Alarcon's proposals "merit close review."

"I don't favor arbitrary time limits" for resolving capital cases, George said. But he added, "We should know within five years if a death sentence should be reversed or carried out. . . It is a negative commentary on the whole justice system to have these cases languish for 20 years."

Two state appeals court justices differed on the merits of Alarcon's proposal to shift some death penalty appeal work to their courts.

"I am an admirer of Judge Alarcon, but I really don't think it will solve the problem," said Roger W. Boren, presiding justice of the 2nd Appellate District in Los Angeles. "They are jumbo-type cases" and if the appellate courts kept their current cases, "we would be hard pressed" to give enough attention to the appeals of people "facing the ultimate penalty," he said.

On the other hand, J. Anthony Kline, presiding justice of the 1st Appellate District in San Francisco, said, "My own view is that it makes little sense to exclude the courts of appeal from the process on capital cases." However, Kline and legal observers both liberal and conservative said altering the state Constitution would be difficult.

Santa Clara University law professor Gerald F. Uelmen said that although he agreed with the need to provide greater compensation for defense appellate lawyers and investigators, he was concerned that shifting review to state appeals courts could lead to inconsistent decisions.

Still, Uelmen said he will welcome Alarcon's appearance in January, when the California Commission on the Fair Administration of Justice, a state-appointed board studying criminal justice reform, takes up the death penalty.

"With 650 cases backed up," said Uelmen, the commission's executive director, "we have to look at all alternatives."

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