Multi-count complaints

Assume the magistrate dismisses one count of a multi-count complaint, and the defendant is held to answer on the remaining counts. In the days before section 871.5, if the district attorney believed that the magistrate erred in dismissing the count, he could simply file that count along with the counts for which defendant *was* held to answer, thereby forcing the defendant to challenge that count in a 995 motion. Does 871.5, in establishing a new method for the review of counts dismissed by the magistrate, now do away with that procedure, or is it merely an alternative method made available to the district attorney?

Section 871.5 is silent on the question. Where the magistrate dismisses an *enhancement* (e.g., Pen Code §12022.5,) the equities strongly favor restricting the district attorney to the 871.5 procedure exclusively, since the defendant is precluded from attacking such enhancement in a 995 motion. (*People v Superior Court (Grilli)* (1978) 84 CalApp3d 506.)

Erroneous dismissal

Suppose the magistrate, after hearing the evidence, concludes that there is insufficient evidence to believe that the defendant committed the crime and accordingly dismisses the case pursuant to Penal Code section 871. Thereafter the superior court judge in an 871.5 proceeding concludes that the magistrate erroneously dismissed the complaint and orders the proceedings before the magistrate "resumed." But in a subsequent 995 proceeding, the judge sets aside the information.

Are the People now barred by section 1387 from filing a new felony complaint against the defendant? The answer may depend upon whether the defendant is entitled to a new preliminary hearing after resumption of the proceedings before the magistrate.

The above inquiries only begin to scratch the surface of the gaping holes left in the statutory scheme of Penal Code section 871.5. The appellate courts will eventually provide us with the answers. In the meanwhile, section 871.5 belongs to the realm of imaginative trial attorneys and judges. □

Interview
Governor Edmund G. Brown Sr.

Gerald Uelmen

During Edmund G. Brown Sr.'s tenure as governor of California, he commuted the death sentences of 23 persons. He is now working on a book tracing the lives of those persons after their sentences were lifted.

In the interview that follows, Governor Brown and Gerald Uelmen discuss his philosophical and practical opposition to the death penalty, and several capital cases which came before him for review.

UELMEN: You started your career as district attorney in San Francisco. Did you ever request the death penalty in any cases you handled as district attorney?

BROWN: Not personally. I never personally tried a first degree murder case and asked for the death penalty. I tried one case where I intended to ask for the death penalty. But the counsel for the defense claimed that the only reason I was trying the case was because an election was coming along and if I were able to get gas for these two people, I thought it would further my career. This was his argument to the jury. And it happened to be true.

Flushed by the defense

So after listening to the defense argument, I stood up before the jury and I said, "Ladies and gentlemen of the jury," I said, "I don't know whether the attorney for the defense has convinced you, but he's convinced me." I said, "What I want you to do is go out and elect a foreman and I want you to return a verdict of guilty of murder of the first degree against these men, and I want you to recommend imprisonment for life."

It's not as simple as that. There were some extenuating circumstances, although it was a homicide committed in the commission of robbery, beyond peradventure a first degree murder case. The jury did return the verdict of murder in the first degree with a recommendation of life imprisonment.

Now, there have been other cases where I've instructed the assistant district attorneys in the trial of cases to ask for the death penalty; and there were, in the seven years I was district attorney, probably a dozen first degree murders with death. I can't remember. I could be wrong about that. I've never checked it out. But I have instructed them to ask for the death penalty and they did ask for the death penalty in many cases.

As a matter of fact, at that time I believed in the death penalty and was very disappointed in two or three cases where my prosecutor would come in and I'd say to them, "Did you achieve our objective?" —and they said "No, the jury brought in a verdict of guilty but they let him off with life." Period.

Liberal atmosphere

Now you must remember, however, that San Francisco is probably the most liberal city in the state of California because of its cosmopolitan population. It's very different from any other county in the state. They voted to legalize marijuana, they vote for the Democrats two and three to one every time. With a jury panel in San Francisco, you've got a tough job getting the death penalty because, I'll wager, there are more people who don't believe in the death penalty in San Francisco, or at least at that time that didn't believe in it, than any other city in the state of California.

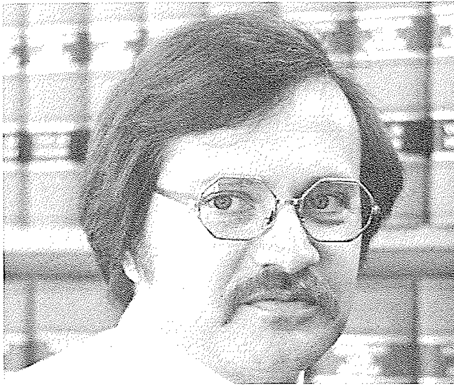
UELMEN: When was that seven-year period?

BROWN: It was 1944 to 1950. Two years during the war, and then five years after that. About seven years.

Career as attorney general

UELMEN: And then you became attorney general?

BROWN: I was elected attorney general, and during the period I was attorney general, in every case when the death penalty was returned I sought affirmance of the judgment. I can't think of any case where we found prejudicial error. There was one case, however, where I read the reports of my investigators after the death penalty had been affirmed, when I went to Justice Schauer, who had written the opinion, and I said to him, "Judge, I think under the facts as developed by the investigation, that this was not a premeditated murder. I think the man was so distraught over finding his wife with another man that all of the facts show



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that it is a crime that occurred without thinking, without premeditation."

In that particular case it was not the lover of his wife that was killed, it was a friend of theirs from whom he tried to borrow money and the man wouldn't lend him money—he was a butcher—and right along side him was a meat cleaver. He got up and hit the man over the head with the meat cleaver and then took his money and went down to Los Angeles, where 48 hours later he turned himself in with deep remorse. He'd never been in trouble before and was just grief-stricken with the fact that his wife had left him.

Commutation

But when I read the case I went to Justice Schauer, who believed in capital punishment and wrote many opinions affirming capital punishment, and convinced him to write a letter to then-Governor Warren and ask him to commute the sentence from death to life, which Governor Warren did. There were very few cases that Warren commuted from death to life.

UELMEN: During the entire period that you were DA and in your first term as attorney general, Earl Warren was governor?

BROWN: He became governor in 1942, so he was governor throughout the entirety of my service as district attorney.

UELMEN: He presided over 85 executions, and he only commuted eight death sentences. Did you have have occasion to discuss with Earl Warren his attitude on capital punishment?

Attitude of prosecutors

BROWN: No. although I discussed many things with Earl Warren about the operation of the district attorney's office. As a matter of fact, right after I was elected district attorney, I went up to see him and talk with him about the attitude of the prosecutors. And I can remember him telling me about his attitude. He gave me two rules that they asked themselves before they issued a criminal complaint or went to the grand jury. Number one: has a crime been committed? Number two: Have we a reasonable chance of attaining conviction?

And if both of these questions are not answered affirmatively, they would not issue a complaint. Not just that they could prove a case beyond a reasonable doubt to a moral certainty, but whether or not they had a reasonable chance to get a conviction. And they exercised excellent prosecutorial judgment in the Alameda County District Attorney's office; I was very impressed.

Trial by media

But it's interesting to me that when I talked to Earl Warren he told me how he attained the conviction of a man in a bribery case. How he went into the grand jury room and he'd come out and tell the press what went on in the grand jury room. The grand jurors were forbidden by statute to disclose anything that went on in the grand jury room, but Warren contended that it did not bind the district attorney. And he did it for the purpose of building up public reaction against the defendant, by the stories he was telling the press for the purpose of getting this man convicted.

You'll recall too that Warren was the chairman of the committee that proposed some constitutional amendments with respect to the right of the prosecution to comment upon the fact that the defendant did not take the stand. But when he became the Supreme Court Chief Justice, he held the very things that he proposed and supported as district attorney—he held them to be unconstitutional and in violation of the civil rights of the defendant.

Changing perspective

UELMEN: That's a good example of how your perspective can change as your office changes. And I'm sure that happened to you. You mentioned that at the time you were a district attorney and attorney general you were in favor of capital punishment. Did your attitude change when you became governor?

BROWN: I think it changed during the period when I was attorney general, when I would see some of the cases and the long delays that ensued, although the delays were far shorter than they are today. If you read the opinions of the California Supreme Court in the 40s and the 50s on capital cases, they swept away objections of the defendants on all sorts of grounds—very cavalierly. They certainly didn't go into the question of cruel or unusual punishment, or what advice the defendant was entitled to before making a confession.

The Cahan decision

The *Cahan* decision occurred during my years as attorney general. I can remember the Supreme Court of California when the question of exclusion of evidence was decided. I can remember Clarence Lynn arguing the case in the Supreme Court. I was sitting there, and I had instructed him to ask for a reversal because the evidence had been obtained illegally. And he wouldn't do it.

And so the Court looked down at me and they said, "Is that your opinion?" Well, I didn't want to get into an open quarrel in the Supreme Court chambers with my deputy. I said, "Not exactly." And I thought I could ask for further argument if they did not rule that way.

Executive clemency

UELMEN: Could you describe the procedure you used when you became governor to review petitions for clemency? How did you go about making a clemency decision?

BROWN: Well, this was established before I became governor. There was a full and complete file made by the clemency secretary, which consisted of an investigation made by the attorney general's office, submitted to you by the attorney general as to all of the facts of the case. You had a copy of the opinion. You had a copy of any letters that might have any bearing upon the case, although you didn't see them all. In the Chessman case, you had hundreds of thousands of letters.

Then you had the report of the prison psychiatrist, psychologist, and the warden. And you had the report of the district attorney and the chief of police and the defense counsel. And you got the background of the individual and you had the recommendation of the clemency secretary. And then you had a hearing and you heard

from defense counsel. I had a hearing in every case that involved the death penalty during my eight years as governor.

Clemency hearings

UELMEN: Would you personally sit in on those hearings?

BROWN: I personally sat in on every one. This was a personal judgment that couldn't be delegated to anyone else. I didn't look at the case until they'd exhausted all their appeals. When they reached the finality of judgment, then I would take it up. Now, sometimes even after I turned them down, they proceeded on a writ of habeas corpus in federal court. But to all intents and purposes, the judgment had become final. Not only in the Supreme Court of the state of California, but exercising any of their ancillary remedies in the federal court. When they reached that point, then I would have the date of execution. Then I'd have the hearing and I'd make a judgment.

I would base my judgment on the question of whether there'd been a long planning and deliberation before the killing took place. To be specific, in a case where a man killed a woman after a quarrel, he went out into the kitchen to get a knife. If he brought a knife or a gun in with him, that would have shown that he'd thought about it before he got there. And the fact that he didn't have a weapon—he got it during the period immediately prior to the killing—that indicated to me that it was not the planning, the deliberation that called for execution.

UELMEN: So, in your mind, the most important factor was how cold-blooded or deliberate the killing was?

The role of deterrence

BROWN: I also was concerned with the amount of deterrence. I had to exercise not justice, the man had had justice. Clemency is synonymous with mercy. So I had to determine whether something here justified mercy, or else they wouldn't give the governor the right to exercise clemency. That was my interpretation of the constitutional provision. So if I didn't think it would have a deterrent effect, I would grant clemency.

I recall a case where some drunks burned down a bar; they were drunk. I didn't think executing these people would be a deterrent to any other drunks. I didn't think they intended to kill. This was homicide in perpetration of arson, so you didn't have to prove intent to kill or premeditation.

UELMEN: You exercised clemency in a higher proportion of cases than any other previous governor. Do you think that was in part because of your opposition to capital punishment?

BROWN: Beyond question. I mean, my belief in the fact that capital punishment is not a deterrent, that the whole life cycle of the individual who committed the murder played a greater part in it than capital punishment. And the only moral justification for capital punishment is that it's a deterrent. I mean, you cannot kill a man or a woman for revenge. You can only kill them in self defense, in my moral standpoint. If executing someone would deter some others, then it is morally justifiable and I have no opposition to capital punishment.

Long delays

My problem is that it takes too long. By the time a person is executed any deterrent effect is lost. To kill a man like Sirhan Sirhan four years after he shot Robert F. Kennedy, I don't see any good in it. I want to punish the man. I mean, he's dangerous to society. I want to keep him out of circulation. But I can't violate the moral commandment, "Thou shalt not kill," even by the state.

UELMEN: Did you ever personally meet the condemned who were petitioning for clemency?

BROWN: Oh yes, I met several of them. I didn't meet them before I exercised clemency in any of the cases, but afterwards I met some, and since they've gotten out, I've met two or three others that I commuted who've come in to see me, to thank me.

UELMEN: Did you ever witness an execution?

BROWN: No. As a matter of fact, the first death penalty case that we had while I was district attorney of San Francisco, you get an invitation from the warden to attend the execution. And I intended to go. But two members of the homicide squad of the police department came over to see me and they said (they all call me Pat), they said "Pat, if I were you I wouldn't go to this execution." And I said "Why not?" And they said, "Because if you see one, you'll never ask for the death penalty again." I remember that very clearly. And I'm glad I never went.

Unpopular stance

UELMEN: Obviously, granting a pardon or commuting a death sentence was not a popular political stance to take.

BROWN: Every one of these guys who got the death penalty had committed a premeditated, deliberate murder in the eyes of a jury, and that decision was then backed up by a court. So if you commuted one of these wretches, it's no different today than it was then. We've had a continuing crime wave over all these years and the people, particularly in the local community, were upset at my continuing to grant clemency. This played a part in my unpopularity during the last four years of my administration. But despite that fact, I knew that it was improper and very easy to let all of these guys go to the gas chamber. I just felt I had to exercise that power.

UELMEN: Can you recall any cases where electoral politics dissuaded you from exercising clemency?

BROWN: Well, I don't like to use your term, electoral politics. But I can think of one case where there was a mentally ill young man. When I say mentally ill, he had been in an institution and psychiatrically been determined to be mentally ill. He had shown signs of violence and his mother said please don't let him out. This was in Texas, a Texas institution. They let him out. She asked them to bring him back in. They brought him back in, kept him there for 90 days and then they let him out. He was tried, pled not guilty by reason of insanity and the jury found he was sane.

Illness vs criminality

But in my opinion he was mentally ill. The court had found him sane and I wasn't going to substitute my opinion for the

opinion of three psychiatrists. But in my own heart, I felt that he was a sick boy rather than an unprincipled murderer—if there is any difference. But the crime was so horrible; he'd raped a little six-year-old girl and it was such a brutal crime. I just felt the community would be so aroused, that as I weighed my duty to exercise clemency against other things, I resolved to let this man die, let justice be done. But to this day, I've always felt that this man should not have died.

I had another case where a young boy had been in prison almost all his life. He was a young Black man, I think he was 21 or 22. He'd been in institutions since he was five years of age. He'd been shuttled from place to place. And he killed a fellow prisoner over a couple of packs of cigarettes. All he knew was the law of the jungle. He'd grown up and been in institutions all of his life. But he'd killed another prisoner before that. This was his second homicide. And although I felt that he was a creature of a prison system, the only way I could protect the lives of other prisoners, unless they wanted to keep this fellow locked up and isolated all the days of his life, was to let him be executed. And it was a cold-blooded, premeditated, laying-in-wait case of murder.

But under my concept of the mind, the ability to contemplate and think and plan a murder, I just felt that this was one that justified mercy too, but I let him die to protect the other prisoners. I talked to the warden, "Is there any way you can isolate him?" They said this fellow would kill again if another prisoner crossed him. I said to the warden, "Can you keep knives out of their hands?" He said, "They'll fashion some shape or form of knife."

Tough decisions

UELMEN: Would you say those were your two toughest decisions?

BROWN: Oh no! They were all tough. There wasn't a single, solitary death penalty case where I couldn't see some basis somewhere along the line for mercy. Background of the individual, his entire life. I concluded that in most of these cases that the person lacked something that every human, every normal human being has: remorse, compassion, sorrow. I'm convinced there are people today that can hurt another person and have absolutely no feeling about it whatsoever. It's unbelievable that this kind of person could get another person strapped and tied down and then torture them slowly to death. This has happened in several cases throughout the U.S. recently. It is my opinion that these few individuals show signs of behavioral defects early in life and could be discovered and isolated or quarantined.

But there are people like that and most of them are cases where they've been shuttled from place to place and their parents or stepparents or custodians have beaten them and hit them and these are people who are just dangerous to society and they should never get out. I mean, there are animals like that and unfortunately there are human beings like that. The same thing's true in some of these sexual molestations of little children. I think these people are very sick and their desire to touch a child is so overwhelming that they aren't able to control their own impulses. They're like an alcoholic.

Increase in capital cases

UELMEN: Do you think there are more cases like that today? When you were governor there were an average of eight death penalty cases a year. Currently the rate seems to be almost twice that, despite intervening restrictions imposed on the death penalty. Do you think juries today are more willing to impose the death penalty, or there are just more of these kinds of murders going on?

BROWN: I think there are more of these kinds of murders going on. We didn't have any of these terrible crimes where they torture the victim. I don't know what the reason for it is. I think there's more drugs, although there were drugs then, there's more promiscuity, sexually and morally. There's more violence in pictures. There was a forebearance or restraint in motion pictures, they'd black out the scene or cut it short.

Today violence is extraordinary. Of course, you can remember, we didn't have very much television. You didn't have any television until 1948, and it was pretty simple. Some of the television today, with the shooting and killing—it's not just an occasional motion picture show, the way it was when I was a child, you see it every night on television—reruns of old pictures. I don't know how to handle it. I'm not for censorship. I don't know what can be done. But I think increasing the penalties is like giving aspirin to a person with cancer. I just don't think it does a damn bit of good.

The Chessman case

UELMEN: I did want to talk specifically about the Chessman case. Actually in the Chessman case you could not have granted a pardon or a commutation if you wanted to. Is that right?

BROWN: Yes. He'd been twice convicted of a felony and I had to get the consent of the Supreme Court to act in that case. I sought the consent. The Chief Justice told me that they would not only turn it down, but they would kick me in the teeth—quote, unquote.

There's no formal procedure for petitioning the court. I would call the Chief Justice and tell him that I wanted to commute a sentence—not even in writing—but wanted to act, ordinarily, and ask him if the court in chambers could advise me of their position. From that he told me that they would turn it down, so I couldn't have done anything. I could grant him a reprieve. I granted him a 60-day reprieve.

But in the absence of some intention on the part of the court, or some action of the legislature to modify the death penalty, I couldn't give him any further reprieves. My hands were tied. I don't think people knew that, then or now.

UELMEN: Who was the Chief Justice at that time?

BROWN: Phil Gibson.