

“The Report of the Foxes: Analysis of Prosecutors’ Perspective on California’s Death Penalty”

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“The bottom line is, I don’t think we want to say there is never a chance an innocent person couldn’t be convicted and sentenced to death.” – Ward Campbell, California Attorney General’s Office; member, Death Penalty White Paper Ad Hoc Committee (CDAA), March 20, 2003

In March 2003, the California District Attorneys Association (CDAA), in collaboration with the pro-death penalty advocacy group Criminal Justice Legal Foundation, published a 127-page defense of California’s death penalty system entitled, *Prosecutors’ Perspective on California’s Death Penalty*. It is a curiously inappropriate document, coming at a time of increasing concern about the fairness, accuracy and rationale for the death penalty. Just last month, the 107th person wrongfully accused of murder was released from America’s death row. Rather than seek solutions to commonly recognized flaws in the system such as racial disparity in sentencing, inadequate counsel for indigent defendants, police misconduct and lack of standardized forensic practices, the report goes to great lengths to defend them and a myriad of other widely cited problems.

Not surprisingly, coming from the group whose death penalty verdicts have been overturned by federal courts at a higher rate than every other state in the union (*San Jose Mercury News*, 4/14/02), their report is filled with a number of inaccuracies and simplifications, as well as serious misrepresentations. The greatest misrepresentation involves the fundamental question of the guilt or innocence of those who have been released from the nation’s death rows, including California’s. The prosecutors draw a metaphysical distinction between “legal innocence” and “actual innocence,” claiming that many of the 107 people released from death row have been legally innocent but not actually so. In the prosecutors’ own words:

“No matter how overwhelming the evidence of a defendant’s guilt, the prosecution cannot appeal if a jury finds the defendant ‘not guilty.’ Nor may the prosecution retry an acquitted defendant. Due to the Double Jeopardy Clause, the prosecutor does not get a ‘second chance’ to improve his or her evidence or present newly discovered evidence of guilt. The defendant, no matter how guilty, goes free. The defendant is ‘legally innocent’ but not ‘actually innocent.’”

This self-justifying distinction allows the CDAA to conclude that only a tiny percentage of those wrongfully condemned to die are “actually” innocent, because it was merely the opinion of a jury or a judge – rather than prosecutors themselves – who declared them innocent. Thankfully, our legal system does not work this way.

Examination of the System Sought

The CDAA has characterized the growing national movement for a moratorium, or temporary freeze on executions, as an “insidious attack” on the death penalty by people with “sympathy for murderers.” But the simple fact is that, a moratorium only asks for a time out on executions while experts on all sides of the issue work together to achieve the goals of making sure that the truly innocent (legal or actual) are acquitted and the truly guilty are convicted. The temporary halt to executions by Illinois Gov. George Ryan in January 2000 led to an in-depth, bipartisan study of that state’s death penalty, and publication of a report detailing 85 recommended reforms in the death penalty system before executions should resume. It was only after the Illinois legislature refused to enact *even one* recommended reform that Governor Ryan commuted the death sentences of 167 individuals to Life Sentences Without Possibility of Parole (LWOP). Governor Ryan, a pro-death penalty Republican when he took office, did not call for a moratorium with an idea to discredit the death penalty. He took it on with the goal of achieving justice, and avoiding the execution of innocent men and women.

Numerous states, from Illinois to Arizona, Nevada to Connecticut, have undertaken studies of their death penalty systems, looking to increase safeguards to prevent wrongful conviction and decrease discrimination based on race, income and geography. A sentence that calls for the taking of a human life demands no less. In California, however, prosecutors have responded to the call for examining the death penalty by defending the system’s errors with excuses, obfuscations and further error of law.

I. Factual Errors¹

A. The CDAA Prosecutor’s White Paper Makes the False Claim that the Death Penalty is Imposed Only on the Worst of the Worst

The White Paper claims that “only the worst of the worst are given the death penalty.”² In California, as elsewhere, this is false. Justice Virginia Long of the New Jersey Supreme Court in *State v. Timmendequas* (N.J. 2001) 168 N.J. 20, 72 [773 A.2d 18], dissented in a death case and said:

“It is time for the members of this Court to accept that there is simply no meaningful way to distinguish between one grotesque murder and another for the purpose of determining why one defendant has been granted a life sentence and another is awaiting execution.”

It is no different in California. While the Californian District Attorney’s Association went out of their way to chronicle the horror stories of a few of the people who received the death penalty or were sentenced to death, they ignored the fact that many other cases where death was imposed are indistinguishable from those who received life.

Manny Babbit, one of the ten executed in California, was convicted of causing a heart

attack in an elderly woman he beat during commission of a burglary. Babbitt was a mentally impaired Vietnam Veteran whose single killing can hardly be categorized as “worst of the worst.” African-American, learning disabled (the Marine recruiter helped him fill out his application when he volunteered for Vietnam), and a classic victim of Post Traumatic Stress Disorder (PTSD), Babbitt represents the real face of the death penalty – poor and minority defendants who cannot afford high-powered attorneys and expert witnesses on their behalf. California’s death penalty system is actually two systems of justice – one reserved for the rich, the other a lethal lottery reserved only for the “poorest of the poor.”

B. The CDAA Prosecutor’s White Paper Miscounts the Number of Special Circumstances

The White Paper claims that, “Only 21 types of murder involving so-called ‘special circumstances’ can qualify in California for capital punishment.”³ This is not correct.

In fact, California Penal Code Section 190.2 (2003) has 22 subdivisions setting forth special circumstances. In addition, special circumstances are found in Military and Veterans Code Section 1627(a) and in Penal Code Sections 37, 128, 219 and 4500, pursuant to Section 190.3 (2003). This figure does not include the “heinous, atrocious, or cruel” special circumstance (Section 190.2(14)) declared invalid in *People v. Superior Court (Engert)*, 31 Cal.3d 797 (1982), *accord, Maynard v. Cartwright*, 486 U.S. 366 (1988). Penal Code Section 219 is also listed in Section 190.2(17)(I) as a felony special circumstance in conjunction with a conviction for first-degree murder.

Therefore, there are 21 special circumstances that remain under Section 190.2 and four additional ones that remain under Section 190.3 totaling 25. However, if the separate subdivisions of Section 190.2(17) are counted, there are 36 special circumstances and if all of the qualifying felonies were counted, there would be 39 total.

C. The CDAA Prosecutors’ White Paper’s Claim That There are Adequate Safeguards in California is False

The death penalty system introduced into California in 1977⁴ and re-introduced in 1978⁵ was not well thought out. Since its enactment it has also been amended repeatedly to the point that it is a patchwork rather than a coherent system. Whatever the reasons, a comparison shows that most other states that have the death penalty have checks and balances and procedural safeguards that are not present here. Some of these deficiencies may also violate the federal Constitution and they should give Californians pause to think. The headings below follow the headings of the CDAA Prosecutors’ White Paper, wherein it is falsely claimed that the California system with its alleged safeguards “effectively protects defendants against errors and prosecution of innocent persons.”

Eligibility

California’s death penalty statute does not meaningfully narrow the pool of people convicted of murder to a smaller group who would be eligible for the death penalty. As in all states that have the death penalty, the death penalty is actually imposed on a small fraction of those who are death-eligible.⁶ As a matter of federal Constitutional law, the selection of those

who are to receive the death penalty cannot be capricious; instead, a rational “narrowing” process is required.⁷ Purportedly, the narrowing process in California is accomplished by the finding of “special circumstances.”⁸ However, those special circumstances are so numerous and so broad in definition as to encompass nearly every first-degree murder.⁹ There are 25 special circumstances under the current California statutes, many with subsections, rendering over 36 actual circumstances in which capital punishment may be sought.¹⁰

One scholarly article has identified seven restricted, theoretically possible, categories of first-degree murder that would not be capital crimes under the California statute.¹¹ These seven restricted categories of non-capital murder stand in contrast to the 25 special circumstances making cases death eligible. Given that some of the “narrowing” special circumstances are so broad in and of themselves, it can hardly be claimed that they fulfill their Constitutionally mandated job of narrowing at all. The seven exceptions are so restricted that the process is turned on its head: almost all murders are death eligible with limited exceptions rather than, as contemplated by the Supreme Court, only limited murder cases be eligible within limited exceptions.¹²

Screening

There is supposed to be a second part of the narrowing process. The law is supposed to further narrow the category of death eligible cases by having the jury consider whether factors in aggravation outweigh factors in mitigation.¹³ The CDAA Prosecutors’ White Paper claims that prosecutors use this process of balancing aggravating and mitigating factors to make a filing decision.

This is undoubtedly true in some counties and under some circumstances. Clearly all trial lawyers evaluate the law that is to be presented to the jury to decide how to approach a jury trial. Prosecutors routinely look at what they have to prove in order to decide what to charge. There would be no reason not to do so in a capital case.

Nevertheless, we know that of the 58 counties in California, practices vary widely. Since the death penalty was re-instituted in 1977 in California, 30 percent of the condemned inmates were sentenced out of Los Angeles County and significant numbers came from counties with smaller populations like Riverside, Kern, San Bernardino, Sacramento, San Diego and Santa Clara. On the other hand, sixteen counties have never imposed the death penalty and eleven have only done so once.¹⁴ The District Attorney of San Francisco has refused to seek the death penalty at all, although there are three condemned people out of that county before his term in office began.¹⁵

Defense Attorneys

There is no requirement under current California law regarding minimum qualifications for retained defense counsel nor are there minimum requirements for the prosecuting attorney. In California, there are minimum requirements for appointed defense counsel at trial¹⁶ and appointed defense counsel on direct appeal and habeas corpus¹⁷ but these do not apply to

retained counsel or to the prosecutor.

The American Bar Association has recently come out with revised Guidelines regarding defense counsel in capital cases.¹⁸ The ABA now expands the Guidelines to apply to all lawyers handling capital cases rather than just appointed counsel.

Jury Protections

First, juries in capital cases are “death qualified.” That means that to be a juror in a death penalty case, a potential juror has to agree that they would support the death penalty. In other words, those opposed to the death penalty are automatically excluded.

Second, the jury is not given proper guidance on the issue of whether to impose death. They are instructed regarding aggravating and mitigating circumstances. Without going into excessive detail, suffice it to say that, one aggravating factor, “the circumstances of the crime,”¹⁹ has been interpreted so broadly as to provide an argument by prosecutors that practically any case warrants the death penalty. The California Supreme Court has never interpreted this factor in a way that would make it a narrowing circumstance. To the contrary, the Court has approved the use of this factor to allow the prosecution to argue that the defendant should get the death penalty on the grounds that the defendant had a “hatred of religion,”²⁰ or because three weeks after the crime the defendant sought to conceal evidence,²¹ or threatened witnesses after his arrest,²² or disposed of the victim's body in a manner that precluded its recovery.²³

In actual practice, prosecutors throughout California have argued that the jury could weigh in aggravation almost every conceivable circumstance of the crime, even those that, from case to case, are absolutely opposite to each other.²⁴ For instance, prosecutors have argued to actual juries that cases were aggravated and death verdicts should be returned because, in one case, the victim was killed in the middle of the night, in another, it was late at night, in another, it was early in the morning and, in yet another, it was in the middle of the day.²⁵ These and countless other examples demonstrate that there is no rational narrowing process. Therefore, in actual practice, death sentences are imposed based on the unfettered discretion of prosecutors and jurors.

Judicial Safeguards

California does not have many of the safeguards common to death penalty sentencing schemes in other states to guard against the arbitrary imposition of death. In California, juries do not have to make written findings as to the basis for their death verdict. They do not have to decide unanimously upon which aggravating circumstances they are relying. The standard of proof beyond a reasonable doubt is not required for the proof of aggravating circumstances, nor is it required for the jury to find that the aggravating outweigh the mitigating circumstances, nor is it required for the jury to find that death is the appropriate penalty.²⁶ In fact, except as to the existence of other criminal activity and prior convictions, juries are not instructed on any burden of proof at all.²⁷

Twenty-five states require that factors relied on to impose death in a penalty phase must be proven beyond a reasonable doubt by the prosecution, and three additional states have related provisions.²⁸ Only California and four other states (Florida, Missouri, Montana, and New Hampshire) fail to statutorily address the matter.

Three states require that the jury must base any death sentence on a finding beyond a reasonable doubt that death is the appropriate punishment.²⁹ The Supreme Court of a fourth state, Utah, reversed a death judgment because that judgment was based on a standard of proof that was less than proof beyond a reasonable doubt.³⁰ In contrast, California does not require that a reasonable doubt standard be used during any part of the penalty phase of a defendant's trial, except as to proof of prior criminality relied upon as an aggravating circumstance – and even in that context, the required finding need not be unanimous.

In addition, there is no requirement of proportionality review in California as there is in other states whereby the trial and appellate courts can compare the nature of the offense and offender to unrelated cases or to the cases of co-defendants.³¹ In fact, proportionality review is actually prohibited in California.³² Therefore, there is no means by which the courts can review individual cases on the basis that these individual defendants are being treated in a disparate fashion despite the fact that non-capital defendants have that right of review.

We also have reason to believe that there are serious racial disparities in California's death penalty system.³³ Studies just completed in Pennsylvania and Maryland confirm that there is significant racial bias in the death penalty sentencing systems of those states. The Pennsylvania Supreme Court Committee found that, "Empirical studies conducted in Pennsylvania to date demonstrate that, at least in some counties, race plays a major, if not overwhelming, role in the imposition of the death penalty."³⁴ The Maryland study concluded that, "Offenders who kill white victims, especially if the offender is black, are significantly and substantially more likely to be charged with a capital crime."³⁵ While Californians may think their system is not subject to the same serious criticism, the preliminary studies show that it is racially biased in exactly the same way.³⁶ More significantly, since California has no proportionality review either in the trial courts³⁷ or the Supreme Court,³⁸ there has been no mechanism to bring the issue of racial bias before the courts of this state.

There is also good reason to suspect that some of the people condemned to death on California's death row are actually innocent. Statistically, there have been approximately 107 condemned people in this country released from death row since the death penalty was reinstated in the 1970's.³⁹ While DNA testing has exonerated many of these people, DNA trace evidence is only available in a small percentage of the cases. Therefore, many people who are in fact innocent will never have the opportunity to bring forth scientific evidence of their innocence.

Cases in which people were conclusively shown to be innocent have been analyzed. The studies show that most of those cases involved "positive" identifications, testimony of jail-house informants or coerced confessions.⁴⁰ The procedures that might minimize these wrongful convictions are not in place in California.

One of the significant factors in California is that many of the cases of the people on death row have not been reviewed. Of the approximately 620 people condemned in California, approximately 140 do not have lawyers to represent them. Another 110 have an appellate lawyer but no lawyer to do the habeas corpus investigation and petition. There is a wait of approximately four to six years before a lawyer is appointed by the California Supreme Court.⁴¹ Furthermore, the California Supreme Court takes approximately 10 years before the direct appeal and state habeas petition are considered.⁴² Meaningful review often does not occur until the case reaches the federal court. As a result, most of the condemned people on California's death row have not had a chance to have their innocence claims advanced or tested.

Given the experience around the country, including Illinois, there can be no question that innocent people have also been condemned to death in California. By comparison, almost ten percent of the death row population in Illinois has so far been discovered to be factually innocent.⁴³ Since no one knows how many other innocent people simply had their sentences commuted or, more tragically, have been executed, ten percent is probably a conservative figure.⁴⁴ In California the death row population is approximately 620. Assuming this conservative ten percent figure based on Illinois' experience, that would mean that there are over 60 innocent people condemned to death in California.

Finally, California's death penalty system is completely out of compliance with international law.⁴⁵ Almost all industrialized nations have abandoned the death penalty and, for instance, having the death penalty will prevent admission of a country into the European Union.⁴⁶ Ninety percent of the world's known executions are conducted by four nations: China, Iran, Saudi Arabia and the United States.⁴⁷ Yet, beyond that, the death penalty and the manner in which it is imposed in California are in conflict with numerous provisions of international treaties and conventions to which the United States claims to be a party.⁴⁸

II. Misrepresentations

A. The CDAA Prosecutors' White Paper Misrepresents the Effectiveness of Post-Conviction Remedies

Direct Appeals and *habeas* in California do not result in relief, even in outrageous cases. Cases take over a decade to get to the federal courts and by then relief is much harder to achieve after the passage of so much time. And clemency, so fervently touted as a final safeguard in California's system, is legally possible but politically moribund. No governor has commuted a death sentence in California since the death penalty was re-instated.

B. The CDAA Prosecutors' White Paper Is Disingenuous in That, After Touting the Procedural Aspects of the Present System, it Seeks to Take Them Away.

After citing review by the U.S. 9th Circuit of Appeals as a principal safeguard of California's death penalty system, the report declares the court "not a neutral forum" to decide death penalty issues. No such criticism is offered of the California Supreme Court, which has

one of the highest rates of death penalty reversals in the nation.

C. The CDAA Prosecutor's White Paper Distorts the Concepts of Guilt and Innocence

In a novel approach, the White Paper attempts to recast guilty any person who the prosecutors filed charges against even if the person were later exonerated. They redefine innocence to exclude people who legally used force in self-defense or who were acquitted because the jury decided that the prosecutor prosecuted the wrong man.

The leadership of the California Public Defenders Association (CPDA) and the California Attorneys for Criminal Justice (CACJ), with a joint membership of over 5,000 defense attorneys and public defenders, have seriously criticized this parsing of innocence. On March 27, 2003 they wrote in a joint statement:

“The CDAA maintain their stubborn refusal to admit that any California prosecutor has ever obtained a wrongful conviction of an innocent person. Under the law, a person who kills in self-defense is innocent of murder; but although the CDAA admits that a unanimous jury found that Patrick "Hooty" Croy was not guilty of murder because he acted in self-defense, the CDAA claims that he was not innocent and his release after serving 12 years on death row was not a case of an innocent man having been wrongly convicted of a capital crime. The CDAA refuses to acknowledge the fact that Lee Perry Farmer was finally released from prison after almost 18 years, including 8 years on California's death row, when a unanimous jury in Riverside County found him not guilty of murder because they determined that someone else committed the murder for which he had been wrongly convicted. The CDAA also failed to admit that Oscar Lee Morris was finally freed after serving 16 years in prison for a murder he did not commit, including 6 years on California's death row, and that he was wrongly convicted by an overzealous prosecutor who obtained a conviction by using the fabricated testimony of a jailhouse informant.

“The list goes on and includes many other innocent human beings who were wrongly imprisoned for years and years for crimes they didn't commit. For example, Dwayne McKinney served 19 years in prison for a murder he didn't commit. He was finally released when the identity of the true criminals was determined, but he may very well have been dead by that time had the prosecution got what it asked for at trial: 8 of the jurors at Mr. McKinney's trial voted to give him the death penalty, but the commitment of the 4 other jurors led to him being sentenced to life without parole; otherwise, he would probably have been executed before the truth finally came out.”

These examples show why the prosecution is only one party to a criminal lawsuit. Prosecutors can be wrong, sometimes they develop “tunnel vision” and sometimes just want to win at all costs. Juries are entrusted to evaluate dispassionately whether or not the prosecution carries its burden of proof beyond a reasonable doubt as to the guilt of the defendant in any given case. Sometimes this works.

History also teaches that sometimes juries convict the innocent at the urging of the

prosecution. Sometimes they do so because the prosecution is overzealous. A truly tragic example of a “tunnel vision” prosecution where prosecutors did not turn over exculpatory evidence because of their desire to win occurred in Illinois. The prosecution won and got a death sentence for Rolando Cruz. They tried the case three times and Mr. Cruz spent years on death row. In the end, the prosecutors were wrong. Mr. Cruz was innocent. Even more tragically, while the police, prosecutors and courts were tied up convicting and re-convicting Mr. Cruz, the real killer was out raping and killing others, including an eight year old girl.⁴⁹

D. The CDAA Prosecutors’ White Paper Cites Discredited Studies on Deterrence

Despite statistical manipulation, the facts about the deterrence quality of the death penalty remain clear: States without the death penalty have lower murder rates; while the South, where more than 90% of all executions take place, has the highest murder rate in the nation. South Dakota, which has the death penalty, has a higher murder rate than North Dakota, which does not; Virginia, which has the death penalty, has a higher murder rate than West Virginia, which does not; Connecticut, which has the death penalty, has a higher murder rate than neighboring Massachusetts.

Authors John Sorenson, Robert Wrinkle, Victoria Brewer, and James Marquart examined executions in Texas between 1984 and 1997. They speculated that if a deterrent effect were to exist, it would be found in Texas because of the high number of death sentences and executions within the state. Using patterns in executions across the study period and the relatively steady rate of murders in Texas, the authors found no evidence of a deterrent effect. The study concluded that the number of executions was unrelated to murder rates in general, and that the number of executions was unrelated to felony rates. (“Capital Punishment and Deterrence: Examining the Effect of Executions on Murder in Texas.” 45 *Crime and Delinquency* 481-93 (1999)).

E. The CDAA Prosecutors’ White Paper Denies Racial Disparities in California’s Death Penalty

The Prosecutors' White Paper offers no rational explanation for the fact that over 59% of the inmates on death row are people of color, out of all proportion to California's demographics. Preliminary studies in California show significant disparity between race of victim and race of defendant regarding who gets sentenced to death in this state. Racial minorities convicted of murdering a white person are at least twice as likely to receive the death penalty as those who murder blacks. (Interview with Michael Radelet, March 20, 2003.) These preliminary findings confirm the same pattern already documented in other jurisdictions. Regrettably, they confirm that death is chosen in this state by prosecutors on the basis of agendas that have nothing to do with who is the "worst of the worst." While these agendas may not reflect a conscious consideration of race in making the choice, it clearly demonstrates that California fails to meet the constitutional requirement that death be chosen only by a neutral and rational process.

The prosecutors' attempt to manipulate the numbers by eliminating consideration of the death sentences from Los Angeles is nothing more than sleight of hand. The fact that race plays a role

in who lives or dies in the Twenty-first Century should be unacceptable to all Californians, especially those who are sworn to uphold the Constitution and laws of this state. This fact on its own is sufficient reason to call a temporary halt to the death penalty so that the causes of this racial impact can be further studied and remedied.

III. Studies Critical of California's Death Penalty System

A. The Liebman Columbia University Study

The Liebman study, out of Columbia University,⁵⁰ has identified California as having the largest death row population of any state in the nation.⁵¹ People under sentence of death in California have to wait four to six years before counsel is appointed to represent them.⁵² In all, condemned people in California have to wait almost 10 years before their direct appeals and post conviction petitions are heard by the state Supreme Court.⁵³ In addition, even after that long wait, almost all convictions are affirmed, no matter what issues are raised.⁵⁴

Thereafter, the cases are reviewed by the federal courts. The end result is that cases from California are reversed by the federal courts at a higher rate than cases from other states.⁵⁵ Nevertheless, the combined state and federal reversal rate for California cases remains in line with the remainder of the death penalty jurisdictions.⁵⁶

B. The Mintz San Jose Mercury News Studies

Extensive investigative reporting by the *San Jose Mercury News*, led by reporter Howard Mintz, has also unearthed disturbing evidence that the California death penalty system is not functioning.⁵⁷ Mintz incorporates some of the research of the Liebman Study and further corroborates it by case studies in California. The *Mercury News* study examined 72 California cases reversed by state and federal courts since 1987 and 150 appeals pending in the federal courts.⁵⁸ It found that even though California spends more money than other states on capital cases, cases are reversed because of similar problems to those in other states which spend less money, such as Alabama or Texas. Prominent among the same recurrent problems in California and elsewhere are incompetent lawyers, prosecutorial misconduct and judicial errors.⁵⁹

The *Mercury News* study found that there were no minimum statewide standards for the qualifications of defense lawyers appointed to death penalty trials;⁶⁰ that the main issue on appeal is penalty as opposed to guilt or innocence; that 2/3 of reversals are of the penalty phase; and fewer than 1/3 of those whose sentence was reversed on appeal have received the death penalty the second time.⁶¹ It also found that California is in greater conflict with the federal courts than any of the other states. The state Supreme Court's reversal rate is 10%, the lowest in the country, while the federal courts have reversed 62 % of the death sentences affirmed by the State Supreme Court, the highest rate nationally. Yet, the combined reversal rate for California cases is roughly in line with the national average found in the Columbia University study.⁶²

C. The Sanger Report on the Illinois Commission Recommendations as Compared to California

Illinois Governor George H. Ryan declared a moratorium on executions in his state on January 31, 2000.⁶³ On March 4, 2000, he appointed a special Governor's Commission to study how the death penalty system in Illinois could be reformed.⁶⁴ The governor took this dramatic action in light of the fact that thirteen⁶⁵ people who had been condemned to Illinois' Death Row were subsequently determined to be innocent.

Nevertheless, the Governor made clear in his instructions to the Commission that they were to study how to reform the death penalty system, not to debate whether or not the death penalty should be abolished. The Governor's Executive Order forming the Commission and setting forth its mission stated:

“The Commission, upon concluding its examination and analysis of the capital punishment process, shall submit to the Governor a written report detailing its findings and providing comprehensive advice and recommendations to the Governor that will further ensure the administration of capital punishment in the State of Illinois will be fair and accurate.”⁶⁶

Governor Ryan, a Republican, appointed Commission members who were informed on criminal justice issues but who were from the mainstream of the criminal justice professions and from positions in the community. The members were selected from across the political spectrum and were all well qualified to understand the system.⁶⁷

On April 15, 2002, after two years of study, the Illinois Governor's Commission issued its Report. The Report made 85 specific recommendations for corrections to the Illinois death penalty system. The recommendations were backed by 207 pages of analysis to which were appended additional materials. Although discussion of the abolition of the death penalty was not within the mandate of the Commission, after reporting on the various reform recommendations, the Commissioners stated: "The Commission was unanimous in the belief that no system, given human nature and frailties, could ever be devised or constructed that would work perfectly and guarantee absolutely that no innocent person is ever again sentenced to death.”⁶⁸

A draft report of a to-be-published study, known as The Sanger Report,⁶⁹ compares the Illinois Commission's 85 recommendations to reform the death penalty with the actual practice in California. California has a compliance rate of 6.17% compared to the imperfect reforms recommended by the Illinois commission. The Illinois Commission Report tracks the system of criminal justice in capital cases systematically from the inception of a case to its conclusion. The Report acknowledges that there are numerous flaws, many of which either have resulted in the conviction of the innocent or are likely to contribute to those results. The recommendations, for the most part, do not hamper the conviction of the truly guilty nor do they place an undue burden on law enforcement, the courts or the defense function. Some are just simple, common sense measures. Others ultimately save resources by giving a greater assurance that things will be done right the first time.

California also compares miserably to the Illinois Recommendations when analyzed

substantively. The statistical failure of California to meet any more than 6.17% of the recommendations is actually exacerbated by the fact that, on some points, California is so far removed from compliance that there is a difference not only of degree but of kind between what California has in reality and what the Commission recommends.

The Illinois Commission studied twelve areas of the criminal process relating to the conduct of capital cases.⁷⁰ They started with an analysis of police procedures, went through investigation and pre-trial matters, trial and sentencing. From those areas of study came 82 specific recommendations. They concluded with a general section in which they made 3 more recommendations.⁷¹ Overall, the Commission found that every stage of the criminal process in Illinois needed serious repair to avoid injustice, including the ultimate injustice of convicting and executing innocent people. Then they concluded that even meeting all of their recommendations would not eliminate the possibility of executing an innocent person.⁷²

Since California meets so few of the Illinois Commission's recommendations, it would be safe to conclude that the California system is dangerously out of control based on the statistical analysis alone. Nevertheless, we will compare the California criminal process with the Illinois recommendations substantively. In doing so, it will become clear that the California system is so far out of compliance as to be even more dangerous than the mere statistical analysis would suggest.

For instance, California has virtually none of the police practices recommended for the purpose of promoting the integrity of investigations. These recommended practices are designed to actually solve the crime and to advance the probability that the real killer actually is arrested, prosecuted and convicted. As Illinois painfully discovered, police practices unchecked as they are in California, not only condemn innocent people but leave the real killers free to continue killing.⁷³

Also, as mentioned above, California lists 25 special circumstances, many of which have subparts, meaning that there are probably over 36 factors that can make a murder death eligible in California.⁷⁴ The Illinois Commission recommends that there be five and only five.⁷⁵ Therefore, the California system makes virtually any murder death eligible as opposed to the recommendations which would properly narrow the class of murders to a smaller number which are death eligible. Arguably, California is not even in compliance with the federal Constitution on this point.⁷⁶ It is so far out of line with the Illinois Commission recommendations that compliance with other recommendations in the Report would still render the system fundamentally different and still subject to the underlying problems addressed by the Commission.

However, as the Sanger Report demonstrates, the Illinois Commission recommendations could easily be incorporated into California law. To date in California, police do not video-tape all interrogations; witnesses are not audio-taped; police fail to detect whether a suspect suffers from mental retardation before interrogation; line-ups and photo-spreads are not conducted with minimum safeguards; homicide detectives are not trained on the unreliability of "jailhouse snitches" and other informants; foreign nationals are not routinely advised of their right to

contact their consulate offices under the Vienna Convention; no statewide standards exist on the selection of cases in which the death penalty is sought and there are no statewide mandatory minimum qualifications, education, training and review of lawyers handling capital cases.

With these many flaws still in place, the California public is justified in questioning the integrity of their state's death penalty system. They may also question the refusal of the state's prosecutors to take a "time out" on sentencing individuals to death while a system that has seen at least five innocent people already condemned to death is thoroughly examined.

If California's death penalty is as unassailable as the prosecutors' report claims, what possible objection could they have to an in-depth study of a system burdened with the job of judging who lives, or who dies?

End Notes

¹Portions of this analysis are derived from Robert Sanger, *Comparison of the Illinois Commission Report on Capital Punishment with the Capital Punishment System in California*, (2003) draft report on file with the California State Senate Select Committee on the California Correctional System, hereinafter, "Sanger Report."

²California District Attorneys Association and Criminal Justice Legal Foundation, *Prosecutors' Perspective on California Death Penalty*, (March 2003) (hereinafter "CDAAs Prosecutors' White Paper") ii.

³CDAAs Prosecutors' White Paper iii.

⁴California Penal Code Sections 190, 190.1, 190.2, 190.26, 190.3, 190.4., enacted 1977 and repealed by initiative (Proposition 7), November 7, 1978 General Election.

⁵Proposition 7 on the November 7, 1978 General Election ballot, known as the Briggs Initiative repealed and replaced California Penal Code Sections 190, 190.1, 190.2, 190.3 and 190.4 and repealed 190.26.

⁶A meticulous study of California murder cases showed that less than one in eight (11.4%) of people convicted of death eligible murders receives a death judgment. Schatz and Rivkind, *The California Death Penalty Scheme: Requiem for Furman?*, 72 N.Y.U. L. Rev. 1283, 1332 (1997).

⁷The Supreme Court of the United States in *Furman v. Georgia*, 408 U.S. 238 (1972), declared the then existing death penalty schemes unconstitutional under the federal Constitution on the grounds that death was being imposed arbitrarily. This process has been described by the Court as "narrowing." See, e.g., *Sawyer v. Whitley*, 505 U.S. 333, 341-42 (1992). Before the United States Supreme Court acted in *Furman*, the California Supreme Court had already found that the California death penalty system was constitutionally flawed. *People v. Anderson*, 6 Cal.3d 628, at 657 (1972).

⁸California Penal Code Section 190.2 and 190.3.

⁹California's broad construction of the "felony murder" and "lying in wait" special circumstances, along with the others enumerated, give rise to "the result that more than 84% of convicted first degree murderers are statutorily death-eligible" under the California statutory scheme. Schatz and Rivkind, *The California Death Penalty Scheme: Requiem for Furman?*, 72 N.Y.U. L. Rev. 1283, 1332 (1997). Not only that, the passage of Proposition 18 on March 7, 2000 changed the elements of the "lying in wait" special circumstance from one committed "while lying-in-wait" to one committed "by means of lying-in-wait" which is the virtually identical standard required for non-capital first degree murder. This change should render the statute unconstitutional because there is no longer any meaningful way to distinguish between capital and non-capital murder committed by means of lying-in-wait. Furthermore, since "lying in wait" requires virtually no "lying" nor "waiting," virtually any intentional homicide can become not only first degree murder but death eligible.

¹⁰California Penal Code Section 190.2 (2003) has 22 subdivisions setting forth special circumstances. In addition, special circumstances are found in Military and Veterans Code Section 1627(a) and in Penal Code Sections 37, 128, 219 and 4500, pursuant to Section 190.3 (2003). This figure does not include the “heinous, atrocious, or cruel” special circumstance (Section 190.2(14)) declared invalid in *People v. Superior Court (Engert)*, 31 Cal.3d 797 (1982), *accord, Maynard v. Cartwright*, 486 U.S. 366 (1988). Penal Code Section 219 is also listed in Section 190.2(17)(I) as a felony special circumstance in conjunction with a conviction for first degree murder.

Therefore, there are 21 special circumstances which remain under Section 190.2 and four additional ones which remain under Section 190.3 totaling 25. However, if the separate subdivisions of Section 190.2(17) are counted, there are 36 special circumstances and if all of the qualifying felonies are counted, there would be 39 total

¹¹ Schatz and Rivkind, *The California Death Penalty Scheme: Requiem for Furman?*, 72 N.Y.U. L. Rev. 1283, 1324-1326 (1997).

¹²*Furman v. Georgia*, 408 U.S. 238 (1972); *Zant v. Stephens*, 462 U.S. 862, 875 (1983); *Tuilaepa v. California*, 512 U.S. 967, 972 (1994).

¹³California Penal Code Section 190.3.

¹⁴California Department of Corrections website contains the statistics as of March 31, 2002. http://www.cdc.state.ca.us/CommunicationsOffice/condemned_summary.asp. (This site was accessed March 11, 2003 with the above information and may currently be under revision)

¹⁵*The Death Penalty Upheld in San Francisco Robbery, Killing*, The Metropolitan News-Enterprise (December 6, 2002) reported that not only had San Francisco District Attorney Hallinan refused to seek the death penalty in his county but that he refused to file a motion to set an execution date in a case predating his taking office. The Attorney General of California stepped in and signed the motion.

¹⁶California Rule of Court 76.6.

¹⁷California Rule of Court 4.117.

¹⁸American Bar Association, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, Rev. Ed. (February 2003).

¹⁹California Penal Code Section 190.3 (a). For portions of the following analysis, credit is given to the work of the California Appellate Project and the Habeas Corpus Resource Center and draft briefing collected and prepared by those offices. These arguments have been included in various briefs filed in the California Supreme Court.

²⁰*People v. Nicolaus*, 54 Cal.3d 551, 581-82 (1991), *cert. den.*, 112 S. Ct. 3040 (1992).

²¹*People v. Walke*, 47 Cal.3d 605, 639 n.10 (1988), *cert. den.*, 494 U.S. 1038 (1990).

²² *People v. Hardy*, 2 Cal.4th 86, 204 (1992), *cert. den.*, 113 S. Ct. 498 (1992).

²³*People v. Bittaker*, 48 Cal.3d 1046 (1989), 1110 n.35, *cert. den.* 496 U.S. 931 (1990).

²⁴A collection of anomalous such arguments has been assembled with the assistance of the California Appellate Project upon a review of briefs on file with the California Supreme Court. The results of this research are summarized in the Appellant’s Opening Brief in *People v. Turner*, S009038. Brief on file with the California Supreme Court.

²⁵See, e.g., *People v. Fauber*, No. S005868, RT 5777 (early morning); *People v. Bean*, No. S004387, RT 4715 (middle of the night); *People v. Avena*, No. S004422, RT 2603-04 (late at night); *People v. Lucero*, No. S012568, RT 4125-26 (middle of the day). Briefs on file with the California Supreme Court.

²⁶CALJIC 8.88, in relevant part instructs the jury: “In weighing of various [aggravating and mitigating] circumstances you determine under the relevant evidence which penalty is justified and appropriate considering the totality of the aggravating circumstances with the totality of the mitigating circumstances. To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without the possibility of parole.”

²⁷See, CALJIC 8.86; *People v. Davenport*, 33 Cal.3d 21, 53-56, n. 19 (1982).

²⁸Alabama, Arkansas, Colorado, Delaware, Georgia, Idaho, Illinois, Indiana, Kentucky, Louisiana, Maryland, Mississippi, Nebraska, Nevada, New Mexico, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia and Wyoming.

Washington has a related requirement that, before making a death judgment, the jury must make a finding beyond a reasonable doubt that no mitigating circumstances exist sufficient to warrant leniency. (Wash. Rev. Code Ann. § 10.95.060(4) (West 1990).) Arizona and Connecticut require that the prosecution prove the existence of penalty phase aggravating factors, but specify no burden. (Ariz. Rev. Stat. Ann. § 13-703(c) (1989); Conn. Gen. Stat. Ann. § 53a-46a(c) (West 1985).)

²⁹See Ark. Code Ann. § 5-4-603(a)(3) (Michie 1991); Wash. Rev. Code Ann. § 10.95.060 (West 1990); and *State v. Goodman*, 257 S.E.2d 569, 577 (1979).

³⁰*State v. Wood*, 648 P.2d 71, 83-84 (Utah 1982).

³¹According to the Illinois Commission study, 19 states provide for proportionality review: Alabama, Delaware, Georgia, Idaho, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, North Carolina, Pennsylvania, South Carolina, South Dakota, Tennessee and Washington. Illinois Commission Report 166.

³²*Pulley v. Harris*, 465 U.S. 37 (1984).

³³Nationwide, the death penalty is imposed on an extremely skewed racial basis. Since the death penalty was re-instituted in 1973, only 12 white defendants were executed for killing blacks while 180 blacks were executed for killing whites. NAACP Legal Defense and Education Fund, *Death Row U.S.A., Winter 2003*. See also, Glenn L. Pierce and Michael L. Radelet, *Race, Region and Death Sentencing in Illinois*, 18 Oregon Law Review 1 (2002).

³⁴"Final Report of the Pennsylvania Supreme Court Committee on Racial and Gender Bias in the Justice System," 218 (2003).

³⁵Paternoster, Brame and others, *An Empirical Analysis of Maryland's Death Sentencing System with Respect to the Influence of Race and Legal Jurisdiction, Final Report*, 36 (2003).

³⁶Preliminary studies show significant disparity between race of victim and race of defendant regarding who gets sentenced to death in California. Racial minorities convicted of murdering a white person are at least twice as likely to receive the death penalty as those who murder blacks. Interview with Michael Radelet on March 20, 2003.

³⁷The trial judge has no authority to do an inter-case proportionality review. *People v. Marshall*, 50 Cal.3d 744, 815-16 (1990). However the judge can do an "intra-case" review to determine if the punishment is proportionate to the individual defendant's culpability. *Marshall, supra*, 937-8 and *People v. Dillion*, 34 Cal.3d 441 (1983).

³⁸*People v. Lang*, 49 Cal.3d 991, 1043 (1989).

³⁹According to the Death Penalty Information Center at <http://www.deathpenaltyinfo.org/innoc.html> (Last visited March 8, 2003) there have been 107 exonerations since 1973

⁴⁰Connors, *et al.*, *Convicted by Juries, Exonerated by Science*, NIJ Research Report, 15 (1996).

⁴¹Interview with Michael Millman, Director California Appellate Project, March 1, 2003 and CDAA Prosecutor's White Paper, 18. Since it is the habeas corpus defense team that examines innocence claims, that means that 40% of the people presently condemned in California have not had anyone start to examine their innocence claims. Obviously, once that examination begins, it can take years before any significant information about those claims comes to light..

⁴²Liebman Study, Part II Appendix A-7.

⁴³Since the death penalty was re-instituted in Illinois in the 1970's, there were 17 people exonerated who had been condemned to death. Governor Ryan commuted the sentences of 167 people, almost all to life in prison without the possibility of parole. In addition, there have been 32 other Illinois condemned people who were exonerated since the death penalty was initially established in that state. Speech of Governor Ryan delivered at the Northwestern College of Law, January 11, 2003.

⁴⁴Certainly many of the people who were condemned to death in Illinois are probably guilty. However, Governor Ryan was not able to ascertain whether or not all of the remaining condemned 167 people were in fact guilty. *Id.*

⁴⁵See Roger Hood, *The Death Penalty: A Worldwide Perspective*, 3rd Ed. (Oxford 2003). Turkey eliminated the death penalty in September 2002 meaning that there are no European nations which have retained the death penalty. The four nations that now account for the most executions in the world are China, Iran, Saudi Arabia and the United States.

⁴⁶Roger Hood, *The Death Penalty: A Worldwide Perspective*, 3rd Ed. (Oxford 2003); *The Death Penalty: An International Perspective*, Death Penalty Information Center, (summarizing the number of abolitionist countries as of August 2000), at <http://www.deathpenaltyinfo.org/dpicintl.html>.

⁴⁷*Id.* In 2001, there were 3,048 known executions in 31 countries, 90% of which took place in China, Iran, Saudi Arabia, and the United States.

⁴⁸The International Court of Justice, known as the World Court, has issued orders seeking to halt executions pending in the state of Texas. *Mexico v. United States* __ ICJ __ (2003). Treaties which raise issues with this country's use of capital punishment include the International Covenant on Civil and Political Rights (ICCPR), the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention Against Torture), the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), and the Vienna Convention on Consular Relations (VCCR).

⁴⁹The Illinois Commission Report, e.g., 126, refers to Mr. Cruz' case. For a fuller account of the painful story, see Frisbie and Garrett, *Victims of Justice* (1998).

⁵⁰Liebman, Fagan and West, *A Broken System: Error Rates in Capital Cases 1973-1995*, The Justice Project, Columbia University School of Law (2000) and Liebman, Fagan, Gelman, West, Davies and Kiss, *A Broken System, Part II: Why There Is So Much Error in Capital Cases, and What Can Be Done About It*, The Justice Project, Columbia University School of Law (2002) (Hereinafter, "Liebman Study").

⁵¹*Id.* at Part II Appendix A.

⁵²Michael Millman, Director of the California Appellate Project, (interviewed March 1, 2003), estimated the delay at four to five years. The CDAAs Prosecutors' White Paper, at 18, stated that the delay in appointment of counsel for condemned inmates in California is currently five to six years.

⁵³Liebman Study at Part II Appendix A-7

⁵⁴*Id.* Since the removal by the voters of Chief Justice Rose Bird and two other Justices in 1986, the California Supreme Court has been even more reluctant to reverse death sentences. More recent figures show a greater disparity in recent years between the low reversal rate in California state court and the high reversal rate of California cases in federal court. Howard Mintz, *Different Standards Lead to Reversals*, San Jose Mercury News, April 14, 2002.

⁵⁵Liebman Study at Part II, 65.

⁵⁶*Id.*

⁵⁷Howard Mintz, *Courtroom Mistakes Put Executions on Hold*, San Jose Mercury News, April 13, 2002; Howard Mintz, *Different Standards Lead to Reversals*, San Jose Mercury News, April 14, 2002; Howard Mintz, *Under Fire*, San Jose Mercury News, April 14, 2002.

⁵⁸Howard Mintz, *Courtroom Mistakes Put Executions on Hold*, San Jose Mercury News, April 13, 2002.

⁵⁹*Id.*

⁶⁰California has enacted minimum standards for the appointment of counsel in capital cases on appeal under California Rule of Court 76.6 (effective February 27, 1998) and, more recently, in the trial courts under California Rule of Court 4.117 (effective January 1, 2003). However, few of the condemned people on California's death row have benefitted from the rule for appellate counsel and none so far has benefitted from the rules on appointment of trial counsel.

⁶¹Howard Mintz, *Courtroom Mistakes Put Executions on Hold*, San Jose Mercury News, April 13, 2002.

⁶²*Id.*

⁶³Executive Order, January 31, 2000. Governor's Press Release, dated January 31, 2000 at <http://www.state.il.us/gov/press/00/Jan/morat.htm>, last visited February 13, 2003.

⁶⁴Executive Order Number 4 (2000), March 4, 2000, at http://www.idoc.state.il.us/ccp/ccp/executive_order.html, last visited February 13, 2003.

⁶⁵Governor's Press Release, dated January 31, 2000 at <http://www.state.il.us/gov/press/00/Jan/morat.htm>, last visited February 13,

2003. However, by the time of Governor Ryan's act commuting the sentences of the remaining condemned inmates, there had been 17 people exonerated. Governor Ryan's Speech delivered at Northwestern University College of Law, January 11, 2003.

⁶⁶Executive Order Number 4 (2000), March 4, 2000, at http://www.idoc.state.il.us/ccp/ccp/executive_order.html, last visited February 13, 2003.

⁶⁷The Commission was comprised of prosecutors, former judges, former prosecutors, members of the community, defense lawyers and scholars. See, Commission Members, http://www.idoc.state.il.us/ccp/ccp/member_info.html, last visited February 13, 2003.

⁶⁸Illinois Commission Report 207.

⁶⁹Robert Sanger, *Comparison of the Illinois Commission Report on Capital Punishment with the Capital Punishment System in California*, (2003) draft report on file with the California State Senate Select Committee on the California Correctional System, hereinafter, "Sanger Report."

⁷⁰The twelve areas in the Illinois Commission Report are: Police and Pre-trial Investigations – Recommendations 1 through 19; DNA and Forensic Testing – Recommendations 20 through 26; Eligibility For Capital Punishment – Recommendations 27 and 28; Prosecutors' Selection of Cases For Capital Punishment – Recommendations 29 through 31; Trial Judges – Recommendations 32 through 39; Trial Lawyers – Recommendations 40 through 45; Pretrial Proceedings – Recommendations 46 through 54; The Guilt-Innocence Phase – Recommendations 55 through 59; The Sentencing Phase – Recommendations 60 through 64; Imposition of Sentence – Recommendations 65 through 69; Proceedings Following Conviction and Sentence – Recommendations 70 through 75; and Funding – Recommendations 76 through 82.

⁷¹General Recommendations – Recommendations 83 through 85.

⁷²Illinois Commission Report at 207.

⁷³Frisbie and Garrett, *Victims of Justice* (1998). This book chronicles the police practices, some well intentioned, some simply incompetent and some corrupt, that led to the death sentences of two innocent men. While the police and prosecutors were forcing the case through the courts and resisting reviews and retrials, the real killer continued to rape and kill others, including an eight year old girl.

⁷⁴California Penal Code Section 190.2, Military and Veterans Code Section 1627(a) and Penal Code Sections 37, 128, 219 and 4500, pursuant to Section 190.3.

⁷⁵Illinois Commission Report at 65-80.

⁷⁶See, Schatz and Rivkind, *The California Death Penalty Scheme: Requiem for Furman?*, 72 N.Y.U. L. Rev. 1283

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Death Penalty Focus is a non-profit organization dedicated to educating the public and elected representatives about the realities of capital punishment and effective alternatives to the death penalty such as Life Sentence Without Possibility of Parole (LWOP). It is located in San Francisco, California, with citizen chapters in nine California locations, including Sacramento.

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