

COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re Scott Peterson,
On Habeas Corpus.

Case No.

S230782

CAPITAL CASE

Related to Automatic Appeal
Case No. S132449

San Mateo County Superior Court
Case No. 55500A

EXHIBITS IN SUPPORT OF PETITION FOR WRIT OF HABEAS
CORPUS

VOLUME 4 (EXHIBITS 39-49)

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DEATH PENALTY

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In re Scott Lee Peterson

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EXHIBIT 39

Declaration of Gerald F. Uelman

1 **DECLARATION OF GERALD F. UELMEN**

2 I, Gerald F. Uelmen, declare as follows:

3 1. I am a Professor of Law at Santa Clara University School of Law, Santa Clara,
4 California, where I served as Dean of the Law School from 1986 to 1994. Prior to that, I was a
5 Professor of Law at Loyola Law School, Los Angeles, California from 1970 to 1986.
6 Throughout my 39 year teaching career, I have taught courses in Criminal Law and Criminal
7 Procedure, and have closely followed the death penalty law and jurisprudence of California.
8 From 2004 to 2008, I served as Executive Director of the California Commission on the Fair
9 Administration of Justice, and drafted the Commission’s Report on the California Death
10 Penalty Law. I have conducted research and written law review articles on the administration
11 of the death penalty law in California, spoken at numerous seminars on this topic, and offered
12 testimony as an expert in several death penalty cases.

13 2. My curriculum vita is attached to this declaration as Appendix A.

14 3. I provide this declaration at the request of counsel for Mr. Troy Ashmus
15 regarding the salient legislative history of California’s death penalty procedures since 1972. In
16 the course of preparing this declaration, I have reviewed substantial legal, legislative, and
17 historical material. A list of the material that I consulted is attached to this declaration as
18 Appendix B.

19 4. Prior to 1972, all first-degree murders codified in former California Penal Code
20 section 189¹ were punishable by death under California law.² Former Cal. Penal Code § 190
21 (West 1970); *People v. Anderson*, 6 Cal. 3d 628, 652 (1972).

22
23
24 ¹ All further statutory references are to the California Penal Code unless otherwise specified.

25 ² In addition to first-degree murder, the following crimes were also punishable by death at this
26 time: treason (Pen. Code § 37), perjury in capital cases (Pen. Code § 128), kidnaping for ransom or
27 robbery with bodily harm to the victim (Pen. Code, § 209), train wrecking (Pen. Code, § 219), malicious
28 assault by life prisoner (Pen. Code, § 4500), explosion of destructive devices causing great bodily injury
(Pen. Code § 12310), and sabotage resulting in death or great bodily injury (Mil. & Vet. Code § 1672,
subd. (a)). The death penalty was mandatory for the treason and perjury offenses and for malicious
assault by a life prisoner if a non-inmate victim died and discretionary for first-degree murder and the
other offenses. *People v. Anderson*, 6 Cal. 3d 628, 652 (1972).

1 5. In 1972, the California Supreme Court invalidated the California death penalty
2 scheme, holding that it violated the state constitution's prohibition against cruel or unusual
3 punishments. *People v. Anderson*, 6 Cal. 3d 628 (1972). California voters swiftly reacted by
4 passing Proposition 17 in November 1972, which amended the California Constitution to
5 provide that capital punishment is not unconstitutional, overturning the *Anderson* decision.
6 Meanwhile, in June 1972, the United States Supreme Court announced several opinions in
7 *Furman v. Georgia*, 408 U.S. 238 (1972), collectively interpreted as holding that the death
8 penalty may not be imposed under sentencing procedures that create a substantial risk that it
9 will be inflicted in an arbitrary and capricious manner, thus the statute must provide a
10 "meaningful basis for distinguishing the few cases in which it is imposed from the many cases
11 in which it is not." *Gregg v. Georgia*, 428 U.S. 153, 188 (1976) (quoting *Furman v. Georgia*,
12 408 U.S. at 313 (White, J., concurring)).

13 6. In response to Proposition 17 and *Furman*, the California Legislature enacted a
14 death penalty statute in 1973 that mandated imposition of the death penalty for individuals
15 found guilty of first-degree murder when one of ten special circumstances were present.³ In
16 1976, the California Supreme Court invalidated this mandatory statute in light of the
17 intervening United States Supreme Court ruling in *Woodson v. North Carolina*, 428 U.S. 280
18 (1976), which held that mandatory death penalty schemes violate the Eighth Amendment of the
19 United States Constitution. *Rockwell v. Superior Court*, 18 Cal. 3d 420 (1976).

20 7. In 1977, the California Legislature again responded to the decisions of the
21 United States Supreme Court by enacting a new death penalty statute with the passage of
22 Senate Bill 155, introduced on January 19, 1977, by then-Senator George Deukmejian.⁴ Then-
23 Senator John Briggs was a co-author of this legislation.⁵ On May 27, 1977, Senate Bill 155 as
24
25

26 ³ Petitioner's Exhibit (Exh.) 139 at 7-12 (1973 Cal. Stat. c. 719, §§ 1- 5 (S.B. 450)).

27 ⁴ Exh. 139 at 82-95 (1977 Cal. Stat. c. 316, §9 (S.B. 155), effective August 11, 1977); Exh. 139 at
28 96-97 (Senate Final History, 1977 Cal. Stat. c. 316, §9 (S.B. 155), effective August 11, 1977).

⁵ Exh. 139 at 96-97.

1 subsequently amended, was enrolled and transmitted to then-Governor Edmund G. Brown Jr.
2 for his signature.⁶

3 8. The 1977 death penalty bill was drafted to restore discretion to the sentencer to
4 impose death upon a finding of first-degree murder when one of twelve legislatively drawn
5 special circumstances was present.⁷ In enacting Senate Bill 155, the California Legislature
6 expressly considered the constitutional parameters of a valid death penalty statute as defined by
7 United States Supreme Court jurisprudence.⁸ In preparation for considering Senate Bill 155
8 and other capital punishment bills before it in early 1977, the Legislature called upon
9 constitutional law experts to educate its members about the recent United States Supreme Court
10 decisions addressing the constitutionality of the death penalty, including concerning the Eighth
11 Amendment narrowing requirement.⁹

12 9. On May 27, 1977, Governor Brown vetoed Senate Bill 155 based upon his
13 moral opposition to the death penalty.¹⁰ Although the Legislature ultimately overrode
14 Governor Brown's veto and Senate Bill 155 went into effect on August 11, 1977,¹¹ the veto
15 override process was highly controversial, driven in many respects by the political aspirations
16 of Senator John Briggs, an announced candidate for Republican nomination for Governor of
17 California for the June 1978 primary election.

18 10. Although Senator Briggs supported capital punishment, helped introduce Senate
19 Bill 155, and had voted for its passage initially, he ultimately attempted to block its enactment,
20 ostensibly to use capital punishment as a political issue during the 1978 gubernatorial race.¹²
21 Prior to the bill's enactment, Senator Briggs threatened to uphold the governor's promised veto,

22 ⁶ Exh. 139 at 97-97.

23 ⁷ Exh. 139 at 82-95.

24 ⁸ See e.g. Exh. 139 at 15-79 (Constitutional Issues Relative to the Death Penalty: Special Hearing
of the California Assembly Committee on Criminal Justice, January 24, 1977 (transcript)).

25 ⁹ See e.g. Exh. 139 at 19-23, 57-63.

26 ¹⁰ Exh. 139 at 96-97; Exh. 139 at 81 (Press Release, Office of Governor Edmund G. Brown (May
27, 1977)); Exh. 140 at 4-6 (Death Penalty Poll Casts Doubt On Veto Override, L.A. Daily Journal,
March 29, 1977, at 1, 4).

27 ¹¹ Exh. 139 at 96-97.

28 ¹² Exh. 140 at 4-6; Exh. 140 at 18-19 (Override Vote Set Today on Death Penalty Vote, L.A.
Daily Journal, June 23, 1977, at 1).

1 admitting that he would be “delighted” to see a death penalty proposition on the November
2 1978 ballot,¹³ and thus preventing the incumbent Governor Brown from “duck[ing] th[e] issue”
3 of capital punishment in the election.¹⁴ After the governor vetoed Senate Bill 155, Senator
4 Briggs reportedly announced that he would abstain from voting in the override proceedings
5 even if his was the crucial vote, and that regardless of the outcome of the override proceedings,
6 he would attempt to qualify an “even tougher” death penalty initiative for the November 1978
7 ballot.¹⁵ Senator Briggs, then the only announced Republican candidate for governor,
8 explained his strategy concerning his planned initiative: “When you have a law on the books
9 you remove it as an issue . . . I don’t want to remove it as an issue.”¹⁶ Senator Briggs had also
10 announced his desire to “send [Governor Brown] out naked in November” on the issue of
11 capital punishment.¹⁷

12 11. Political leaders distanced themselves from Senator Briggs and his strategy
13 during the override process, accusing Briggs of grandstanding, and dismissing him as a “fellow
14 who is seeking publicity.”¹⁸ Senator Briggs was publically criticized for his attempts to thwart
15 the veto override. For example, former Governor Ronald Reagan warned that attempts to
16 bypass the override process “could bring on charges of opportunism later.”¹⁹ Then-Los
17 Angeles County Sheriff Peter Pitchess released a letter to Senator Briggs stating: “I am shocked
18 that you, or any other human being, would try to make a cheap partisan show out of a matter of
19 such grave consequence. I do not intend to stand idly by while you allow the death penalty
20 issue, a matter of critical importance to the safety of our citizens, to degenerate into a sideshow
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23 ¹³ Exh. 140 at 6.

24 ¹⁴ Exh. 140 at 12 (Briggs Nixes Death Penalty Vote Override, The Recorder, June 2, 1977, at 1,
25 7).

26 ¹⁵ Exh. 140 at 12.

27 ¹⁶ Exh. 140 at 12-14.

28 ¹⁷ Exh. 140 at 7 (Death Bill Passed By Senate on Slender Two-Vote Margin, L.A. Daily Journal,
April 1, 1977, at 1).

¹⁸ Exh. 140 at 12.

¹⁹ Exh. 140 at 15, 17 (Reagan Backs Override Of Death Veto, The Recorder, June 16, 1977, at 1,
6).

1 to dramatize your own political ambitions.”²⁰ As threatened and arguing that Senate Bill 155
2 was not sufficiently tough, Senator Briggs abstained from voting in the override proceeding,
3 temporarily resulting in the override being one vote short of passage in the Senate.²¹ The
4 passing vote was ultimately cast by another member of the Senate, and the veto override passed
5 in the Assembly soon thereafter.²²

6 12. Fear of a “far broader” death penalty ballot initiative lacking the constitutional
7 protections of Senate Bill 155 drove pivotal votes in the process of legislatively enacting Senate
8 Bill 155.²³ Assemblyman Henry Mello, who cast the necessary “aye” vote after the bill
9 initially fell one vote short in the Assembly, reported that although he was “philosophically
10 opposed” to capital punishment, he feared a death penalty initiative drafted by law enforcement
11 groups would be “far broader and far worse” than the legislatively drawn Senate Bill 155.²⁴
12 Similarly, concerning his “difficult and painful vote” to enact Senate Bill 155, Assemblyman
13 Tom Bane explained that “I believe if this bill is not enacted the eventual result will be far
14 worse. The people of California will support an initiative which will not have the protections
15 of SB 155.”²⁵

16 13. In November 1977, approximately three months after Senate Bill 155 went into
17 effect, Senator Briggs and the law enforcement-dominated group he co-chaired, Citizens for an
18 Effective Death Penalty, launched a ballot initiative campaign in order to enact “the nation’s
19 toughest, most effective death penalty law”²⁶ through Proposition 7, which became known as
20 the “Briggs Initiative.”²⁷ Senator Briggs hired Donald Heller, a former Assistant United States

21 ²⁰ Exh. 140 at 22 (Pitchess Scores Solon On Move To Defeat Death Bill, L.A. Daily Journal, June
22 28, 1977, at 4).

23 ²¹ Exh. 140 at 20-21 (Close Senate Override On Death Penalty, The Recorder, June 24, 1977, at 1,
24 6).

25 ²² Exh. 139 at 96-97; Exh. 140 at 21.

26 ²³ Exh. 140 at 9 (Assembly Passes Death Penalty Bill, The Recorder, May 17, 1977, at 1, 6).

27 ²⁴ Exh. 140 at 9.

28 ²⁵ Exh. 139 at 80 (Letter from Tom Bane, Assemblyman, California Assembly, to Mark Waldman,
Legislative Counsel, American Civil Liberties Union (May 23, 1977)).

²⁶ Exh. 139 at 102 (California Voters Pamphlet, General Election, Nov. 7, 1978, at 32-46).

²⁷ See Exh. 140 at 24 (‘Insurance Death Penalty’ Drive Planned, The Recorder, Nov. 3, 1977, at
1); Exh. 140 at 26 (George Skelton, Briggs Launches Death Penalty Initiative Drive, L.A. Times, Nov.
10, 1977, at 3, 20).

1 Attorney who had never tried a capital case, to draft the proposed statute.²⁸ The Briggs
2 Initiative included 27 special circumstances, more than double the number included in the 1977
3 law; substantially broadened the definitions of special circumstances that were included in the
4 1977 law; eliminated the across-the-board intent to kill requirement of the 1977 law; and
5 expanded death-eligibility for accomplices. See Steven F. Shatz & Nina Rivkind, The
6 California Death Penalty Scheme: Requiem for Furman, 72 N.Y.U.L. Rev. 1283, 1311-13
7 (1997); Cal. Penal Code § 190.2 (West 1988).

8 14. Senator Briggs admitted that he intended to use his death penalty initiative to
9 further his own political career.²⁹ At a press conference announcing the unveiling of the
10 initiative campaign, Senator Briggs announced: "I intend to make this a very big part of my
11 gubernatorial campaign, I don't mind telling you"³⁰ and reportedly stated that he planned to
12 seek necessary petition signatures on campaign stops.³¹ In promoting his initiative, Senator
13 Briggs charged that the death penalty bill enacted by the Legislature in 1977 was "weak and
14 unconstitutional,"³² contained "ridiculous" limitations on its application,³³ and did not
15 adequately protect "the average citizen" from murderers.³⁴ Senator Briggs said of the initiative
16 measure "This is the peoples' death penalty bill . . . [t]he other was the Legislature's,"³⁵ and
17 that the people of California had been ". . . fooled one more time by the politicians into
18 thinking they have death penalty protection when in fact they don't."³⁶ The Briggs-chaired
19
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22 ²⁸ Exh. 140 at 27 (New Death Penalty Proposal Unveiled, The Recorder, November 10, 1977, at
23 1); Exh. 140 at 49 (Dan Morain, California Debate: Agony Over Resuming Executions, L.A. Times,
24 Aug. 18, 1985 at 1).

25 ²⁹ Exh. 140 at 26.

26 ³⁰ Exh. 140 at 26.

27 ³¹ Exh. 140 at 27.

28 ³² Exh. 140 at 26.

³³ Exh. 140 at 29 (Richard Bergholz, Briggs Hits 'Weak' Death Penalty Law, L.A. Times, Feb. 14,
1978, at A21).

³⁴ Exh. 140 at 26.

³⁵ Exh. 140 at 27.

³⁶ Exh. 140 at 26.

1 sponsoring group of the initiative claimed that Senate Bill 155 did not go far enough, reserving
2 capital punishment only in some circumstances surrounding the crime of murder.³⁷

3 15. Senator Briggs' ballot petition materials targeted the fears of Californians. In a
4 mailing sent to the state's citizens seeking petition signatures for the Briggs Initiative, Senator
5 Briggs informed voters that: "Your life is being threatened by the hardened, violent criminals
6 who are stalking the streets of your community . . ." and that "If a bloodthirsty criminal like
7 Charles Mason had you or your family brutally murdered, that criminal would not face the
8 death penalty under current California law. In fact, he could be back on the streets in 7 years!"
9 and promised that his law would "give Californians the protection of a tough, effective death
10 penalty through the initiative process."³⁸

11 16. The campaign and ballot materials generated for California voters by Senator
12 Briggs and the Briggs Initiative sponsors state that the proposed death penalty statute was
13 intended to expand the death penalty to apply to "every murderer."³⁹ In the argument in favor
14 of Proposition 7 in the ballot pamphlet, voters were told that "the death penalty law passed by
15 the State Legislature was as weak and ineffective as possible," listing certain types of murders
16 not covered by the 1977 law that would be covered by the Briggs Initiative, and that if passed,
17 the Briggs Initiative would "give every Californian the protection of the nation's toughest, most
18 effective death penalty law."⁴⁰ The ballot argument also stated that

19 . . . if you were to be killed on your way home tonight simply
20 because the murderer was high on dope and wanted the thrill, that
21 criminal would not received the death penalty. Why? *Because the*
Legislature's weak death penalty law does not apply to every
*murderer. Proposition 7 would.*⁴¹

22 17. Members of the law enforcement community and those charged with
23 prosecuting offenders of the laws of California expressed constitutional concerns about the

24
25 ³⁷ Exh. 140 at 24; Exh. 139 at 98 (Letter from Senator John V. Briggs, Co-Chairman, Citizens for
an Effective Death Penalty, to Concerned Citizen (undated)).

26 ³⁸ Exh. 139 at 98 (emphasis in original); see also Exh. 140 at 30 (W.E. Barnes, Sen. Briggs: 'Your
Life is in Danger', S.F. Examiner & Chronicle, April 2, 1978, at A10).

27 ³⁹ Exh. 139 at 102.

28 ⁴⁰ Exh. 139 at 102.

⁴¹ Exh. 139 at 102. (Emphasis added).

1 breath of the proposed initiative, with its expansive list of death-eligible crimes. Lowell
2 Jensen, then-Alameda County District Attorney, stated that the Legislature's 1977 death
3 penalty bill "is about as far as you can go in line with Supreme Court decisions"⁴² and thus
4 Proposition 7 is "vulnerable to legal attack."⁴³ William O'Malley, then-Contra Costa County
5 District Attorney, stated that "Prop. 7 is too broad to stand a court test. It tries to cover all the
6 bases and that's where the trouble is."⁴⁴ Joseph Freitas Jr., then-San Francisco County District
7 Attorney, warned that "Proposition 7 has not been carefully prepared"⁴⁵ and that "California
8 voters should understand that they are being cruelly manipulated by a man for whom the issue
9 of life and death itself is just so much fuel for his political machine."⁴⁶ In urging defeat of
10 Proposition 7, the California State Bar Conference of Delegates described the Briggs Initiative
11 as "unnecessary, unlawyerlike and irrational."⁴⁷ Citing that the proposition would "radically
12 expand" the types of murder punishable by death, the Board of Directors of the Barristers Club
13 of San Francisco unanimously voted to oppose Prop. 7, calling it "unnecessary, poorly drafted
14 and irrational."⁴⁸

15 18. The Briggs Initiative was approved by California voters on November 7, 1978,
16 and went into effect on November 8, 1978, supplanting the 1977 death penalty statute enacted
17 by the Legislature. Proposition 7, § 6, approved Nov. 7, 1978, eff. Nov. 8, 1978. The statute
18 enacted by the Briggs Initiative significantly expanded both the number of death-eligible
19 crimes, or special circumstances, as well as the scope of existing special circumstances. As
20 acknowledged by the California Supreme Court, the special circumstances set forth in Penal
21 Code section 190.2 are intended to serve the constitutionally required narrowing function in the
22

23 ⁴² Exh. 140 at 37 (Gayle Montgomery, District Attorneys Troubled by Prop. 7, Oakland Tribune,
Oct. 24, 1978, at C11-12).

24 ⁴³ Exh. 140 at 41 (Editorial, We Oppose Proposition 7, Oakland Tribune, Oct. 28, 1978, at 20).

25 ⁴⁴ Exh. 140 at 41.

26 ⁴⁵ Exh. 140 at 40 (Major S.F. Opponents of Prop. 7, S.F. Chronicle, Oct. 26, 1978, at 6).

27 ⁴⁶ Exh. 140 at 42 (District Attorney Freitas Comes Out Against Prop. 7, L.A. Daily Journal, Nov.
2, 1978, at 1).

28 ⁴⁷ Exh. 140 at 31 (Bob de Carteret and C. Wong, State Bar Delegates Urge Defeat of Prop. 7
Initiative, L.A. Daily Journal, Sept. 17, 1978, at 1).

⁴⁸ Exh. 140 at 32 (Barristers Vote 'No' On Prop. 7, The Recorder, Oct. 10, 1978, at 1, 11).

1 California death penalty scheme. *People v. Visciotti*, 2 Cal. 4th 1, 74 (1992); *People v.*
2 *Bacigalupo*, 6 Cal. 4th 457, 467-68 (1993).

3 19. The Briggs Initiative contained typographical or other errors, as well as legal
4 ambiguities and unconstitutional provisions. According to then-California Supreme Court
5 Justice Cruz Reynoso, "(Briggs) had bragged he would have the toughest death penalty law in
6 the world, and he did not pay any attention to the guidelines set down by the U.S. Supreme
7 Court," resulting in the California Supreme Court being "forced to overturn cases to clarify the
8 law."⁴⁹ Former California Supreme Court Justice Joseph Grodin explained that in light of the
9 Briggs Initiative, the Court's role in addressing death penalty cases had been "rendered
10 particularly difficult by ambiguities in the death penalty statute."⁵⁰ Acknowledging the drafting
11 errors contained in the death penalty law he enacted, such as inclusion of the felony murder
12 special circumstance of killing in the commission of arson in violation of Penal Code section
13 447, which had been repealed in 1929 (1929 Cal. Stat. c. 25, 47, § 6), Senator Briggs himself
14 introduced legislation during the 1979-1980 Legislative Regular Session to "correct" several
15 drafting errors in the statute in an effort to "clean up the death penalty initiative."⁵¹ Opponents
16 of this proposed legislation pointed out the "irony" of Senator Briggs' proposed bill, which
17 requested that the Legislature make changes in the initiative measure Senator Briggs sponsored
18 "in order to avoid the legislative process," noting that many of the errors contained in the
19 initiative "undoubtedly" would not have occurred had Senator Briggs not sought to ignore that
20 process.⁵²

21 20. In the years following the enactment of the Briggs Initiative, the California
22 judiciary was required to resolve ambiguities in the death penalty statute. In *People v. Engert*,

24 ⁴⁹ Exh. 140 at 53 ('Blame Briggs, Not High Court' For Reversals, The Recorder, Aug. 19, 1986, at
25 3).

⁵⁰ Exh. 140 at 49.

26 ⁵¹ Exh. 139 at 110-15 (California Assembly Committee on Public Safety, Bill Analysis, Senate
27 Bill No. 2054 (1979-80 Reg. Sess.) as amended May 6, 1980; Senate Committee on Judiciary, Bill
Analysis, Senate Bill No. 2054 (1979-80 Reg. Sess.) as introduced).

28 ⁵² Exh. 139 at 116 (Letter to John Briggs, Senator, California Legislature, from James R. Tucker,
Legislative Advocate, American Civil Liberties Union (June 13, 1980)).

1 31 Cal. 3d 797 (1982), the California Supreme Court declared that the special circumstance
2 defined in former Penal Code section 190.2(a)(14) that the murder was “especially heinous,
3 atrocious, or cruel manifesting exceptional depravity” was unconstitutionally vague and thus
4 struck the provision. In *Carlos v. Superior Court*, 35 Cal. 3d 131 (1983), the California
5 Supreme Court construed Penal Code section 190.2(b) to require a finding of intent to kill
6 before a defendant could be subject to a felony murder special circumstance under former Penal
7 Code section 190.2(a)(17), resolving ambiguity in the statute concerning the fundamental issue
8 of death-qualifying mental state culpability to avoid potential constitutional concerns. In
9 *People v. Turner*, 37 Cal. 3d 302 (1984), the Court clarified that under *Carlos*, the intent to kill
10 requirements in former Penal Code section 190.2(b) applied to both actual killers and
11 accomplices and applied to all special circumstances set forth in 190.2(a) other than the prior
12 murder special circumstance (§ 190.2(a)(2)). In *People v. Bigelow*, 37 Cal. 3d 731, 750 (1984),
13 citing to the “vague and broad generalities” of the language of the Briggs Initiative generally
14 and the financial gain special circumstance (§ 190.2(a)(1)) specifically, the Court adopted a
15 limiting construction requiring that the victim’s death be an essential pre-requisite to the
16 financial gain sought by the defendant for this special circumstance to apply. The *Bigelow*
17 Court also held that the conjunctive language of the kidnap felony murder special circumstance
18 in former section 190.2(a)(17)(ii) as drafted, specifying “[k]idnapping in violation of Sections
19 207 and 209,” was a careless drafting error and that the intent of the provision should be
20 construed to permit a special circumstance finding if the defendant was convicted of
21 kidnapping under either section 207 or 209. *Id.* at 755-56. In *People v. Davenport*, 41 Cal. 3d
22 247 (1985), the Court narrowly construed the torture murder special circumstance (former §
23 190.2(a)(18)) to save it from constitutional infirmity, by holding that the special circumstance
24 required proof of the intent to inflict torture. In *People v. Weidert*, 39 Cal. 3d 836 (1985), the
25 Court limited the witness killing special circumstance as enacted (former § 190.2(a)(10)) to
26 apply only to witnesses in criminal proceedings, to the exclusion of juvenile proceedings.
27 During the initial period following the enactment of the statute, the California Supreme Court
28

1 issued several other rulings concerning the application of the Briggs Initiative on issues other
2 than those directly pertaining to the special circumstances.

3 21. By the mid 1980s, the California Supreme Court had reversed the vast majority
4 of death sentences in the cases that came before it.⁵³ California District Attorneys, Sheriffs,
5 Chiefs of Police, and politicians who supported capital punishment harnessed their collective
6 outrage at the California Supreme Court's failure to affirm death sentences obtained under the
7 Briggs Initiative by campaigning to oust Supreme Court Chief Justice Rose Bird and Associate
8 Justices Cruz Reynoso and Joseph Grodin in the 1986 judicial retention elections.⁵⁴ This
9 coalition joined forces under the name "Californians to Defeat Rose Bird,"⁵⁵ and made claims
10 in the highly publicized campaign such as that "The majority of the Bird Court will not allow
11 anyone in California to be executed regardless how perfect the trial"⁵⁶ and that because these
12 justices are "largely responsible for overturning 39 of 42 death sentences which they have
13 decided," voters were encouraged to "think about brutal killers who live to celebrate another
14 Christmas because the Rose Bird Court has allowed them to escape their just punishment."⁵⁷
15 This unprecedented election, the results of which were driven by the perception that these
16 justices were soft on crime and did not adequately enforce the death penalty, resulted in the
17 three challenged justices being removed from the California Supreme Court.

18 22. With newly-installed justices on the bench headed by former Chief Justice
19 Malcolm Lucas, the California Supreme Court overruled *Carlos v. Superior Court*, which
20 narrowly construed intent to kill requirements of the Briggs Initiative, in *People v. Anderson*,
21 43 Cal. 3d 1104 (1987). The newly comprised Court otherwise broadly interpreted issues that
22 came before it concerning the application of the special circumstances and the statute generally,
23 and paved the way for continued expansion of the death penalty. For example, the Court
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25 ⁵³ See Exh. 139 at 117-18, 131-33 (Miscellaneous Campaign Materials: Californians to Defeat
26 Rose Bird (1985-1986)).

27 ⁵⁴ See Exh. 139 at 117-33.

28 ⁵⁵ Exh. 139 at 123-26.

⁵⁶ Exh. at 129.

⁵⁷ Exh. at 133.

1 broadly interpreted the lying in wait special circumstance by holding that the “concealment”
2 element of lying in wait can be satisfied by a defendant’s “concealment of purpose” even when
3 there is no attempted or actual physical concealment involved. *People v. Morales*, 48 Cal. 3d
4 527, 554-55 (1989). Prior to 1981, the Court consistently applied lying in wait to cases in
5 which the defendant physically concealed him or herself for some period of time before
6 attacking the victim. *See Webster v. Woodford*, 369 F.3d 1062, 1073 (9th Cir. 2004). Soon
7 after Rose Bird and her colleagues were removed from the California Supreme Court, the
8 Court’s affirmance rate in capital cases shifted dramatically. The California Supreme Court
9 reversed fifty-eight death sentences and upheld just four during Rose Bird’s decade on the
10 bench, while under her successor, Chief Justice Lucas, the Court affirmed sixty-four of the
11 eighty-nine capital appeals it reviewed in three years.⁵⁸

12 23. Since passage of the Briggs Initiative in 1978, the definition of first-degree
13 murder and the special circumstances have continually been expanded, further broadening the
14 pool of death-eligible crimes in California. In 1983, Penal Code section 189 was amended to
15 add murder perpetrated by means of knowing use of armor piercing bullets to the list of
16 statutory first-degree murders. 1982 Cal. Stat. c. 950, 3440, § 1 (S.B. 1342), eff. Sept. 13,
17 1982.

18 24. The definition of first-degree murder and the special circumstances were further
19 expanded in 1990 with the passage of Proposition 115, effective June 6, 1990, known as the
20 “Crime Victims’ Justice Reform Act,” a central purpose of which was to “clarify, restore, and
21 overturn various Bird [C]ourt decisions which affect potential capital cases,”⁵⁹ including those
22 that judicially narrowed or otherwise limited the application of the Briggs Initiative.⁶⁰ The
23 voter ballot arguments in favor of Proposition 115 explained that Proposition’s 115’s “Bird

24 ⁵⁸ Exh. 140 at 55 (Rebecca LaVally, The Death Penalty in California - Closing in on the First
25 Execution, California Journal, July 1, 1990).

26 ⁵⁹ Exh. 139 at 314 (Joint Hearing on Crime Victims Justice Reform Act, Proposition 115 on the
27 June 1990 Ballot: California Senate Committee on Judiciary and Assembly Committee on Public Safety,
December 11, 1989 (transcript, staff analysis, written testimony in support of and opposition to
initiative)).

28 ⁶⁰ *See* Exh. 139 at 617-36 (1990 Crime Victims Justice Reform Initiative, Proposition 115
Manual: State of California Department of Justice (1990)).

1 Court' death penalty provisions improve our death penalty law and overturn decisions by Rose
2 Bird and her allies which made it nearly inoperative.”⁶¹ Proposition 115 was intended and
3 served to “expand” the definition of first-degree murder and the list of special circumstances.⁶²

4 25. Proposition 115 added the following types of first-degree felony murders Penal
5 Code section 189: kidnapping, sodomy, oral copulation, rape with a foreign object, and train
6 wrecking.⁶³ It also added the mayhem felony murder and rape with a foreign object felony
7 murder special circumstances to Penal Code section 190.2(a)(17).⁶⁴ Proponents of these
8 expansions noted that prior to Proposition 115, the first-degree felony murders in section 189
9 and the felony murder special circumstances in section 190.2(a)(17) were “not the same” and
10 thus the measure was necessary to “conform” the list of first-degree felony murders and the
11 felony murder special circumstances.⁶⁵ According to the State of California Office of the
12 Attorney General, the result of these expansions accomplished by Proposition 115 was to
13 “make all types of first degree felony murders subject to capital punishment.”⁶⁶

14 26. Proposition 115 also broadened some existing special circumstances. The
15 witness killing special circumstance defined in Penal Code section 190.2(a)(10) was expanded
16 to apply to witnesses in juvenile proceeding, nullifying the California Supreme Court’s ruling
17 to the contrary in *People v. Weidert*, 39 Cal. 3d 836 (1985).⁶⁷ The torture murder special
18 circumstance was expanded by eliminating the requirement of “proof of the infliction of
19 extreme physical pain no matter how long its duration” previously required by that special
20 circumstance.⁶⁸ The drafters of Proposition 115 apparently attempted to revive the “heinous,
21 atrocious, or cruel” special circumstance (former Penal Code section 190.2(a)(14)) held to be
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23 ⁶¹ Exh. 139 at 650 (California Ballot Pamphlet, Primary Election (June 5, 1990), Full Text of
24 Proposition 115).

25 ⁶² Exh. 139 at 648.

26 ⁶³ Exh. 139 at 658.

27 ⁶⁴ Exh. 139 at 660.

28 ⁶⁵ Exh. 139 at 285.

⁶⁶ Exh. 139 at 616, 630-31.

⁶⁷ Exh. 139 at 275; Exh. 139 at 659.

⁶⁸ Exh. 139 at 660.

1 unconstitutional in *People v. Engert*, by including it in the proposed new law and affirmatively
2 making non-substantive amendments to the provision.⁶⁹ Proposition 115 codified the
3 California Supreme Court's holding in *People v. Anderson*, that as to actual killers, intent to kill
4 is not a required element for any of the special circumstances unless explicitly made so by the
5 statute.⁷⁰ According to the Senate Committee on Judiciary and Assembly Public Safety
6 Committee analysis of Proposition 115, the proponents of the Proposition desired this
7 amendment to preclude any future judicial re-imposition of intent to kill beyond the holdings of
8 *Anderson*.⁷¹ The Proposition also expanded the liability of felony murder accomplices,
9 eliminating the intent to kill element and requiring only that the accomplice act with "reckless
10 indifference to human life and as a major participant" for the felony murder special
11 circumstances to apply.⁷² Proposition 115 also corrected drafting errors included in the Briggs
12 Initiative, including to the kidnapping and arson felony murder special circumstances.⁷³

13 27. Along with Proposition 115, Proposition 114 was also approved by California
14 voters on June 5, 1990, effective June 6, 1990, and served to expand the definition of "peace
15 officer" for purposes of the peace officer special circumstance in Penal Code section
16 190.2(a)(7), and other areas of the Penal Code.⁷⁴

17 28. The definition of first-degree murder was again expanded in 1993 with the
18 addition of felony murder carjacking and murder perpetrated by means discharging a firearm
19 from a motor vehicle to the list of statutory first-degree murders in Penal Code section 189.
20 1993 Cal. Stat. c. 611 (S.B.60), § 4, eff. Oct. 1, 1993; 1993 Cal. Stat. c. 611 (S.B.60), § 4.5, eff.
21 Oct. 1, 1993; 1993 Cal. Stat. chap. 611, § 4.5, effective October 1, 1993. According to the
22 Assembly Committee on Public Safety's analysis of Senate Bill 60, which enacted the
23 carjacking felony murder theory of first-degree murder, this additional type of first-degree

24 ⁶⁹ Exh. 139 at 660.

25 ⁷⁰ Exh. 139 at 661.

26 ⁷¹ Exh. 139 at 279.

27 ⁷² Exh. 139 at 661.

28 ⁷³ Exh. 139 at 660.

⁷⁴ Exh. 139 at 671-74 (California Ballot Pamphlet, Primary Election (June 5, 1990), Full Text of Proposition 114).

1 murder was necessary because it was “difficult to prove” this crime under the robbery felony
2 murder theory.⁷⁵ According to a Senate Committee analysis of Senate Bill 310, which enacted
3 the drive-by murder theory first-degree murder, this amendment to Penal Code section 189 was
4 designed to “change the elements of first degree murder to make it easier to obtain a first-
5 degree murder conviction for a drive-by shooting murder.”⁷⁶ According to the author and
6 sponsor of Senate Bill 310, those convicted of drive-by killings should be subject to the death
7 penalty, and then-current law did not “adequately punish” this type of murder.⁷⁷

8 29. Despite that the special circumstances are supposed to narrow death-eligibility
9 from first-degree murder, the Legislature and electorate continued to remove differences
10 between first-degree murder and the special circumstances by enacting subsequent amendments
11 to the list of special circumstances deemed necessary when it was discovered that a type of
12 first-degree murder was not punishable by death. Soon after felony murder carjacking and
13 drive-by killings were added to the list of statutory first-degree murders in Penal Code section
14 189, the Legislature acted to ensure that this same criminal conduct also constituted special
15 circumstance liability, thus, was punishable by death. 1995 Cal. Stat. c. 477 § 1 (S.B. 32);
16 1995 Cal. Stat. c. 478 (S.B. 9).

17 30. With the passage of Senate Bill 32, which was approved by California voters on
18 March 26, 1996 by Proposition 195, the felony murder carjacking special circumstance and the
19 juror killing special circumstance were added to the Penal Code as sections 190.2(a)(17)(L) and
20 190.2(a)(20), and the felony murder kidnapping special circumstance was expanded to include
21 murders resulting from carjacking kidnap (Penal Code section 190.2(a)(17)(B)). 1995 Cal.
22 Stat. c. 477 § 1 (S.B. 32) and Proposition 195, approved March 26, 1996, effective March 27,
23 1996.⁷⁸ Urging passage of Senate Bill 32, the author, then-Senator Steve Peace, asserted that

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25 ⁷⁵ Exh. 139 at 679-80 (California Assembly Committee on Public Safety, Bill Analysis, July 13,
1993 Hearing, Senate Bill No. 60 (1993-94 Reg. Sess.), as proposed to be amended).

26 ⁷⁶ Exh. 139 at 677 (California Senate Committee, Bill Analysis, March 30, 1993 Hearing, Senate
Bill No. 310 (1993-94 Reg. Sess.), as amended March 29, 1993).

27 ⁷⁷ Exh. 139 at 676.

28 ⁷⁸ See Exh. 139 at 712-24 (California Ballot Pamphlet, Primary Election (March 26, 1996), Full
Text of Proposition 195).

1 felony murder carjacking and felony murder kidnap carjacking were “the only crimes that are
2 subject to the first degree felony murder rule that are not special circumstances under law”⁷⁹
3 and thus, according to the argument in favor of Proposition 195 in the voter pamphlet, the
4 addition of these two new special circumstances would “conform” the list of special
5 circumstances to the list of first-degree felony murders.⁸⁰ In urging passage of his bill, Senator
6 Peace on the one hand took the position that the carjacking felony murder and the kidnap-
7 carjacking felony murder special circumstances were “merely ‘clean-up’ provisions since a
8 carjacking is essentially a robbery and robbery is already a special circumstance and
9 kidnapping is also a special circumstance.”⁸¹ He also acknowledged, however, that carjacking
10 first-degree murders “cannot easily be prosecuted” under the robbery felony murder special
11 circumstance, rather, securing such a conviction required “a series of procedural hoops,” but
12 that the proposed legislation “solves the problem by directly making carjacking related first
13 degree murders a special circumstance.”⁸²

14 31. The juror killing special circumstance was added to the Penal Code as section
15 190.2(a)(20) by this same legislation, despite law enforcement officials’ apparent inability to
16 identify any case in California involving the murder of a juror.⁸³ The bill’s author argued that
17 this additional special circumstance was necessary since “It is obvious given the central role
18 that jurors play in the administration of justice, killing a juror because of his or her official
19 actions is just as much an outrage as killing a judge or a witness.”⁸⁴ The bill’s author also
20 referenced the need to “legislatively rectify drafting errors and other problems with the [] 1978
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22 ⁷⁹ Exh. 139 at 706 (Letter to Governor Pete Wilson, from Senator Steve Peace, California State
23 Senate (Sept. 15, 1995) (emphasis in original).

24 ⁸⁰ Exh. 139 at 714.

25 ⁸¹ Exh. 139 at 706.

26 ⁸² Exh. 140 at 69-70 (Letter to the Editor, Sacramento Bee, from Senator Steve Peace, California
27 State Senate (March 4, 1996) (emphasis in original); Exh. 140 at 156-57 (Editorial, Letters, Sacramento
28 Bee, March 19, 1996, at B7).

⁸³ See Exh. 140 at 75 (State Propositions at a Glance, S.F. Chronicle, March 24, 1996, at 6/Z1).

⁸⁴ Exh. 139 at 690 (California Senate Committee on Criminal Procedure, Analysis, March 7, 1995
Hearing, Senate Bill No. 32 (1995-96 Reg. Sess.), as proposed to be amended); Exh. 139 at 157; Exh.
139 at 714.

1 death penalty law” as being behind the need to add the juror killing special circumstance to
2 Penal Code section 190.2.⁸⁵

3 32. At the same time Senate Bill 32 and corresponding Proposition 195 went into
4 effect, Senate Bill 9 was passed and approved by California voters by Proposition 196, which
5 added the drive-by murder special circumstance to Penal Code section 190.2 (§ 190.2(a)(21)).
6 1995 Cal. Stat. c. 478 (S.B. 9), § 2 (Prop. 196, approved March 26, 1996) effective March 27,
7 1996.⁸⁶ The legislation was enacted in recognition that drive-by shooting murder “is first
8 degree murder, but is not one of the enumerated special circumstances”⁸⁷ and thus the voter
9 ballot for Proposition 196 informed voters that the measure simply “adds first-degree murder
10 resulting from a drive-by shooting to the list of special circumstances . . .”⁸⁸ According to
11 proponents of this expansion of the death penalty, drive-by shootings were “no longer confined
12 to the inner city,”⁸⁹ rather, drive-by shootings, thought largely to be gang-related, were
13 “spreading like wildfire to the suburbs and even rural California,”⁹⁰ thus, the sentence for first-
14 degree murder without special circumstances was thought to be “too lenient.”⁹¹

15 33. The drafters of Senate Bills 32 and 9 and the corresponding propositions again
16 included the “heinous, atrocious, cruel” special circumstance (§ 190.2(a)(14)) in the proposed
17 amended law, again making non-substantive amendments to this unconstitutional special
18 circumstance.⁹²

19 34. Concerns have been raised that political considerations played a significant role
20 in these more recent expansions of the California death penalty. Because first-degree felony
21 murder carjacking and kidnap-carjacking, as well as drive-by first-degree murder were
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23 ⁸⁵ Exh. 140 at 69-70.

24 ⁸⁶ See Exh. 139 at 725-37 (California Ballot Pamphlet, Primary Election (March 26, 1996), Full
Text of Proposition 196).

25 ⁸⁷ Exh. 139 at 703 (California Senate Committee on Criminal Procedure, Analysis, March 7, 1995
Hearing, Senate Bill No. 9 (1995-96 Reg. Sess.), as introduced).

26 ⁸⁸ Exh. 139 at 726.

27 ⁸⁹ Exh. 139 at 726.

28 ⁹⁰ Exh. 139 at 728.

⁹¹ Exh. 139 at 702.

⁹² Exh. 139 at 718; Exh. 139 at 731.

1 potentially already covered by existing special circumstances, these death penalty bills were
2 criticized as being “grandstanding” political bills⁹³ and a waste of time utilized to gain political
3 mileage out of high profile types of crime.⁹⁴

4 35. In 2000, both the definition of first-degree murder and the special circumstances
5 were once again expanded. The first-degree murder statute was expanded by the addition of
6 torture felony murder to the list of first-degree felony murders in Penal Code section 189. 1999
7 Cal. Stat. 1c. 694, §1, (AB 1574) effective January 1, 2000. The purpose of adding torture
8 felony murder to section 189 was to ease the prosecution’s burden in securing a first-degree
9 murder conviction when the crime of torture is involved.⁹⁵ Specifically, the purpose of the bill
10 was to “eliminate” the prosecution’s burden of proving that the torture of the victim was
11 willful, deliberate and premeditated, as is required by the murder by means of torture theory of
12 first-degree, and require only proof that the defendant intended to torture.⁹⁶ According to the
13 Assembly Committee of Public Safety’s analysis of Assembly Bill 1574, which enacted this
14 amendment, this addition to section 189 would “significantly affect the way a prosecutor would
15 go about charging” torture-related killings.⁹⁷ The inability of the Los Angeles County District
16 Attorney’s Office to obtain a first-degree murder conviction in a specific case apparently gave
17 rise to the need for this expansion of the first-degree murder statute. According to the Los
18 Angeles District Attorney’s Office, the “source” of Assembly Bill 1574, a “miscarriage of
19 justice” had occurred in a then-recent case, when the jury convicted the defendant of torturing a
20 child to death, “but nevertheless found that there was no ‘premeditation or deliberation’ and
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23 ⁹³ Exh. 140 at 62 (Mike Lewis, Expansion of Capital Crimes Nears Passage, Sonoma County
24 Herald-Recorder, Sept. 19, 1995, at 8, 15).

25 ⁹⁴ See Exh. 140 at 64 (Pamela Martineau, Wilson Signs Bill Allowing Death Penalty for
Murdering Carjackers, Metropolitan News Enterprise, Los Angeles, California, Sept. 27, 1995, at 9).

26 ⁹⁵ Exh. 139 at 783-84 (California Assembly, Third Reading, Assembly Bill No. 1574 (1999-2000
27 Reg. Sess.), as introduced Feb. 26, 1999); Exh. 139 at 785-89 (California Assembly Committee on
Public Safety, Analysis, April 13, 1999 Hearing, Assembly Bill No. 1574 (1999-2000 Reg. Sess.), as
introduced Feb. 26, 1999).

28 ⁹⁶ Exh. 139 at 786-87.

⁹⁷ Exh. 139 at 786.

1 returned a verdict of second not first degree murder.”⁹⁸ According to the bill sponsor,
2 Assembly Bill 1574 “corrects this anomaly” and “ensures” that when a murder occurs during
3 the crime of torture, the crime is treated as first-degree felony murder.⁹⁹

4 36. The death penalty was also expanded in several respects in 2000. Senate Bill
5 1878 and corresponding Proposition 18, which became effective March 8, 2000, expanded the
6 kidnap and arson felony murder special circumstances (Penal Code §§ 190.2(a)(17)(B), (H),
7 (M)) as well as the lying in wait special circumstance (Penal Code § 190.2(a)(15)). 1998 Cal.
8 Stat. c. 629, § 2 (S.B. 1878), Proposition 18, approved by California voters on March 7,
9 effective March 8, 2000.¹⁰⁰ The purpose of this bill was to “overturn specific court cases
10 regarding the death penalty by changing the language regarding lying in wait, and to eliminate
11 the distinction between committing a murder during the commission of an arson or kidnapping
12 and committing an arson or kidnapping to facilitate a murder”¹⁰¹ “for purposes of expanding
13 the death penalty.”¹⁰² Specifically, according to the bill sponsor, Senate Bill 1878 was “clearly
14 designed to abrogate” California Supreme Court precedent set forth in *People v. Green*, 27 Cal.
15 3d 1 (1980), *People v. Weidert*, 39 Cal. 3d 836 (1985) and *Domino v. Superior Court*, 129 Cal.
16 App. 3d 1000 (1982).¹⁰³

17 37. Senate Bill 1878 and corresponding Proposition 18 amended the lying in wait
18 special circumstance by expanding the former statutory language requiring that the defendant
19 intentionally killed the victim “while lying in wait,” which had been interpreted in *Domino* to
20 require proof that no cognizable interruption separate the period of lying in wait from the

21 ⁹⁸ Exh. 139 at 807 (California Senate Rules Committee, Third Reading, Analysis, Assembly Bill
22 No. 1574 (1999-2000 Reg. Sess.), as introduced (Sept. 2, 1999)).

23 ⁹⁹ Exh. 139 at 807.

24 ¹⁰⁰ See Exh. 139 at 809-17 (California Ballot Pamphlet, General Election (March 7, 2000), Full
Text of Proposition 18).

25 ¹⁰¹ Exh. 139 at 742 (California Senate Committee on Public Safety, Analysis, April 21, 1998
Hearing, Senate Bill No. 1878 (1997-98 Reg. Sess.), as introduced as reflected by proposed
amendments).

26 ¹⁰² Exh. 139 at 780 (California Assembly Committee on Appropriations, Analysis, July 29, 1998
Hearing, Senate Bill No. 1878 (1997-98 Reg. Sess.), as amended July 16, 1998).

27 ¹⁰³ Exh. 139 at 755 (Letter to The Honorable Quentin L. Kopp, California State Senate, from
28 Gregory D. Totten, Chief Deputy District Attorney and Peter D. Kossoris, Senior Deputy District
Attorney, Office of the District Attorney, Ventura County, California (April 23, 1998)).

1 period during which the killing takes place, to “by means of lying in wait,” language identical
2 to the first-degree murder theory of lying in wait, which does not include this additional
3 temporal requirement.¹⁰⁴ As explained by the bill sponsor, the statutory language of the lying
4 in wait special circumstance prior to this amendment required “more rigorous proof” than the
5 first-degree murder theory of lying in wait, a distinction the sponsor felt was “not a fair or just
6 one” and in need of elimination.¹⁰⁵ This distinction was apparently perceived as problematic
7 because it “allows some persons to satisfy the requirements for first degree murder without
8 satisfying the requirements to limit their sentence options to death or [life without the
9 possibility of parole].”¹⁰⁶ In other words, the “more rigorous proof” required by the special
10 circumstance that provided some statutory narrowing from first-degree murder by means of
11 lying in wait was eliminated *because* of the narrowing function it provided. In order to
12 eliminate this narrowing distinction, the purpose of this amendment was “to conform” the
13 narrower definition of lying in wait as used in the special circumstance to the broader first-
14 degree murder definition.¹⁰⁷

15 38. Also as a result of Senate Bill 1878 and Proposition 18, the kidnap and arson
16 felony murder special circumstances were expanded to apply to cases in which the felony of
17 kidnapping or arson was committed primarily or solely for the purpose of facilitating murder
18 when intent to kill is present, thereby expressly exempting these two special circumstance from
19 the “independent felonious purpose” doctrine, as set forth in the longstanding California
20 Supreme Court decisions of *People v. Green*, 27 Cal. 3d 1 (1980), and *People v. Weidert*, 39
21 Cal. 3d 836 (1985), which was the Legislature’s stated intent in amending these two special
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23 ¹⁰⁴ Exh. 139 at 744-45, 752; Exh. 139 at 809-10.

24 ¹⁰⁵ Exh. 139 at 739-40 (Letter to Mr. Charles Fennessey, Deputy Legislative Secretary, Governor’s
25 Office, from Gregory D. Totten, Chief Deputy District Attorney, Office of the District Attorney,
Ventura County, California (Dec. 4, 1997)).

26 ¹⁰⁶ Exh. 139 at 757 (California Department of Finance, Bill Analysis, Senate Bill No. 1878 (1997-
98 Reg. Sess.), as amended April 28, 1998 (May 13, 1998)).

27 ¹⁰⁷ Exh. 139 at 752-73; Exh. 139 at 759-60 (California Assembly Republican Bill Analysis, Senate
28 Bill No. 1878 (1997-98 Reg. Sess.), as amended July 16, 1998); Exh. 138 at 769 (California Assembly
Committee on Public Safety, Analysis, June 23, 1998 Hearing, Senate Bill No. 1878 (1997-98 Reg.
Sess.), as proposed to be amended).

1 circumstances.¹⁰⁸ The “independent purpose” doctrine limitations the California Supreme
2 Court applied to the felony murder special circumstances were judicially enacted out of
3 constitutional necessity; according to the California Supreme Court, without this narrowing
4 construction, the special circumstance would run afoul of the narrowing requirements of
5 *Furman v. Georgia*, 408 U.S. 238 (1972), and *Gregg v. Georgia*, 428 U.S. 153 (1976). *People*
6 *v. Green*, 27 Cal. 3d 1, 59-63 (1980). In urging passage of Proposition 18, however, these
7 judicial decisions were described to voters in the ballot pamphlet arguments as “unjust, illogical
8 remnants of the Rose Bird court” in need of abrogation in order to “restore logic, fairness and
9 justice to our death penalty laws.”¹⁰⁹

10 39. The expansions of the California death penalty enacted by Senate Bill 1878 and
11 Proposition 18 were enacted “as a result of”¹¹⁰ a single 1997 trial in Ventura County,
12 California, in which the jury rejected the lying in wait special circumstance as to one of two
13 defendants, and the facts of which “unfortunately” did not support charging the kidnap felony
14 murder special circumstance (as it then existed) against either defendant.¹¹¹ Although the jury
15 found the financial gain special circumstance (Penal Code § 190.2(a)(1)) to be true as to both
16 defendants in that case,¹¹² the prosecution of these defendants apparently was not sufficiently
17 extensive for the Ventura County Deputy District Attorney’s Office, who sponsored Senate Bill
18 1878 and corresponding Proposition 18 following this trial in order to “correct two separate
19 problems with the law of special circumstances” which limited the applicability of the lying in
20 wait special circumstance and prevented application of the kidnap felony murder special
21 circumstance in their case.¹¹³ The bill’s sponsor explained that it was “Because of some bizarre
22 Rose Bird court decisions from the 1980s,” that the two defendants could not be charged with a
23

24 ¹⁰⁸ Exh. 139 at 818 (1998 Cal. Stat. c. 629, § 2 (S.B. 1878) as chaptered Sept. 21 1998, approved
25 by Proposition 18 on March 7, 2000, effective March 8, 2000).

26 ¹⁰⁹ Exh. 139 at 811.

27 ¹¹⁰ Exh. 140 at 144 (Editorial, Letters: Help Our Children, Vote for Prop. 18 . . ., Ventura County
28 Star, Feb. 29, 2000, at B09).

¹¹¹ Exh. 139 at 767-68.

¹¹² Exh. 139 at 767-68.

¹¹³ Exh. 139 at 744, 767-68.

1 kidnap special circumstance and one could not be found guilty of the lying in wait special
2 circumstance, but that “Proposition 18 will correct the tortured interpretations of the law these
3 1980s decisions represent, as well as a similar misinterpretation regarding the arson special
4 circumstances.”¹¹⁴

5 40. The most recent expansion to the California death penalty statute came as a
6 result of the passage of Proposition 21, which added the criminal street gang killing special
7 circumstance to Penal Code section 190.2 (§190.2(a) (22)), effective March 8, 2000. The
8 argument in favor of Proposition 21 in the ballot pamphlet informed voters that “Prop 21 ends
9 the ‘slap on the wrist’ of current law by imposing real consequences for GANG MEMBERS,
10 RAPISTS AND MURDERES who cannot be reached through prevention or education.”¹¹⁵
11 The roots of Proposition 21 can be traced to former Governor Pete Wilson. In 1998, then-
12 Governor Wilson, along with several law enforcement organizations, attempted to pass a
13 legislative crime package designed to overhaul the juvenile justice system and increase
14 punishments for juvenile offenders. When the legislation was defeated, Wilson and the bill’s
15 sponsors put their plan, referred to as “The Gang Violence and Juvenile Crime Prevention Act,”
16 on the ballot as Proposition 21.¹¹⁶ Reportedly, then-Governor Wilson put this issue on the
17 ballot at a time when he planned to run for President of the United States in order to advance
18 his standing in the March 2000 primary election.¹¹⁷

19 41. The drafters of Senate Bill 1878 and corresponding Proposition 18, and of
20 Proposition 21 again included the unconstitutional “heinous, atrocious, cruel” special
21 circumstance (§ 190.2(a)(14)) in the proposed amended laws.¹¹⁸
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24 ¹¹⁴ Exh. 140 at 144-45.

25 ¹¹⁵ Exh. 139 at 829 (California Ballot Pamphlet, General Election (March 7, 2000), Full Text of
26 Proposition 21).

27 ¹¹⁶ Exh. 139 at 831; Exh. 140 at 96-97 (Propositions, California Journal, Feb. 1, 2000); and see
28 *Robert L. v. Superior Court*, 109 Cal. Rptr. 2d 716, 721 (2001) *superseded by Robert L. v. Superior Court*, 30 Cal. 4th 894 (2003).

¹¹⁷ Exh. 140 at 135 (Endorsements, L.A. Weekly, Feb. 25, 2000, at 24).

¹¹⁸ Exh. 139 at 815; Exh. 139 at 842.

1 42. In 2002, the definition of first-degree murder was once again expanded by the
2 addition of murder by means of a weapon of mass destruction to the list of first-degree murders
3 in Penal Code section 189. 2002 Cal. Stat. c. 606 (A.B.1838), § 1, eff. Sept. 17, 2002.
4 According to the Senate Committee on Public Safety's analysis of Assembly Bill 1838, which
5 enacted this amendment, the rationale for the amendment was that destructive devices, already
6 a type of first-degree murder listed in Penal Code section 189, and weapons of mass destruction
7 ("WMD") are "very similar" and that "the most important consequence of designating a murder
8 as murder in the first-degree is that such crimes may be punished by the death penalty if the
9 prosecutor proves specified special circumstances."¹¹⁹ The Legislature acknowledged that
10 "The list of special circumstances is long. It is very likely that defendants convicted of murders
11 by means of a WMD would be eligible for the death penalty in many, if not most, cases."¹²⁰

12 43. As the categories of death-eligible offenses have been increasingly broadened,
13 growing concerns have been raised about whether California is "pushing the envelope" with
14 respect to the continued expansion of the special circumstances.¹²¹ Around the time the death
15 penalty statute was expanded to include the felony murder carjacking, felony murder kidnap
16 carjacking, drive-by killing, and the juror killing special circumstances, representatives of the
17 California Attorney General's Office acknowledged that those who seek to further expand the
18 California death penalty "could run out of legal territory to carve out"¹²² and that "[i]n the
19 abstract, you could toss a bunch more crap in there, but you have to know your constitutional
20 limits . . . [y]ou have to be very careful."¹²³ At the time Senate Bill 1878 was making its way
21 through the legislative process in the late 1990s, Dane R. Gillette, then a Senior Assistant
22 Attorney General and currently the Chief Assistant Attorney General, noted that a
23 constitutional challenge for failing to adequately narrow the death penalty in California is not

24
25 ¹¹⁹ Exh. 139 at 890 (California Senate Committee on Public Safety, Analysis, June 18, 2002
Hearing, Assembly Bill No. 1838 (2001-2002 Reg. Sess.), as amended March 7, 2002).

26 ¹²⁰ Exh. 139 at 890.

27 ¹²¹ See e.g. Exh. 139 at 763.

28 ¹²² Exh. 140 at 72-73 (Mike Lewis, Death Penalty Quietly Moves Into Broader Territory, S.F.
Daily Journal, March 20, 1996, at 1, 7).

¹²³ Exh. 140 at 62.

1 an argument he felt would be successful, but is one his office would “want to avoid if at all
2 possible,” acknowledging that it is “a concern.”¹²⁴ In connection with its analysis of Senate
3 Bill 1878 in 1998, the Assembly Committee on Public Safety noted that United States Supreme
4 Court justices had warned the California Attorney General’s Office against expanding
5 California’s death penalty.¹²⁵

6 44. In 1999, the California Legislature acknowledged that “Adding More Special
7 Circumstances Raises Constitutional Concerns,” and that “At some point, the courts will likely
8 announce that the ‘special circumstances’ list contains too many crimes and sweeps too
9 broadly, striking it down on constitutional grounds and the Legislature will be required to
10 rewrite the special circumstances law to return it to a judicially acceptable dimension.”¹²⁶ The
11 Legislature has also acknowledged that “California’s statute is so broad that a high percentage
12 of all first-degree murders are death eligible, thereby eliminating the narrowing function that its
13 special circumstances are supposed to provide.”¹²⁷

14 45. The California Commission on the Fair Administration of Justice was created by
15 Senate Resolution No. 44 of the 2003-04 Session of the California State Senate, adopted on
16 August 27, 2004. The Commission examined many facets of California’s criminal justice
17 system, including California Death Penalty procedures. Two of the Commission’s findings,
18 agreed to by all or a majority of the Commissioners, are relevant here.

19 46. The Commission unanimously recommended that “all District Attorney Offices
20 in California formulate and disseminate a written Office Policy describing how decisions to
21 seek the death penalty are made, who participates in the decisions, and what criteria are
22 applied.” California Commission on the Fair Administration of Justice, Final Report 155
23

24 ¹²⁴ Exh. 140 at 86 (Peter Blumberg, Expanding Capital Punishment: Making More Crimes Death-
25 Eligible Has Public Appeal but Major Constitutional Problems, S.F. Daily Journal, May 26, 1998, at 1,
9).

26 ¹²⁵ Exh. 139 at 763.

27 ¹²⁶ Exh. 139 at 794-95 (California Assembly Committee on Public Safety, Analysis, April 13, 1999
Hearing, Assembly Bill No. 3 (1999-2000 Reg. Sess.), as introduced Dec. 7, 1999).

28 ¹²⁷ Exh. 139 at 801 (California Assembly Committee on Public Safety, Analysis, April 13, 1999
Hearing, Assembly Bill No. 625 (1999-2000 Reg. Sess.), as amended April 7, 1999).

1 (2008). The impetus for this recommendation was “the great variation in the practices for
2 charging specials circumstances.” *Id.* Indeed, not only are there not any statewide, uniform
3 capital charging policies, most county district attorney offices lack coherent policies for making
4 such decisions. Because the vast majority of first-degree murders are death-eligible under
5 California’s death penalty statute, county District Attorney’s offices and individual prosecutors
6 have been forced to develop their own policies or practices, formal and informal, for
7 determining which, of all death-eligible murders, actually deserve to be and are charged as
8 death penalty cases.

9 47. For example, in 2003, the Alameda County District Attorney described how his
10 office decided who, among those who were death eligible under the statute, would ultimately
11 be charged with death in Alameda County: “I plug everything in, and I make an evaluation of
12 whether a jury may reasonably come back with death . . . [t]hat’s kind of the bottom-line test.
13 All murders are bad. How bad is this one?” This District Attorney reportedly estimated that
14 his office sought capital punishment in about a quarter of eligible cases.¹²⁸ Concerning the
15 reason behind the ultimate decision to seek the death penalty in eligible cases, the then-
16 Alameda County District Attorney said, “Basically, it can be anything.”¹²⁹

17 48. The Los Angeles County Assistant District Attorney who in 1994 made the final
18 decision on whether to seek the death penalty in cases that were death-eligible after an eight-
19 member committee considered penalty options, reported that the defendant’s criminal history
20 was “major, major factor” in deciding whether to seek death by that office at that time.¹³⁰

21 49. Concerning whether to seek the death penalty in a highly publicized case
22 involving multiple murder, the presiding District Attorney of Stanislaus County stated in 2003
23 that he “intend[ed] to give the [victim’s] family’s opinions a lot of weight.”¹³¹ Local
24

25 ¹²⁸ Exh. 140 at 152 (Harriet Chiang, How Prosecutors Choose Death Penalty; Stanislaus D.A. Says
26 Laci Case Meets Most of His Criteria, S.F. Chronicle, April 24, 2003, at A1).

27 ¹²⁹ Exh. 140 at 152.

28 ¹³⁰ Exh. 140 at 58 (Beth Barrett, Simpson Isn’t Seen as Likely Candidate for Death Sentence, Daily
News of Los Angeles, July 24, 1994, at N1).

¹³¹ Exh. 140 at 151.

1 prosecutors interviewed at this time reportedly stated that they pursue capital punishment only
2 in a fraction of the eligible cases.¹³²

3 50. In 2002, the Riverside County District Attorney reportedly stated that his test for
4 what makes a death penalty case is to ask “Is the death penalty appropriate, given all the
5 circumstances, and would a jury be likely to return a death verdict?”¹³³ This District Attorney
6 reportedly stated that his approach in determining when to charge death in death-eligible crimes
7 had changed through the years; for example, he has learned that juries in his county are less
8 likely to return death verdicts when the defendant is young or the crime is committed among
9 family members and thus, explained that “We understand the costs and other issues. We
10 obviously do not want to go forward on cases where there's no reasonable likelihood a jury will
11 return a verdict of death.”¹³⁴ In 2008, the Riverside County District Attorney stated that he
12 recently “changed the approach” from that of his predecessor in determining whether to seek
13 the death penalty, including by “open[ing] up the process . . . to law enforcement and to the
14 victim's family,” to ask whether they have a recommendation.¹³⁵

15 51. In 2003, a Santa Clara County Assistant District Attorney who oversaw
16 homicide cases reportedly stated that prosecutors in her county do not seek the death penalty in
17 the majority of eligible cases and that it is a “very fact-specific decision.”¹³⁶ In 2003, a Chief
18 Deputy District Attorney in San Mateo County stated that, “The manner in which the murder is
19 carried out is probably one of the most -- if not the most -- important factor for the prosecution
20 in assessing whether to seek the death penalty.”¹³⁷

21 52. The second finding made by a majority of the Commissioners was the
22 recommendation to either correct the numerous deficiencies in California “dysfunctional” death
23

24 ¹³² Exh. 140 at 151-52.

25 ¹³³ Exh. 140 at 149 (Stuart Pfeifer, California Courts Sentencing Fewer Killers to Death Row;
Justice: The Decline Comes as Violent Crime Falls, D.A.s are More Selective in Capital Cases, L.A.
Times, June 10, 2002, at Part 1, Metro Desk, p.1).

26 ¹³⁴ Exh 140 at 149.

27 ¹³⁵ Exh. 140 at 155 (Interactive Map: [See Where Murderers Most Often get the Death Penalty](#),
Sacramento Bee, July 1, 2009).

28 ¹³⁶ Exh. 140 at 152.

¹³⁷ Exh. 140 at 153.

1 penalty scheme or adopt either a much narrower death penalty statute or replace the death
2 penalty with the maximum penalty at lifetime incarceration. The evidence before the
3 Commission for the first alternative came from several witnesses who testified that “the
4 primary reason that the California Death Penalty Law is dysfunctional is because it is too
5 broad, and simply permits too many murder cases to be prosecuted as death penalty cases. The
6 expansion of the list of special circumstances in the Briggs Initiative and in subsequent
7 legislation, they suggest, has opened the floodgates beyond the capacity of our judicial system
8 to absorb.” (Final Report at 138.) As former Florida Supreme Court Chief Justice Gerald
9 Kogan told the Commission having 21 special circumstances is “unfathomable.” *Id.*

10 53. After following and studying the enactment, amendment, litigation and
11 interpretation of the California death penalty law for the past 39 years, I have concluded that
12 the California death penalty law imposes no meaningful limitations on the broad discretion of
13 prosecutors and juries to seek and impose the death penalty for first degree murders in
14 California. There is nothing “special” about the special circumstances in California’s death
15 penalty law; they have been deliberately designed to encompass nearly all first degree murders.
16 This has resulted in widespread geographic and racial disparity in the administration of
17 California’s death penalty law.

18 The foregoing is true and correct and executed under penalty of perjury under the laws
19 of the United States and the State of California on October 30, 2009.

20
21
22 
23 GERALD F. UELMEN

APPENDIX A

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Curriculum Vitae

GERALD F. UELMEN

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Born: October 8, 1940; Greendale, Wisconsin

Marital Status: Married to Martha Uelmen, Family Law Attorney/Mediator, Sunnyvale, California
Three children: Nancy, Amy, Matthew

I. Educational Background

1965-66 Georgetown University School of Law,
LL.M. Degree; E. Barrett Prettyman Fellow in
Criminal Trial Advocacy.

1962-65 Georgetown University School of Law,
J.D. Degree.

Awards and Activities:

Board of Editors, Georgetown Law Journal, Vol.53;
Winner, Edward Douglas White Public Law Argument, (Law School Competition), 1965;
Winner, Beaudry Cup Legal Argument Competition, (1st Year Competition) 1963.

1958-62 Loyola University of Los Angeles,
B.A. in Political Science.

Awards and Activities:

Outstanding Debater, Southern California, 1962;
Class President.

1954-58 Mt. Carmel High School, Los Angeles

II. Academic Experience

1986- Present: Professor of Law,
Santa Clara University School of Law

1997: Director, Santa Clara Law School Summer Study Program, Budapest, Hungary.

1995, 2000: Visiting Professor of Law, Stanford Law School.

1986-94: Dean and Professor,
Santa Clara University School of Law.

1970-86: Professor of Law, Loyola Law School
Los Angeles, California
(Associate Dean, 1973-75)

1 Law School Courses Taught: Evidence, Trial Advocacy, Advanced Trial
2 Advocacy, Criminal Law, Criminal Procedure, Advanced Criminal Procedure,
3 Drug Abuse Law, Lawyering Skills, Legal Ethics, Civil Procedure.

3 **III. Legal Experience**

4 1965-66: Representation of indigent defendants in
5 criminal cases in District of Columbia.

6 1966-70: Assistant U. S. Attorney,
7 Central District of California, Los Angeles, California.

8 Prosecution of organized crime cases from
9 grand jury stage through trial and appeal.
10 Chief, Special Prosecutions Division, 1970;
11 Sustained Superior Performance Award, 1968.

12 1971-Present: Occasional representation of defendants in
13 criminal cases in federal and state courts, principally on appeals.

14 Of Counsel to Law Offices of Douglas Dalton, Los Angeles (1983-1986).

15 Of Counsel to Law Offices of Ephraim Margolin, San Francisco (1993-present).

16 Admitted to Practice: District of Columbia (1966);
17 California (1967); U.S. Supreme Court (1974);
18 Certified Specialist, Criminal Law, California Board of Legal Specialization (1973-1983).

19 **Significant Cases:**

20 United States v. Friedman, 432 F.2d 879 (1970).

21 Prosecution and appeal of organized crime conspiracy to cheat in high-stakes gin rummy games at
22 Friars Club.

23 United States v. Daniel Ellsberg, U.S.D.C., C.D.Cal. (1972).

24 Preparation and argument of motions and jury instructions in defense of Ellsberg's release of
25 "Pentagon Papers."

26 United States v. Drebin, 557 F.2d 1316, 572 F.2d 215 (9th Cir. 1978).

27 Defense and appeal of first criminal copyright charges for "film piracy."

28 In Re Gordon Castillo Hall, 30 Cal.3d 408 (1981).

Successful habeas corpus challenge to first degree murder conviction based on new evidence of
innocence.

Yarbrough v. Superior Court, 39 Cal.3d 197 (1985).

Amicus brief challenging power of courts to appoint attorneys to represent civil defendants without
compensation or reimbursement of expenses.

People v. Christian Brando, L.A. Sup. Ct., 2nd D.C.A. (1991-92).

Pretrial Motions, Preliminary Hearing, sentencing hearing and appeal in manslaughter conviction of
Marlon Brando's son.

People v. O.J. Simpson, L.A. Sup. Ct.
(1994-95)

Preparation and presentation of Suppression
and Evidentiary Motions and Jury Instructions in televised murder trial.

Eslaminia v. White, 136 F.3d 1234 (9th Cir. 1997).

Appeal of Habeas Corpus Petition Challenging Murder conviction arising from "Billionaire Boys Club"
case.

1 People v. Peter Baez, 78 Cal.App.4th 403 (2000); 79 Cal.App.4th 1177 (2000).
2 Defense of Founder of Santa Clara Medical Cannabis Center.

3 United States v. Oakland Cannabis Buyers' Cooperative, 190 F.3d 1109 (9th Cir. 1999);
4 --- U.S. ---(2001).

5 Defense against effort to close down medical
6 marijuana facility by federal injunction.

7 Wo/Mens Alliance for Medical Marijuana v. United States, Pending appeal to 9th Circuit;
8 Motion for return of medical marijuana seized in D.E.A. raid.

9 County of Santa Cruz v. John Ashcroft, Pending in U.S. District Court for Northern District of California.
10 Suit for injunctive and declaratory relief on behalf of terminally ill patients
11 who are members of Wo/Mens Alliance for Medical Marijuana.

12 **IV. Professional Activity**

13 Judicial Council of California, Task Force on the Quality Of Justice,
14 Committee on Alternative Dispute Resolution and the Judicial System, 1998-99.

15 California Attorneys for Criminal Justice: Board of Governors, 1976-Present; President, 1982-1983.

16 California Academy of Appellate Lawyers: 1981-Present; President, 1990-91.

17 State Bar of California: Special Investigator in disciplinary investigation, 1975-1976; Ad Hoc
18 Committee to Consider an Appellate Justices Evaluation Commission, 1983-1984; Ad Hoc Committee
19 to Study the Crisis in the Representation of Indigents in Criminal Appeals, 1983- 1984; Executive
20 Committee, Criminal Law Section, 1987-92, Chair, 1991-92; Editorial Board, California Litigation
21 (journal of Litigation Section), 1990-99.

22 Sixth District Appellate Project: Board of Directors, 1988-Present; Treasurer, 1988-Present.

23 U.S. Court of Appeals, Ninth Circuit: Co-Chair, Rules Advisory Committee, 1984-1992; Delegate,
24 Circuit Conference, 1983-84.

25 Los Angeles County Bar Association: Vice Chair, Law Schools Committee, 1981-1983; Executive
26 Committee, Criminal Justice Section, 1981-1986; Vice Chair, Federal Courts Committee, 1974-1977;
27 Chair, Special Committee on Defense of the Courts, 1982; Trustee, 1983-1985.

28 Markkula Center for Applied Ethics, Santa Clara University: Steering Committee, 1992-1999; Scholar.

National Association of Criminal Defense Lawyers:
Editorial Advisory Board, Champion Magazine.

California Habeas Resource Center: Board of Directors,
1998-Present.

California Lawyer Magazine, Editorial Advisory Board,
1990-Present; Chair, 1997-Present.

Board of Directors, California Supreme Court Historical Society, 2001-Present.

V. Charitable, Civic and Community Activity

Law Foundation of Santa Clara County Bar Association: Board of Directors, 1987-1990; President,
1988.

Suicide Prevention Center, Los Angeles: Board of Directors, 1984-1986.

Public Interest Clearinghouse, San Francisco: Board of Directors, 1986-1995.

- 1 Death Penalty Focus: Board of Directors, 1987-1992.
- 2 City of San Jose, Citizen Task Force for Campaign Reform: Chair, 1992-93.
- 3 Santa Clara County Bench and Bar Historical Society: Director, Court of Historical Review, 1988-
Present.
- 4 Ascension Catholic Church, Saratoga: Eucharistic Minister, 1986-1990; Marriage Preparation
5 Instructor, 1987-1994.
- 6 **VI. Honors and Awards**
- 7 1983 Richard A. Vachon Memorial Award for
8 Community Service, presented by Loyola
Law School.
- 9 1984 Winner of Ross Essay Prize, American Bar
Association.
- 10 1990 Justice Byrl R. Salsman Award for Contributions to Community and Profession, Presented by
11 Santa Clara County Bar Association.
- 12 1993 La Raza Law Students Association Award "In Recognition of Outstanding Dedication and
Commitment to Minority Admissions and Success in Law School"
- 13 1993 Santa Clara County Black Lawyers Association Award "For Setting the Standard of Excellence in
Achieving Diversity in the Legal Community"
- 14 1994 Recognition Award, Death Penalty Focus of California.
- 15 1996 St. Thomas More Award, St. Thomas More Society of Santa Clara County. (Co-recipient
16 With Martha A. Uelmen).
- 17 1997 Owens Lawyer of the Year, Santa Clara University School of Law Alumni Association.
- 18 2002 California Lawyer Attorney of the Year Award. See California Lawyer, March, 2003 at p. 18.
- 19 VII. Consulting Activity
- 20 Workshop Leader for 1976 Cornell Institute on Organized Crime, Ithaca, New York.
- 21 Special Review Committee to make recommendations concerning organization and operations of the
22 Los Angeles County District Attorney's Bureau of Investigation, 1975-1976.
- 23 Adjunct Professor for National Institute of Trial Advocacy in Reno, Nevada (1974) and Boulder,
24 Colorado (1975).
- 25 Consultant to the Rand Corporation from 1974-1976 in a study of methods to measure performance in
26 the criminal justice system. The results of this study were published in June, 1976 as "Indicators of
27 Justice: Measuring the Performance of Prosecution, Defense, and Court Agencies Involved in Felony
Proceeding" (R-1917-DOJ).
- 28 Consultant to Drug Abuse Council, Inc., Washington D.C., in assessing impact of proposals for
experimental heroin maintenance programs (1976).
- Consultant to California Law Revision Commission on revising felony statutes of limitations (1982-
1984), and
impact of court consolidation on criminal procedure (1999-Present).
- Testimony before the Criminal Justice Committee of the California State Assembly in Hearings on Use

1 of Deadly Force by Police Officers (1974), Hearings on Reform of the Controlled Substances Act
2 (1976), Hearings on Prosecutorial Discovery (1982), and Hearings on Statute of Limitations (1984).
3 Testimony before the Committee on the Judiciary of the California Senate on Administration of Death
4 Penalty Laws (1986) and workload of California Supreme Court (1998). Testimony before the
5 Committee on the Judiciary, U.S. Senate, on Reform of the Grand Jury System (1976) and the
6 Committee on the Judiciary, Subcommittee on Crime, U.S. House of Representatives, on Police Use of
7 Deadly Force (1980).

8 Gerald Uelmen's Publications

9 A. CALIFORNIA SUPREME COURT

10 Opinion: Dissent, "Supreme Court Reform: Diversion Instead of Division," 11 Pepperdine L.Rev. 5
11 (1983).

12 "Death Penalty Laws and the California Supreme Court: A Ten Year Perspective," 25 Crime and Social
13 Justice 78 (1987).

14 "The Know-Nothing Justices on the California Supreme Court," Western Legal History, Vol. 2 No. 1
15 Winter/Spring (1989).

16 "Review of Death Penalty Judgments by the Supreme Courts of California: A Tale of Two Courts," 23
17 Loy. of L.A. L.Rev. 237 (Nov., 1989).

18 "Depublication," Los Angeles Lawyer (magazine of L.A. Co. Bar Assoc.) Aug./Sept., 1990.

19 "Judicial Reform and Insanity in California - A Bridge Too Far," Prosecutor's Brief (magazine of
20 California District Attorneys Assoc.), May/June, 1979.

21 "Three-strikes Decision: State Supreme Court Shows that it's Tough on Legislative Sloppiness," San
22 Jose Mercury-News, June 23, 1996.

23 "Tracking the Splits: Fault Lines on the George Court," California Litigation, Winter, 1998.

24 "Sizing Up Justice Moreno," California Litigation, Fall, 2003.

25 California Lawyer Magazine

26 "Lucas Court: First Year Report," June, 1988, p. 30.

27 "Mainstream Justice: A Review of the Second Year of the Lucas Court," July 1989, p. 37.

28 "Losing Steam; California Supreme Court: The Year in Review," June, 1990, p. 33.

"The Disappearing Dissenters," June, 1991, p. 34.

"Plunging Into the Political Thicket," June, 1992, p. 31.

"Waiting for Thunderclaps," June, 1993, p. 29.

"The Lucas Legacy," May, 1996, p. 29.

"Seizing the Center," July, 1997, p. 34.

"Playing Center," July, 1998, p.45.

"Mosk's Top Ten Opinions," April, 1999, p. 46.

"Shifting the Balance," July, 1999, p. 54.

"Taming the Initiative," August, 2000, p.46.

"Friends of the Court," December, 2000, p. 21.

"Courtly Manners," July, 2001, p. 37.

"All in the Family," November, 2001, p. 21.

"After Mosk," July, 2002.

"The Seven Year Itch," July, 2003, p. 22.

29 Los Angeles Times Op-Ed Page:

1 "A Shift in Style or an Ominous Warning?," December 16, 1985.
2 "Color Our New Court Bland," January 7, 1987.
3 "When Law Is in Doubt, Bring out the Canons," March 9, 1988.
4 "The Lucas Court is Suffocating," May 9, 1988.
5 "Will 'Judicial Restraint' Court Defer on Minimum Wage?" September 7, 1988.
6 "Depublication: The Court Makes Un-Cases," September 12, 1989.
7 "A Cure for the Court's Death Row Burnout" November 29, 1989.
8 "Does Laming the Legislature Upset the Constitution?," November 13, 1990.
9 "California, of all States, Needs a Court in Full Color," June 5, 1991.
10 "At the Highest Level, the Bar Could Use Civility Lessons," May 10, 1996.
11 "Bigger Court Won't Be Speedier," July 12, 1998.

12 Los Angeles and San Francisco Daily Journal:

13 "The Agony and the Irony: The Political Decisions of The Lucas Court," Daily Journal Report, June,
14 1992.
15 "How the Justices Stack Up," Daily Journal Report, June 4, 1993.
16 "Trashing the Chief Justice," Open Forum, Nov. 24, 1993.
17 "FAX From the Future," Open Forum, Jan. 12, 1994.
18 "The Lucas Court's Seventh Year: Achieving a Balanced Menu," Daily Journal Report, June 8, 1994.
19 "The Lucas Court's Eighth Year: Coming Back to Life," Daily Journal Report, June 14, 1995.
20 "Term of Transition: An Analysis of the Ninth and Final Year of the Lucas Court," May 13, 1996.
21 "Record Numbers," July 22, 1998.
22 "Capital Expenditure," July 30, 1998.
23 "Runs and Hits but No Errors," Sept. 13, 1999.
24 "He Was No Roger Maris," Oct. 18, 1999.

25 B. CRIMINAL LAW AND PROCEDURE

26 The Preliminary Hearing in the District of Columbia, Lerner Law Book Co., Wash., D.C., 1967 (Co-
27 author).

28 Criminal Defense Techniques, Matthew Bender, 1979.

29 Authored the following chapters of this six volume treatise: Chapter 17: "Competency to Stand Trial"
30 Chapter 26: "Prior Conviction Impeachment"
31 Chapter 46: "Vacation of Illegal Sentences"

32 "Federal Sentencing Reform: The Emerging Constitutional Issues," in Constitutional Government in
33 America, Carolina Academic Press, 1979.

34 "Post-Conviction Relief for Federal Prisoners Under 28 U.S.C.," 2255, 69 W.Va.L. Rev. 277 (1967).

35 "Varieties of Police Policy: A Study of Police Policy Regarding the Use of Deadly Force in Los Angeles
36 County," 6 Loy. (L.A.) L.Rev 1 (1973).

37 "Proof of Aggravation Under the California Uniform Determinate Sentencing Act: The Constitutional
38 Issues," 10 Loy. (L.A.) L.Rev 725 (1977). (Also published as "Article of Special Interest" in West's
39 California Reporter Advance Sheets, 140 Cal. Rptr. No. 5, Oct. 10, 1977).

40 "Testing the Assumptions of Neil v. Biggers: A Classroom Experiment in Eye-Witness Identification,"
41 16 Crim. Law Bull. 358 (July, 1980).

42 "The Psychiatrist, the Sociopath and the Courts: New Lines for an Old Battle," 14 Loy. (L.A.) L.Rev. 1
43 (1980)

44 "Searches of Business Offices for Intermingled Documents," Criminal Defense (Magazine of Natl.
45 College for Crim. Defense), Nov./Dec., 1981.

- 1 "Prop. 8 Casts Uncertainty Over Vast Areas of Criminal Law," California Lawyer, July/Aug., 1982, p. 43.
- 2 "Making Sense out of the California Criminal Statute of Limitations," 15 Pacific L.J. 35 (1983).
- 3 "The Good Faith Exception to the Exclusionary Rule," 6 Whittier L.Rev. 979 (1984).
- 4 "Striking Jurors Under Batson v. Kentucky," ABA Criminal Justice, Fall, 1987.
- 5 "Litigating Retroactivity Issues Under Proposition 115," Calif. Crim. Def. Practice Reporter, July, 1990, Vol. 10, No. 7, p. 217.
- 6
- 7 "The California Constitution After Proposition 115," 3 Emerg. Issues in State Const. Law 33 (1990).
- 8 "Replacing the Exclusionary Rule with No Fault Insurance," Calif. Crim. Def. Practice Reporter, March, 1992, Vol. 12, No. 3, p. 81.
- 9 "Federal Sentencing Guidelines: A Cure Worse than the Disease," 29 Am.Crim.L.Rev. 899 (1992).
- 10 "Victim's Rights in California," 8 St.John's J. Of Legal Commentary 197 (1992).
- 11 "2001: A Train Ride: A Guided Tour for the Sixth Amendment Right to Counsel," 58 Law & Contemp. Probs. 13 (1995).
- 12
- 13 "The Anonymous Jury: Jury Tampering by Another Name?," A.B.A. Criminal Justice, Fall, 1994.
- 14 "Do Lawbreakers Have Too Many Rights?: Gaining Convictions Is Actually Easier Today," Syndicated Column for Catholic News Service, June, 1996.
- 15 Los Angeles Times Op-Ed Page:
- 16 "The State Must Never 'Search or Seize' Our Private Thoughts," July 1, 1984.
- 17 "Preliminary Hearings, Tainted Juries and Public Rights," February 26, 1986.
- 18 "The Nincompoops Aren't in the Jury Box," October 19, 1991.
- 19 "Three Strikes and a Balk: Beneficial Statutory Clinker," April 25, 1994.
- 20 "Why Some Juries Judge the System," Jan. 24, 1996.
- 21 "What's a Fair Price for a Fair Trial?," March 18, 1998.
- 22 "Starr's Legacy May Include a New Privilege," April 23, 1998.
- 23 "Be Careful of a Wolf in Sheep's Clothing," March 3, 2000.
- 24 "Ghost of a Tribunal Should Haunt Ashcroft," Dec. 17, 2001.

21 C. DEATH PENALTY

- 22 "The Hanging Judge of Arkansas," National Law Journal, October 19, 1981, p. 11.
- 23 "A Concise History of Capital Punishment in California," Forum (Magazine of Calif. Attys. for Crim. Justice) Sept./Oct., 1981.
- 24
- 25 "Capital Punishment," in Encyclopedia of the American Presidency (Simon and Schuster, 1994).
- 26 "The California Habeas Corpus Resource Center: Defining The Goal," 26 C.A.C.J. Forum, No. 1, p.47 (1999).
- 27 "Landmark Study Reveals a 'Broken' Justice System," San Francisco Daily Journal, July 21, 2000.
- 28 Los Angeles Times Op-Ed Page:

1 "The Death Penalty Costs Too Much," July 27, 1983.

2 "Death Penalty Issue is Alive and Well," May 15, 1985.

3 "Death Penalty: Blame Briggs, Not Court, April 22, 1986.

4 "If Defendant Concedes Guilt, Why Delay Death Penalty?" July 16, 1986.

5 "Finding the Fair Interval Between Sentencing, Death," May 17, 1990.

6 "Oops! Three Strikes, Death Penalty Out," March 4, 1994.

7 D. DRUG ABUSE

8 Drug Abuse and the Law, West Pub. Co., 1982 (2nd Edition). (Co-authored with Dr. Victor Haddox.)
9 (Updated Annually). [Click here to order this book].

10 "Should Heroin Use Be Decriminalized?" in Critical Issues in Criminal Justice, Carolina Academic Press,
11 1979.

12 "Controlled Substance Abuse," Encyclopedia of the American Constitution (Macmillan Publishing Co.,
13 1990).

14 "California's New Marijuana Law: A Sailing Guide for Uncharted Waters," Calif. St. Bar Jrnl.
15 (California Lawyer) Jan./Feb., 1976 (51:27).

16 "Providing Legal Services to the Addict: An Experimental Law School Clinical Program," 6 Contemp.
17 Drug Probs. 3 (1977). Co-authored with Jane Wolf-Eldridge.

18 "Sentencing Narcotics Offenders in Great Britain and the United States: A Comparison," 9 J. of Drug
19 Issues 491 (Fall, 1979).

20 "Prescribing Narcotics to Habitual and Addicted Narcotic Users," 133 Western J. of Medicine 539 (Dec.
21 1980). Co-authored with Dr. Forest S. Tennant, Jr.

22 "Cultivation of Marijuana Under the Uniform Controlled Substances Act: Shallow-Rooted Weeds," 13 J.
23 of Psychedelic Drugs, 247 (Fall, 1981).

24 "Narcotic Maintenance for Chronic Pain Relief: Medical and Legal Guidelines," 73 Postgraduate
25 Medicine 81 (Jan. 1983). Co-authored with Dr. Forest S. Tennant, Jr.

26 "Symposium, Punishing Drug Offenders: International and Comparative Perspectives," 13 J. Drug
27 Issues, No. 3 (Summer, 1983). Guest Editor

28 "The Impact of Drugs Upon Sentencing Policy," 44 St. Louis Univ. L. J.359 (Spring, 2000).

"A Defense Lawyer's Guide to Proposition 39," CACJ Forum, Vol. 28, No. 1, p. 37 (2001).

"Formulating Rational Drug Policy in California," 33 McGeorge Law Review 769 (Summer 2002).

"Compassion and Common Sense," San Jose Mercury-News, July 23, 1999.

"High Court Ignores Suffering," San Francisco Chronicle, May 20, 2001.

Los Angeles Times Op-Ed Page:

"G-Men, Guns Blazing, Won't Solve Local Drug Problems," April 10, 1989.

"A New Czar Means Same Old Folly in the Drug War," December 11, 1990.

E. JUDICIAL SELECTION AND INDEPENDENCE

- 1 "Elected Judiciary," Encyclopedia of the American Constitution (Macmillan Publishing Co., 1990).
- 2 "Supreme Court Retention Elections in California," 28 Santa Clara Law Review 335 (1988).
- 3 "Will Reagan Go 'Judge-Shopping?'," National Law Journal, December 29, 1980, p. 13.
- 4 "Recalling 1932: The Bench Preserved," Los Angeles Lawyer, February, 1983
- 5 "Judging the Supreme Court Judges," Los Angeles Lawyer, May, 1986.
- 6 "Standards for Judicial Retention Elections," The Docket, Sept/Oct, 1986.
- 7 "The Biltmore Debate: Should the Justices Be Retained?," The Supreme Court Project, May 29, 1986.
- 8 "Standards for Judicial Retention Elections in California," Proceedings and Papers of the Chief Justice
9 Donald R. Wright Memorial Symposium on the California Judiciary, Senate Office of Research,
September, 1986.
- 10 "The Politicization of Our Courts: The Crocodile in Our Bathtub," California Litigation, Winter, 1992.
- 11 "Crocodiles in the Bathtub: Maintaining the Independence Of State Supreme Courts in the Era of
12 Judicial Politicization," 72 Notre Dame L. Rev. 1133 (1997).
- 13 "The Fattest Crocodile: Why Elected Judges Can't Ignore Public Opinion," ABA Criminal Justice,
Spring, 1998.
- 14 "Justices and Politics Don't Mix," California Bar Journal, October, 1998.
- 15 "A 'Death-Qualified' Judiciary," California Lawyer Magazine, September, 1999, p. 27.
- 16 "How to Soften the Judicial Mettle," San Francisco Daily Journal, October 14, 1998.
- 17 Los Angeles Times Op-Ed Page:
- 18 "Don't Plunge Judges Into Political Thicket," September 19, 1984.
19 "Assault on the Court," January 30, 1985.
"Shopping for Judges, California Style," September 30, 1986.
20 "In Politicizing the Courts, We're Buying and Selling Justice," October 16, 1987.
"Nation's Judges Fear Specter of Dread 5th Vote," September 13, 1990.
21 "Judges Hear Crocodiles Snapping," Feb. 19, 1997.
"Chief Justice George's Mistaken Case of Identity," Feb. 25, 1998.
- 22
- 23
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APPENDIX B

1	
2	
3	1 1973 Cal. Stat. c. 719, §§ 1- 5 (S.B. 450); Senate Final History 1973 Cal. Stat. c. 719, §§ 1- 5 (S.B. 450).
4	2 <u>Constitutional Issues Relative to the Death Penalty: Special Hearing of the California Assembly Committee on Criminal Justice, January 24, 1977</u> (transcript).
5	
6	3 Letter from Tom Bane, Assemblyman, California Assembly, to Mark Waldman, Legislative Counsel, American Civil Liberties Union (May 23, 1977).
7	
8	4 Press Release, Office of Governor Edmund G. Brown (May 27, 1977).
9	5 1977 Cal. Stat. c. 316, §9 (S.B. 155), effective August 11, 1977.
10	6 Senate Final History, 1977 Cal. Stat. c. 316, §9 (S.B. 155), effective August 11, 1977.
11	
12	7 Letter from Senator John V. Briggs, Co-Chairman, Citizens for an Effective Death Penalty, to Concerned Citizen (undated).
13	
14	8 California Voters Pamphlet, General Election, Nov. 7, 1978, at 32-46.
15	9 California Assembly Committee on Public Safety, Bill Analysis, Senate Bill No. 2054 (1979-80 Reg. Sess.) as amended May 6, 1980; Senate Committee on Judiciary, Bill Analysis, Senate Bill No. 2054 (1979-80 Reg. Sess.) as introduced.
16	
17	10 Letter to John Briggs, Senator, California Legislature, from James R. Tucker, Legislative Advocate, American Civil Liberties Union (June 13, 1980).
18	
19	11 Miscellaneous Campaign Materials: Californians to Defeat Rose Bird (1985-1986).
20	12 <u>Joint Hearing on Crime Victims Justice Reform Act, Proposition 115 on the June 1990 Ballot: California Senate Committee on Judiciary and Assembly Committee on Public Safety, December 11, 1989</u> (transcript, staff analysis, written testimony in support of and opposition to initiative).
21	
22	
23	13 <u>1990 Crime Victims Justice Reform Initiative, Proposition 115 Manual: State of California Department of Justice</u> (1990).
24	
25	14 California Ballot Pamphlet, Primary Election (June 5, 1990), Full Text of Proposition 115.
26	
27	15 California Ballot Pamphlet, Primary Election (June 5, 1990), Full Text of Proposition 114.
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16	California Senate Committee, Bill Analysis, March 30, 1993 Hearing, Senate Bill No. 310 (1993-94 Reg. Sess.), as amended March 29, 1993.
17	California Assembly Committee on Public Safety, Bill Analysis, July 13, 1993 Hearing, Senate Bill No. 60 (1993-94 Reg. Sess.), as proposed to be amended.
18	California Senate Bill 32 (1995-96 Reg. Sess.), Bill Text, as introduced Dec. 9, 1994.
19	Letter to The Honorable Steve Peace, Member, California Senate, from Gregory D. Totten, Executive Director, California District Attorneys Association (March 6, 1995).
20	California Senate Committee on Criminal Procedure, Analysis, March 7, 1995 Hearing, Senate Bill No. 32 (1995-96 Reg. Sess.), as proposed to be amended.
21	California Senate Committee on Criminal Procedure, Analysis, March 7, 1995 Hearing, Senate Bill No. 9 (1995-96 Reg. Sess.), as introduced.
22	Letter to Governor Pete Wilson, from Senator Steve Peace, California State Senate (Sept. 15, 1995).
23	California Department of Finance, Enrolled Bill Report, Senate Bill No. 9 (1995-96 Reg. Sess.), as amended Aug. 21, 1995 (Sept. 22, 1995).
24	California Ballot Pamphlet, Primary Election (March 26, 1996), Full Text of Proposition 195.
25	California Ballot Pamphlet, Primary Election (March 26, 1996), Full Text of Proposition 196.
26	Letter to Mr. Charles Fennessey, Deputy Legislative Secretary, Governor's Office, from Gregory D. Totten, Chief Deputy District Attorney, Office of the District Attorney, Ventura County, California (Dec. 4, 1997).
27	California Senate Committee on Public Safety, Analysis, April 21, 1998 Hearing, Senate Bill No. 1878 (1997-98 Reg. Sess.), as introduced as reflected by proposed amendments.
28	Letter to The Honorable Quentin L. Kopp, California State Senate, from Gregory D. Totten, Chief Deputy District Attorney and Peter D. Kossoris, Senior Deputy District Attorney, Office of the District Attorney, Ventura County, California (April 23, 1998).
29	California Department of Finance, Bill Analysis, Senate Bill No. 1878 (1997-98 Reg. Sess.), as amended April 28, 1998 (May 13, 1998).

1	30	California Assembly Republican Bill Analysis, Senate Bill No. 1878 (1997-98 Reg. Sess.), as amended July 16, 1998.
2	31	California Assembly Committee on Public Safety, Analysis, June 23, 1998
3		Hearing, Senate Bill No. 1878 (1997-98 Reg. Sess.), as proposed to be amended.
4	32	Letter to The Honorable Gray Davis, Lieutenant Governor, State of California,
5		from Quentin L. Kopp, California State Senator (July 20, 1998).
6	33	California Assembly Committee on Appropriations, Analysis, July 29, 1998
7		Hearing, Senate Bill No. 1878 (1997-98 Reg. Sess.), as amended July 16, 1998.
8	34	California Assembly, Third Reading, Assembly Bill No. 1574 (1999-2000 Reg.
9		Sess.), as introduced Feb. 26, 1999.
10	35	California Assembly Committee on Public Safety, Analysis, April 13, 1999
11		Hearing, Assembly Bill No. 1574 (1999-2000 Reg. Sess.), as introduced Feb. 26,
12		1999.
13	36	California Assembly Committee on Public Safety, Analysis, April 13, 1999
14		Hearing, Assembly Bill No. 3 (1999-2000 Reg. Sess.), as introduced Dec. 7, 1999.
15	37	California Assembly Committee on Public Safety, Analysis, April 13, 1999
16		Hearing, Assembly Bill No. 625 (1999-2000 Reg. Sess.), as amended April 7,
17		1999.
18	38	California Senate Rules Committee, Third Reading, Analysis, Assembly Bill No.
19		1574 (1999-2000 Reg. Sess.), as introduced (Sept. 2, 1999).
20	39	California Ballot Pamphlet, General Election (March 7, 2000), Full Text of
21		Proposition 18.
22	40	1998 Cal. Stat. c. 629, § 2 (S.B. 1878) as chaptered Sept. 21, 1998, approved by
23		Proposition 18 on March 7, 2000, effective March 8, 2000.
24	41	California Ballot Pamphlet, General Election (March 7, 2000), Full Text of
25		Proposition 21.
26	42	California Senate Committee on Public Safety, Analysis, June 18, 2002 Hearing,
27		Assembly Bill No. 1838 (2001-2002 Reg. Sess.), as amended March 7, 2002.
28	43	<u>Death Penalty Poll Casts Doubt On Veto Override</u> , L.A. Daily Journal, March 29,
		1977, at 1, 4.
	44	<u>Death Bill Passed By Senate on Slender Two-Vote Margin</u> , L.A. Daily Journal,
		April 1, 1977, at 1.

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45	<u>Assembly Passes Death Penalty Bill</u> , The Recorder, May 17, 1977, at 1, 6.
46	<u>Briggs Nixes Death Penalty Vote Override</u> , The Recorder, June 2, 1977, at 1, 7.
47	<u>Reagan Backs Override Of Death Veto</u> , The Recorder, June 16, 1977, at 1, 6.
48	<u>Override Vote Set Today On Death Penalty</u> , The Recorder, June 23, 1977, at 1.
49	<u>Close Senate Override On Death Penalty</u> , The Recorder, June 24, 1977, at 1, 6.
50	<u>Pitchess Scores Solon On Move To Defeat Death Bill</u> , L.A. Daily Journal, June 28, 1977, at 4.
51	<u>'Insurance Death Penalty' Drive Planned</u> , The Recorder, Nov. 3, 1977, at 1.
52	George Skelton, <u>Briggs Launches Death Penalty Initiative Drive</u> , L.A. Times, Nov. 10, 1977, at 3, 20.
53	<u>New Death Penalty Proposal Unveiled</u> , The Recorder, November 10, 1977, at 1.
54	Richard Bergholz, <u>Briggs Hits 'Weak' Death Penalty Law</u> , L.A. Times, Feb. 14, 1978, at A21.
55	W.E. Barnes, <u>Sen. Briggs: 'Your Life is in Danger'</u> , S.F. Examiner & Chronicle, April 2, 1978, at A10.
56	Bob de Carteret and C. Wong, <u>State Bar Delegates Urge Defeat of Prop. 7 Initiative</u> , L.A. Daily Journal, Sept. 17, 1978, at 1.
57	<u>Barristers Vote 'No' On Prop. 7</u> , The Recorder, Oct. 10, 1978, at 1, 11.
58	Ron Jarers, <u>John Briggs Models a Role</u> , S.F. Chronicle, Oct. 16, 1978, at 8.
59	Gayle Montgomery, <u>District Attorneys Troubled by Prop. 7</u> , Oakland Tribune, Oct. 24, 1978, at C11-12.
60	<u>Major S.F. Opponents of Prop. 7</u> , S.F. Chronicle, Oct. 26, 1978, at 6.
61	Editorial, <u>We Oppose Proposition 7</u> , Oakland Tribune, Oct. 28, 1978, at 20.
62	<u>District Attorney Freitas Comes Out Against Prop. 7</u> , L.A. Daily Journal, Nov. 2, 1978, at 1.
63	Dan Morain, <u>California Debate: Agony Over Resuming Executions</u> , L.A. Times, Aug. 18, 1985 at 1.

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64	<u>'Blame Briggs, Not High Court' For Reversals</u> , The Recorder, Aug. 19, 1986, at 3.
65	Rebecca LaVally, <u>The Death Penalty in California - Closing in on the First Execution</u> , California Journal, July 1, 1990.
66	Beth Barrett, <u>Simpson Isn't Seen as Likely Candidate for Death Sentence</u> , Daily News of Los Angeles, July 24, 1994, at N1.
67	Mike Lewis, <u>Expansion of Capital Crimes Nears Passage</u> , Sonoma County Herald-Recorder, Sept. 19, 1995, at 8, 15.
68	Pamela Martineau, <u>Wilson Signs Bill Allowing Death Penalty for Murdering Carjackers</u> , Metropolitan News Enterprise, Los Angeles, California, Sept. 27, 1995, at 9.
69	Jon Matthews, <u>Death Penalty Bill for Carjack Killings Signed by Governor; Legislation Won't Take Effect Unless Approved by Voters in 1996 Primary</u> , Fresno Bee, Sept. 27, 1995, at A3.
70	John Schwada, <u>Drive-by Measure Signed; Law Enforcement: Gov. Wilson Oks Bill That Could Make Such Shootings a Capital Crime If Victims Die. Voters Must Approve Change</u> , L.A. Times, Sept. 28, 1995, at Part A, p. 3.
71	Letter to the Editor, Sacramento Bee, from Senator Steve Peace, California State Senate (March 4, 1996).
72	Mike Lewis, <u>Death Penalty Quietly Moves Into Broader Territory</u> , S.F. Daily Journal, March 20, 1996, at 1, 7.
73	<u>State Propositions at a Glance</u> , S.F. Chronicle, March 24, 1996, at 6/Z1.
74	Stuart Pfeifer, <u>DA's Crowded Death-Row Docket - Courts: 16 Defendants are Targeted - the Most Ever - Despite the Decline in the County's Murder Rate</u> , Orange County Register, Oct. 20, 1996, at B01.
75	Peter Blumberg, <u>Expanding Capital Punishment: Making More Crimes Death-Eligible Has Public Appeal but Major Constitutional Problems</u> , S.F. Daily Journal, May 26, 1998, at 1, 9.
76	<u>Propositions</u> , California Journal, Feb. 1, 2000.
77	<u>Endorsements</u> , L.A. Weekly, Feb. 25, 2000, at 24.
78	Molly Selvin and Tim Rutten, <u>Commentary: Garcetti's Key Third Term Goal: Rampart Scandal Cleanup</u> , L.A. Times, Feb. 25, 2000, at B7.
79	Editorial, <u>Letters: Help Our Children, Vote for Prop. 18 . . .</u> , Ventura County Star,

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	Feb. 29, 2000, at B09.
80	Stuart Pfeifer, <u>California Courts Sentencing Fewer Killers to Death Row; Justice: The Decline Comes as Violent Crime Falls, D.A.s are More Selective in Capital Cases</u> , L.A. Times, June 10, 2002, at Part 1, Metro Desk, p.1.
81	Harriet Chiang, <u>How Prosecutors Choose Death Penalty; Stanislaus D.A. Says Laci Case Meets Most of His Criteria</u> , S.F. Chronicle, April 24, 2003, at A1.
82	Interactive Map: <u>See Where Murderers Most Often get the Death Penalty</u> , Sacramento Bee, July 1, 2009.
83	Editorial, <u>Letters</u> , Sacramento Bee, March 19, 1996, at B7.

EXHIBIT 40

Declaration of Steven F. Shatz

DECLARATION OF STEVEN F. SHATZ

I, STEVEN F. SHATZ, declare as follows:

1. I am the Philip and Muriel Barnett Professor of Trial Advocacy at the University of San Francisco School of Law, where I have been employed on a full-time basis since 1972. During that time, I have regularly taught the required courses in Criminal Law and Criminal Procedure at U.S.F., and, in 1993 and 1994, I was a Lecturer at Boalt Hall, teaching Criminal Law. I practiced criminal law in California before joining the faculty at U.S.F., and I joined the faculty to help create and, for one year, co-direct, the U.S.F. Criminal Law Clinic. During the period 1986-92, I was the director of the U.S.F. Law Clinic, the successor to the Criminal Law Clinic and supervised students handling civil rights cases and criminal appeals. In 1991, I was Visiting Professor at Hastings College of Law, where, in addition to teaching a Criminal Practice course, I established Hastings's criminal law clinical program. I am the author of a casebook on California criminal law, *California Criminal Law: Cases and Problems* (1st and 2nd eds) (Lexis Publishing, 1999, 2004) and a co-author of a casebook on the death penalty, *Cases and Materials on the Death Penalty* (1st, 2nd and 3rd eds) (Thomson/West, 2001, 2005, 2009). I have been qualified, and have testified as, an expert witness on the California death penalty in two cases: *People v. Erskine*, S.D. Sup.Ct. No. SCD161640, and *Ashmus v. Wong*, No. C 93-0594 TEH (N.D. Cal.). I was co-counsel for one death-sentenced defendant, Teddy Sanchez, on his direct appeal and his petition for habeas corpus in the

California Supreme Court; I have not been counsel in any other capital case.

2. I am providing this declaration concerning three empirical studies I have conducted on California murder conviction cases. The studies are described below (¶¶ 10-15). The purpose of the first study, and one of my purposes in the subsequent two studies was: (1) to determine the degree to which the special circumstances listed in California Penal Code § 190.2 limit death-eligibility for persons convicted of first degree murder, and (2) to determine what percentage of persons convicted of first degree murder who are statutorily death-eligible are sentenced to death, i.e., California's death sentence rate. To date, I have published two law review articles based the studies: *The California Death Penalty: Requiem for Furman?* 72 N.Y.U. L.REV. 1283 (1997) (with Nina Rivkind) and *The Eighth Amendment, the Death Penalty, and Ordinary Robbery-Burglary Murderers: A California Case Study*, 59 FLA. L.REV. 719 (2007).

3. My attempt to determine the death eligibility and death sentence rates in all three studies was based on the understanding: (1) that, under *Furman v. Georgia*, 408 U.S. 238 (1972) and subsequent cases, particularly *Zant v. Stephens*, 462 U.S. 862, 877-78 (1983), states must "genuinely narrow" the death-eligible class and the measure of genuine narrowing is whether (unlike the situation at the time of *Furman*) the death penalty is imposed in a "substantial portion" of the cases where the defendants are death-

eligible (*Penry v. Lynaugh*, 492 U.S. 302, 327 (1989)); and (2) that California relies upon the special circumstances provisions of Penal Code § 190.2 to perform the required "narrowing" function. *People v. Jablonski*, 126 P.3d 938, 973 (Cal. 2006); *People v. Bacigalupo*, 862 P.2d 808, 813 (Cal. 1993).¹

4. My conclusions regarding the constitutionality of the California scheme are informed by the fact that in *Furman* the justices addressed death penalty schemes where approximately 15-20% of those convicted of capital murder were actually being sentenced to death (see 402 U.S. at 309, n.10 (Stewart, J., concurring); *id.* at 386, n.11 (Burger, C.J., dissenting); *id.* at 435-36 n.19 (Powell, J., dissenting))² and held such schemes created too great a risk of arbitrariness to satisfy the Eighth Amendment.

1. Unlike other states (e.g., Louisiana, Texas) which have narrow definitions of capital murder, California has always had a broad definition of first degree murder which currently includes, in addition to premeditated killings, killings done with one of seven means or in the commission or attempted commission of one of thirteen felonies. See Cal. Pen. Code § 189. As a consequence of the felony-murder rule, first degree murder includes, not only intentional killings, but negligent and accidental killings as well.

2. See also *Gregg v. Georgia*, 428 U.S. 153, 182 n.26 (plurality); *Woodson v. North Carolina*, 428 U.S. 280, 296, n.31 (1976) (plurality). The pre-*Furman* experience in California was consistent with the Court's understanding concerning the death sentence rate. See *Aikens v. California*, 406 U.S. 813 (1972) (Brief for Petitioner, Appendix F, pp. 4f-5f) (citing the estimate of a former Director of the California Department of Corrections and statistics from 1967 and 1969).

HISTORY OF THE 1978 DEATH PENALTY LAW

5. The current California death penalty scheme is a product of the 1978 "Briggs Initiative."³ This initiative replaced the Legislature's much narrower 1977 death penalty law and, according to its author, State Senator John V. Briggs, was intended to "give Californians the toughest death-penalty law in the country."⁴ The original 1978 law ("1978 Version") had 27 separately enumerated special circumstances making a first degree murderer death-eligible.⁵ Under the 1978 Version, a non-killing accomplice was death-eligible only upon proof that the accomplice had the intent to kill. The 1978 Version was in effect for murders committed from November 8, 1978, through June 5, 1990.

6. In 1990, the 1978 death penalty law was broadened by initiative.⁶ The initiative added two felony-murder special circumstances (mayhem and rape by instrument) and broadened death

3. Initiative Measure Proposition 7 (approved Nov. 7, 1978).

4. California Journal Ballot Proposition Analysis, Calif. J., No. 1978, Special Section, at 5. By "toughest death penalty law," the proponents meant the law "which threatens to inflict that penalty on the maximum number of defendants." *Carlos v. Super. Ct.*, 672 P.2d 862, 871 n.13 (Cal. 1983).

5. Penal Code § 190.2(a) listed 19 special circumstances, one of which (felony-murder) had 9 enumerated sub-parts. One of the special circumstances - the "heinous, atrocious, or cruel" special circumstance (Pen. Code § 190.2 (a)(14)) was subsequently declared to be unconstitutional in *People v. Superior Court (Engert)* (1982) 31 Cal.3d 797 and was ignored for purposes of the three studies.

6. Initiative Measure Proposition 115 (approved June 5, 1990).

eligibility for non-killing accomplices by eliminating the intent to kill requirement and requiring only that the accomplice have acted with "reckless indifference to human life and as a major participant" in a special circumstances felony.⁷ This broadened death penalty scheme ("1990 Version") was in effect for murders committed from June 6, 1990, through March 26, 1996.

7. In 1996, the 1978 death penalty law was again broadened by initiative.⁸ The initiative added three more special circumstances: felony murder carjacking, murder of a juror and murder by discharging a firearm from a motor vehicle. This version of the death penalty scheme ("1996 Version") was in effect for murders committed from March 27, 1996, through March 7, 2000.

8. In 2000, for the third time in a decade, the 1978 death penalty law was expanded by initiative.⁹ The initiative added a 33rd special circumstance to Penal Code § 190.2 - murder to further the activities of a criminal street gang - expanded the lying in wait special circumstance and overturned a limiting construction the California Supreme had given to two special circumstances, felony-murder kidnapping and felony-murder arson. This version of the death penalty scheme ("2000 Version") was in effect for murders committed from March 8, 2000, through July 1, 2009.

7. Penal Code § 190.2(d).

8. Initiative Measure Proposition 196 (approved Mar. 26, 1996).

9. Initiative Measure Proposition 18 (approved Mar. 7, 2000)

9. The most recent expansion of the 1978 death penalty law is not the product of an initiative, but of the California Supreme Court's decision in *People v. Farley*, 210 P.3d 361 (Cal. 2009). In *Farley*, the court overturned the burglary "merger" rule which had prohibited the application of the felony-murder rule and the felony-murder special circumstance when the defendant's purpose in a burglary was to commit an aggravated assault or murder. This decision expanded the size of the death-eligible pool by 2-3% by making death-eligible anyone who enters a building, room, etc. belonging to someone else with the intent to kill or, commit an aggravated assault against, the victim.¹⁰ This is the version of the death penalty scheme ("2009 Version") currently in effect.

DESCRIPTION OF THE STUDIES

The "Appellate Study"

10. The first study I conducted, and the principal study, for purposes of this declaration was the "Appellate Study." The methodology of the Appellate Study is described in detail in the N.Y.U. Law Review article cited in ¶2. In summary, the data was drawn from appellate opinions in first degree murder cases decided on appeal during the period 1988-92. The study examined all published decisions during the period and all unpublished decisions

10. For example, consider *People v. Saille*, 820 P.2d 588 (Cal. 1991). Saille was thrown out of a bar by a security guard for being drunk and was subsequently denied re-entrance. Saille returned with a rifle and entered the bar intending to kill the security guard, but ultimately killing a patron. Saille would not have been death-eligible under any of the earlier versions of the law, but would be death-eligible under the current version.

in the First Appellate District during the period. The study encompassed 158 death penalty cases, 246 non-death first degree murder cases and 192 second degree murder cases. I assumed that the distribution of types of first degree murders occurring in these cases was representative of the distribution generally in California.¹¹ With respect to each first degree murder case, I determined whether special circumstances had been found, and, if not, whether, under the facts as stated by the appellate court, a reasonable juror could have found a special circumstance beyond a reasonable doubt.¹² I determined the percentage of murder cases that were special circumstances cases, and, eliminating a percentage of cases to account for juvenile murderers, who were not death-eligible (estimated at 3.5% of non-death cases), I calculated the percentage of first degree murderers who were death-eligible. I then divided the percentage of first degree murderers actually sentenced to death by the percentage who were death-eligible to determine the death sentence rate for death-eligible murderers.

11. Below (¶¶ 16-25), I apply each of the five versions of the death penalty statute to the Appellate Study cases to compare the death eligibility and death sentence rates for the various periods.

11. This assumption was tested in part by comparing the findings with regard to the study cases with appealed second degree murder cases and with unappealed cases in three counties.

12. This is the test suggested by the Supreme Court in its decisions in *Godfrey v. Georgia*, 446 U.S. 420, 428-29 (1980), and *Maynard v. Cartwright*, 486 U.S. 356, 364 (1988), for determining the narrowing effect of individual aggravating circumstances.

The "Alameda Study"

12. In 2007, I completed the second study, covering murder conviction cases in Alameda County for murders committed during the period November 8, 1978 to November 7, 2001 ("Alameda Study").¹³ In the Alameda Study, I attempted to survey all murder conviction cases for the study period. Working from five lists of cases created by the Alameda County District Attorney's Office in response to a California Public Records Act request for all murder filings since 1977, supplemented by three other lists of murder conviction cases, I surveyed 816 murder conviction cases, including all death penalty cases (cases in which the defendant was sentenced to death) for the period.¹⁴ The study included 473 first degree murder cases, among which were 49 death penalty cases. I believe that the 767 non-death penalty murder cases in the study comprise approximately 98% of such cases during the period, and I assume that they are representative of the missing cases.

13. The data for the study was derived from a review of trial court casefiles, supplemented with appellate opinions, where available. Each case was coded in two ways: (1) with reference to the version of the death penalty statute in effect at the time of the murder and (2) with reference to the 2000 Version of the law.

13. November 8, 1978 is the effective date of the 1978 death penalty law.

14. The numbers differ slightly from the numbers reported in the Florida Law Review article cited in ¶2 because 13 of the missing cases were identified and reviewed after the article went to press.

The "Current Study"

14. I recently completed a third study ("Current Study") based on discovery produced by the California Department of Corrections and Rehabilitation in response to a subpoena *duces tecum*. The study covers all persons sentenced upon a conviction for first degree murder in California during the period 2003-2005. The data for the Current Study was derived from a review of the pre-sentence reports ("PSR"s) for 1299 defendants convicted of first degree murder and sentenced to the California Department of Corrections and Rehabilitation ("CDCR") during the three-year period,¹⁵ supplemented by appellate opinions in the cases, where available.

15. As was the case with the Alameda Study, each case was coded in two ways: (1) with reference to the version of the death penalty statute in effect at the time of the murder and (2) with reference to the 2000 Version of the statute.

THE FINDINGS FOR THE SCHEME AS A WHOLE

The Appellate Study

16. In the calculations for the 1978, 1990 and 1996 Versions below, I use 33.2 as the average number of death sentences per year and 9.6% as the percentage of convicted first degree murderers sentenced to death. These are the figures from the original study

15. CDCR produced PSRs for an additional eleven defendants convicted of first degree murder, but, as to each of these defendants, the information in the PSR was insufficient to permit inclusion of the case in the study.

period (1988-1992) and were used in the N.Y.U. Law Review article. In fact, the average number of death sentences during the 21-year period encompassing the first three versions of the law (1979-1999) is 31.3, so the death sentence rates (as a percentage of first degree murderers and as a percentage of death-eligible murderers) for these versions of the law are somewhat overstated. For the period 2000-present, encompassing the 2000 and 2009 Versions of the law, I use the average number of death sentences per year for the 10-year period 2000-2009, which is 21.6; and the average number of adult convicted first degree murderers per year from the Current Study (2003-2005), which is 394.

17. **1978 Version.** Using the Appellate Study cases and the calculation methods described above (§§ 10, 16), I calculate that, under the 1978 Version, approximately 84% of all convicted first degree murderers (87.2% of adult convicted first degree murderers) were death-eligible. If 84% of convicted first degree murderers were death-eligible and only 9.6% of convicted first degree murderers were actually sentenced to death, California's death sentence rate for death-eligible defendants during the period was approximately 11.4%.

18. The above calculations do not take into account that, for murders occurring during a four-year period, December 12, 1983 to October 13, 1987, the California Supreme Court interpreted § 190.2 to require proof of the defendant's intent to kill for a special circumstances finding. See *Carlos v. Superior Court*, 672 P.2d 862 (Cal. 1983), overruled by *People v. Anderson*, 742 P.2d 1306 (Cal.

1987).

19. I have reexamined the Appellate Study cases applying § 190.2 as interpreted by *Carlos*. In the course of that reexamination, I have resolved all questionable cases against finding an intent to kill, thus adopting the interpretation most favorable to the constitutionality of the scheme.¹⁶ Applying the *Carlos* interpretation would affect the categorization of 21 cases. Under § 190.2 as interpreted by *Carlos*, approximately 76.6% of convicted first degree murderers would have been death-eligible, and the resulting death sentence rate for death-eligible defendants would have been approximately 12.5%.¹⁷

20. **1990 Version.** Using the Appellate Study cases and the calculation methods described above (§§ 10, 16), I calculate that, under the 1990 Version, the death eligibility rate for adult convicted first degree murderers during this period was 89.1%, and

16. Reliance on facts stated in appellate cases probably leads to *understatement* of the number of cases where a jury could have found intent to kill. Where, in cases not governed by *Carlos*, the prosecution did not have to prove intent to kill, it may not have developed or introduced available evidence on the issue, and the appellate opinion may not have discussed evidence which would have supported such a finding.

17. This death sentence rate for the period 1983-1987, represents the *highest* statewide death sentence rate under the 1978 death penalty law. In calculating the death sentence rate for *Carlos* window cases, I do not mean to suggest that the calculations have any bearing on the constitutionality of the 1978 death penalty law. It is my understanding that the Eighth Amendment requires *legislative* narrowing of the death-eligible class (see *Zant v. Stephens*, 462 U.S. 862, 878 (1983)), so that the California Supreme Court's erroneous and short-lived narrowing interpretation cannot validate a statute if, as a whole, it was unconstitutional when passed.

the death sentence rate for death-eligible defendants was approximately 11.1%.

21. **1996 Version.** Using the Appellate Study cases and the calculation methods described above (¶¶ 10, 16), I calculate that, under the 1996 Version, the death eligibility rate for adult convicted first degree murderers during this period was 89.9%, and the death sentence rate for death-eligible defendants was approximately 10.9%.¹⁸

22. **2000 Version.** Using the Appellate Study cases and the calculation methods described above (¶¶ 10, 16), I calculate that, under the 2000 Version, the death eligibility rate for adult convicted first degree murderers during this period was 91.4%, and the death sentence rate for death-eligible defendants was approximately 6.1%.

23. **2009 Version.** Using the Appellate Study cases and the calculation methods described above (¶¶ 10, 16), I calculate that, under the 2009 Version, the death eligibility rate for adult convicted first degree murderers during this period would be 94.0%, and the death sentence rate for death-eligible defendants would be approximately 5.9%.

18. The figures given for the 1990 and 1996 Versions are lower than that given in the N.Y.U. Law Review article for two reasons: (1) post-1997 case authority interpreting § 190.2(d) establishes that, with respect to two cases categorized as not involving a death-eligible defendant, there were sufficient facts to justify a special circumstances finding; and (2), at the time of the article, I treated the published and unpublished case samples as separate for calculation purposes but have since concluded that the difference between the two samples is not statistically significant and the samples should be combined.

24. In addition to overstating the death sentence rates as to the 1978, 1990 and 1996 Versions of the law because of my use of a higher average number of death sentences (see ¶16), the previous paragraphs almost certainly overstate the true death sentence rates because of three additional protocol decisions I made that favored the constitutionality of California's scheme: (1) I did not consider, in deriving the death sentence rate, statutorily death-eligible defendants who (because of plea bargaining or jury leniency) were convicted only of second degree murder or lesser crimes; (2) I based the study on *initial* death sentences and, therefore, did not take account of defendants who obtained reversals of their convictions or death sentences and were not resentenced to death; and (3) I did not take account of the effect of *Atkins v. Virginia*, 536 U.S. 304 (2002) (holding unconstitutional the application of the death penalty to mentally retarded persons), although apparently mentally retarded persons may be overrepresented on death row.¹⁹

25. In sum, the 1978 death penalty was exceedingly broad when it was adopted, making death eligible 87.2% of adult first degree murderers and producing a death sentence rate for death-eligible first degree murderers of approximately 11.4%. The death eligibility rate has gone up and the death sentence rate has gone down with each successive expansion, to the point where the 2009 Version of the death penalty statute makes 94.0% of convicted first

19. See *Atkins*, 536 U.S. at 346-347 (Scalia, J., dissenting).

degree murderers death-eligible and can be expected to produce a death sentence rate for death-eligible first degree murderers of just under 6%.²⁰

The Alameda Study

26. The Alameda Study covered cases under the 1978, 1990, 1996 and 2000 Versions of the statute. Overall, during the 23-year period, the death eligibility rate for adult convicted first degree murderers was 87.0%, and the death sentence rate was 12.7%.

27. Almost half the adult first degree murder conviction cases in the study (217/439) involved murders occurring in the period covered by 1978 Version of the statute. In those cases, 88.9% of the defendants were death-eligible. The death sentence rate for death-eligible defendants was 15.5%. The difference between the Alameda Study death sentence rate and the lower Appellate Study death sentence rate is likely a reflection of the fact that Alameda County has been a relatively "high death" county. See Glenn L. Pierce & Michael Radelet, *The Impact of Legally Inappropriate Factors on Death Sentencing for California Homicides, 1990-1999*, 46

20. These findings are entirely consistent with the findings of Professor David Baldus and his colleagues, who recently completed a study of 27,928 cases where defendants were convicted of non-negligent homicide (first degree murder, second degree murder or voluntary manslaughter), using a stratified sample of 1618 cases. See Declaration of David C. Baldus filed in *Ashmus v. Wong*, Civ. No. C93-00594-TEH (N.D. Cal.). Professor Baldus concluded, *inter alia*, that "the rate of death eligibility among California homicide cases is the highest in the nation by every measure" (*id.* at 25) and that "the post-*Furman* California death sentencing rate among death-eligible cases is among the lowest in the nation and 66% (10/15) lower than the death sentencing rate in pre-*Furman* Georgia. *Id.* at 25-26.

Santa Clara L. Rev. 1, 27 (2005).

28. The other half of the Alameda Study cases (222) involved adult first degree murders covered by the 1990, 1996 and 2000 Versions of the law. In these cases 85.1% of the defendants were death-eligible, and the death sentence rate for death-eligible defendants was 9.5%.

29. Applying the 2000 Version of the statute to the Alameda Study cases, 91.5% of the defendants would have been death-eligible, and the death sentence rate for death-eligible defendants would be 5.9%, virtually the same figures produced by the Appellate Study.

The Current Study

30. The Current Study found an overall death eligibility rate for adult first degree murderers of 84.6% and a death sentence rate of 5.5%. Although many of the Current Study cases involved murders under the 2000 Version of the law, if the 2000 Version were applied to all the cases, the death eligibility rate would be 85.7% and, using the average yearly number of death sentences for the decade, the death sentence rate for death-eligible defendants would be 6.4%.²¹

31. Under the 2009 Version of the death penalty statute, the death eligibility rate for defendants in the Current Study would be 87.6% and the death sentence rate for death-eligible defendants would be 6.3%.

21. This death-sentencing rate is higher than the actual rate found in the Current Study because the average yearly number of defendants sentenced to death was higher for the decade as a whole than for the three-year period of the study.

The State's Calculations

32. In *Frye v. Woodford*, CIV S-99-0628 LKK JFM (E.D. Cal.), in response to interrogatories, the State analyzed the appellate first degree murder cases used in the Appellate Study. The State agreed that 157 out of 158 death penalty cases were special circumstances cases. With regard to the other 246 cases, the State took the position that in 7 cases the facts contained in the court's opinion were insufficient to determine the existence of special circumstances and in 65 of the remaining 239 cases there was insufficient evidence of a special circumstance. Thus, the State found that in 174 cases special circumstances were proved or provable.

33. Assuming, *arguendo*, that the State was correct in its characterization of all of the cases, and applying the same calculation methods described above (including disregarding the 7 cases where the State contended there were insufficient facts), the State in effect conceded that at least 73.0% of first degree murderers are factually death-eligible, yielding a corresponding death sentence rate of 13.2%.

THE FINDINGS FOR PARTICULAR SPECIAL CIRCUMSTANCES

34. It is my understanding that not only does the Eighth Amendment require that a death penalty scheme as a whole narrow the death-eligible class, but it also prohibits the imposition of the death penalty "when juries generally do not impose the death

sentence in a certain kind of murder case."²² Accordingly, below I provide data on the frequency with which six commonly occurring special circumstances result in a death sentence.

Theft-related felony-murders: Robbery (§ 190.2(a)(17)(A)), Burglary (§ 190.2(a)(17)(G)),²³ Carjacking (§ 190.2(a)(17)(L))

35. Using the data from all three studies, I calculated the death sentence rate for defendants who killed during a robbery, a (theft-related) burglary or carjacking, where no more aggravated special circumstance was proved or provable. Virtually all the cases in the Appellate Study arose in the 1980s. The death sentence rate for defendants convicted of first or second degree murder who were factually death-eligible under one of these special circumstances was approximately 5.5%. The Alameda Study cases for the most part arose during the 1980s and 1990s. The death sentence rate for defendants convicted of first or second degree murder who were factually death-eligible under one of these special circumstances was approximately 4.5%.²⁴ Most of the Current Study

22. *Gregg v. Georgia*, 428 U.S. 153, 205-206. (1976) (citing with approval the Georgia's Supreme Court's understanding of the law)

23. While burglary may be committed for purposes other than theft, e.g., with the intent to commit a sexual assault, only the more common theft-related burglaries are included in these calculations.

24. Of course, calculating the narrowing effect of the robbery/burglary/carjacking special circumstances by only examining the pool of convicted murderers (as was done in both studies) overstates the narrowing effect of the circumstances. Some portion of robbery/burglary/carjack murderers are allowed to plead to lesser offenses, while others are given immunity for testimony against co-defendants, so that the true percentage who receive the death penalty is below the cited 5.5% and 4.5%.

cases arose during the late 1990s and early 2000s. The Current Study covered only defendants convicted of first degree murder. The death sentence rate for adult defendants convicted of first degree murder who were factually death-eligible under one of these special circumstances was less than 2%.²⁵ The death sentence rate for defendants who are made death-eligible by these theft-related special circumstances has always been far lower than the death sentence rate for the statute as a whole, and it has steadily declined over time.

Lying in Wait (§ 190.2(a)(15)) and Drive-by Killing (§ 190.2(a)(21))

36. The lying in wait special circumstance has been part of the death penalty statute in all versions of the statute. The drive-by killing special circumstance was added in 1996 and, therefore, is applicable for the 1996, 2000 and 2009 Versions of the statute. Both have the effect of making death-eligible intentional killers whose killings are not connected to felonies. In the Appellate Study, only one of the 157 death sentences was based on the finding of a lying in wait special circumstance alone. The death sentence rate for the lying in wait special circumstance alone was .45%. In the Alameda Study, none of the 49 death sentences was based only on a finding of a lying in wait special circumstance, a drive-by shooting special circumstance or both lying in wait and drive-by shooting special circumstances. In the Current Study, one

25. Since the study covers only defendants convicted of first degree murder and since many robbery/burglary murderers are convicted of second degree murder or lesser charges (see n.24), even a figure this low overstates the death sentence rate.

of the 55 death sentences was based on a finding of a lying in wait special circumstance alone. None was based on a drive-by shooting special circumstance alone or combined with a lying in wait special circumstance. The death sentence rate for cases where the lying in wait and/or drive-by shooting special circumstances were the only proved or provable special circumstances is .71%.

Gang Motive (§ 190.2(a)(22))

37. The "gang motive" special circumstance was added to Penal Code § 190.2 in 2000, so only the Current Study contains data on the death sentence rate for such killings. In that study, among the 1,000 death-eligible first degree murderers, 339, more than one-third, had a proved or provable gang motive special circumstance. None of the 55 defendants sentenced to death was sentenced on the basis of a gang motive special circumstance alone, and only six of the 339 defendants with a proved or provable gang motive special circumstance (1.8%) were sentenced to death. In five of the six cases, the defendant murdered multiple victims, and a multiple murder special circumstance was found. Thus, in the single-victim gang motive murder cases, there was only one defendant sentenced to death (0.3%), and that case was altogether atypical because the defendant was found to have intentionally killed a police officer to effect an escape from custody.

CONCLUSIONS

38. A statutory scheme in which death eligibility is so broadly defined that it has never produced a statewide death sentence rate even approaching the 15-20% death sentence rate

produced by the schemes held unconstitutional in *Furman* and that in 2003-2005 produced a death sentence rate of no more than 5.5% does not "genuinely narrow" and creates too great a risk of arbitrary application to be constitutional under the Eighth Amendment.

39. When special circumstances rarely result in a death sentence, their use in any given case is a violation of the Eighth Amendment. That is the case for the following special circumstances: the theft-related felony-murder special circumstances - robbery, burglary and carjacking - which currently result in a death sentence less than 2% of the time; lying in wait and drive-by shooting, which result in a death sentence less than 1% of the time; and "gang motive" which, in the period 2003-2005, never resulted in a death sentence.

I declare under the penalty of perjury under the laws of the United States and the State of California that I have read the foregoing declaration, and it is true and correct.

Executed this 18th day of April, 2011, in San Francisco, California.

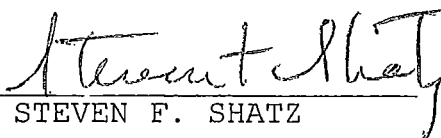

STEVEN F. SHATZ

EXHIBIT 41

Amended Declaration of George Woodworth

1 **AMENDED DECLARATION OF GEORGE WOODWORTH, PH.D.**

2 I, George Woodworth, Ph.D., declare as follows:

3 1. From 1971 until June 2010, I was employed at the University of Iowa, first as an
4 Associate Professor from 1971 until 1996 and then as a Professor of Statistics and Actuarial
5 Science from 1996 until my retirement earlier this year.

6 2. I received a bachelor's degree from Carlton College in 1962 and a doctorate in
7 Statistics from the University of Minnesota in 1966. My resume is attached at Appendix A of
8 this declaration.

9 3. My areas of research interest are Bayesian Statistical Methodology and
10 Applications. Areas in which I have done collaborative research are Clinical (medical) Trials,
11 Employment Discrimination, and Capital Charging and Sentencing.

12 4. I have applied statistical methods to Capital Charging and Sentencing systems
13 for many years. I am the co-author of Equal Justice And The Death Penalty: A Legal And
14 Empirical Analysis (1990) (with David Baldus and Charles A. Pulaski Jr.). I have co-authored
15 numerous research papers on death penalty sentencing, including Race Discrimination In
16 America's Capital Punishment System Since *Furman v. Georgia* (1972): The Evidence Of Race
17 Disparities And The Record Of Our Courts And Legislatures In Addressing The Issue, Report
18 To American Bar Association, Section Of Individual Rights And Responsibilities (July 25,
19 1997) (with David Baldus); and Arbitrariness and Discrimination in the Administration of the
20 Death Penalty: A Legal and Empirical Analysis of the Nebraska Experience (1973-1999), 81
21 Neb. L. Rev. 486 (2002) (with David Baldus, Catherine Grosso, and Aaron Christ).

22 5. I have qualified as an expert witness and testified in state and federal court
23 proceedings, including *McCleskey v. Kemp*, Case No. CIV C81-2434A (N.D. Ga.).

24 6. Our study in this case reports the findings of an empirical study of 27,453
25 California homicide cases with a date of offense between January 1, 1978, and June 30, 2002,
26 that resulted in a first or second degree murder or voluntary manslaughter conviction. The
27 findings of the study are based on a stratified sample of 1,900 cases drawn from the 27,453
28 case universe.

1 7. Professor Baldus and I documented the rates of death eligibility under post-
2 *Furman* law among several categories of legally relevant homicide cases. We also compared
3 post-*Furman* California death eligibility rates with post-*Furman* death eligibility rates in other
4 states based on different research methodologies. One of these methods is based on the Federal
5 Bureau of Investigation's Supplementary Homicide Reports (SHR) reported in a recently
6 published paper by Jeffery Fagan and colleagues.¹ The results of their analysis of death
7 eligibility rates are presented in Table 1.² It lists the states in increasing order of their rates of
8 death eligibility with California leading all states with a death eligibility rate of 37.8%.

9 8. The purpose of this declaration is to document the extent to which the reported
10 California estimate of a 37.8% death eligibility rate reported in Table 1 underestimates the
11 actual rate. The reason is that the SHR-based methodology on which the Table 1 estimates are
12 based reflects only a minor "lying in wait" type aggravating circumstance – "sniper killings,"
13 the only species of "lying in wait" that is included in the FBI's SHR database. The broad scope
14 of California's lying-in-wait special circumstance (California Penal Code section 190.2(a)(15))
15 (LIW) is simply not reflected in the SHR-based estimates of death eligibility.

16 9. When I adjust the California SHR data for the wide prevalence of the LIW
17 special circumstance cases under California law, the death eligibility rate for California based
18 on the SHR data is 50.3%. The underlying data for each state on which the Fagan, *et. al.*

19 _____
20 ¹ Jeffrey Fagan, Franklin E. Zimring, & Amanda Geller, Capital Punishment and Capital
21 Murder: Market Share and the Deterrent Effects of the Death Penalty, 84 Tex. L. Rev. 1803,
22 1816-17 (2006) describe their methodology as follows. "The SHR has the unique advantage of
23 providing detailed, case-level information about the context and circumstances of each homicide
24 event known to the police. This allows us to identify the presence of factors that map onto the
25 statutory framework of the Texas murder statutes and more broadly onto the Model Penal Code
26 aggravating factors." To generate a death eligibility estimate for each state, the authors classified
27 a murder or non-negligent homicide as death eligible if it included any of "the following
28 elements that are part of the recurrent language of capital-eligible homicides across the states: (a)
killings during the commission of robbery, burglary, rape or sexual assault, arson, and
kidnapping; (b) killing of children below age six; (c) multiple-victim killings; (d) 'gangland'
killing involving organized crime of street gangs; (e) institution killings where the offender was
confined in a correctional or other governmental institution; (f) sniper killings... (g) killings in
the course of drug business." They also defined a law enforcement officer victim as a qualifying
aggravating factor. When the defendant's age was known cases were classified as not death
eligible if the defendant was under 16 years of age at the time of the offense.

² This Table contains the same information as Table 4, Part II in the Baldus declaration.

TABLE 1

State Death-Eligibility Rates Rank Ordered From Low (Alabama) to High (California) (1978-2003)¹

A State	B Percent of Homicides that are Death Eligible	C 95% Confidence Interval for Estimate in Column B
Alabama	13.1	12%, 15%
North Carolina	16.8	16%, 18%
Florida	18.2	17%, 20%
Kentucky	18.2	16%, 20%
Louisiana	18.3	17%, 19%
Delaware	18.4	14%, 23%
Tennessee	18.7	17%, 20%
Mississippi	19.7	18%, 22%
Georgia	20.3	18%, 22%
New York	20.4	18%, 22%
Virginia	20.6	20%, 22%
Texas	21.7	20%, 23%
Maryland	21.9	20%, 23%
Ohio	22.0	21%, 23%
Missouri	22.4	21%, 24%
South Carolina	22.5	21%, 24%
Nevada	22.7	21%, 24%
New Mexico	22.9	21%, 25%
Arkansas	23.0	21%, 25%
Connecticut	23.2	21%, 25%
Arizona	23.8	22%, 25%
Kansas	23.9	20%, 28%
Indiana	24.0	22%, 25%
Pennsylvania	25.0	24%, 26%
New Jersey	25.5	24%, 27%
Colorado	26.1	24%, 28%
Montana	26.5	20%, 33%
Wyoming	26.9	22%, 32%
South Dakota	27.4	21%, 34%
Oregon	28.0	25%, 30%
Washington	28.0	26%, 30%
Oklahoma	28.3	25%, 32%
Nebraska	28.9	25%, 32%
Illinois	28.9	27%, 31%
Idaho	29.7	25%, 34%
Utah	30.0	27%, 33%
New Hampshire	31.9	26%, 38%
California	37.8	36%, 40%

¹The estimates in this table are based on the number of death-eligible homicides reported to the FBI using the Fagan-Geller-Zimring estimation procedure described in the Amended Declaration of David C. Baldus at page 18, note 35.

1 estimates and my California reanalysis are based are presented in Tables 1, 2, and 3.

2 10. In the balance of this declaration I explain the basis for this adjusted California
3 rate estimated with the SHR data.

4 11. According to the SHR data 37.8% of the 76,225 California murder and non-
5 negligent manslaughter cases reported between 1978 and 2003³ were death eligible by virtue of
6 possessing one of the special circumstances described in Footnote 1. The SHR population of
7 reported cases contains the 27,453 First-degree murder (M1), second-degree murder (M2), and
8 voluntary manslaughter (VM) convictions comprising the universe of our study (hereafter
9 called the Narrowing Study). The first adjustment of the 37.8% SHR death eligibility rate
10 corrected an undercount of lying-in-wait cases; the adjustment consists of deleting the 132
11 cases (0.2% of the total) in which sniping was the sole special circumstance⁴ and replacing
12 them with an estimated 11,411 cases (15.0% of the total) in which lying in wait was the sole
13 special circumstance⁵. This estimate is based on our observation that 15% of the cases in our
14 universe of California's M1, M2, and VM cases were death eligible solely by virtue of the
15 lying-in-wait special circumstance and assuming that rate applies to the larger SHR population.
16 The second adjustment corrects an overcount in the SHR death-eligibility rate; the adjustment
17 consists of deleting an estimated 1,753 cases (2.3% of the total) which were death eligible solely
18 by virtue of the gang related special circumstance during the period January 1, 1978, through
19 March 7, 2000, when gang related killing was not a California special circumstance.⁶ This
20 adjustment is based on our observation that 2.5% of the cases in our universe described above
21 would have been death eligible solely by virtue of the gang related special circumstance; we
22 arrived at the 2.3% adjustment to the SHR by prorating our 2.5% rate to the 90.8% of our study
23 period during which that circumstance was not applicable. Appendix B presents the basis of
24 my analysis in more detail.

25
26 ³ Table 1, header and last row; Appendix B, part 1, table row 14.

27 ⁴ Appendix B, part 1, table row 5.

28 ⁵ Appendix B, part 1, table row 11.

⁶ Appendix B, part 1, table row 12.

Table 2

Capital Homicides by State by Total and Type of Killing (Percent), 1978-2003, Using Fagan-Geller-Zimring Estimation of Capital Eligibility*

FIPS	State	Total N of Capital Homicides	Percent Felony Murder	Percent Child Killings	Percent Multiple Victims	Percent Institution Killings	Percent Police Killings	Percent Organized Crime	Percent Youth Gangs	Percent Sniper
1	alabama	1,292	56.72	18.53	28.50	.32	2.19	4.53	.59	1.31
2	alaska	237	35.64	17.81	56.04	.43	4.72	.64	.21	.07
4	arizona	1,952	42.19	16.63	40.80	1.12	1.72	4.08	4.14	.21
5	arkansas	1,210	53.17	16.24	35.08	.31	2.22	2.72	2.92	.68
6	california	28,790	38.40	8.75	22.43	.50	.49	.48	39.01	.66
8	colorado	1,230	39.52	24.31	36.92	.41	1.40	6.52	3.31	.39
9	connecticut	863	52.21	18.27	35.67	1.14	1.06	2.61	3.82	.20
10	delaware	137	37.63	43.50	36.39	.50	.00	.00	.00	.00
12	florida	3,180	46.52	15.60	43.08	.47	1.53	.82	1.11	.21
13	georgia	3,145	65.67	14.49	26.06	.36	.92	1.06	1.15	.03
15	hawaii	.268	42.80	29.72	31.78	1.44	1.01	1.69	1.22	.00
16	idaho	256	19.80	32.84	45.16	2.10	2.54	5.43	.61	.00
17	illinois	6,220	45.40	11.63	24.13	.11	.58	3.82	26.10	.97
18	indiana	2,018	47.67	16.88	40.61	.62	1.53	2.00	2.11	.11
19	iowa	388	33.30	31.55	45.36	.00	.86	1.73	.44	.00
20	kansas	480	33.17	24.89	47.30	.40	3.72	.59	.71	.00
21	kentucky	906	50.18	19.05	38.47	.79	1.06	.85	1.08	.36
22	louisiana	2,740	56.12	13.18	36.39	.14	1.59	1.15	.86	.30
23	maine	174	39.31	29.24	33.28	.46	.60	1.39	.00	1.36
24	maryland	2,668	57.01	15.20	36.19	1.53	1.16	.27	.29	.31
25	massachusetts	1,005	45.18	17.81	37.73	.29	2.64	7.10	4.17	.42
26	michigan	4,939	56.41	15.00	37.70	.91	1.04	1.60	.37	.21
27	minnesota	648	43.98	25.43	35.60	.53	1.98	2.10	6.61	.14
28	mississippi	965	58.86	14.59	31.57	.00	3.23	1.15	1.75	.15
29	missouri	2,444	50.88	19.06	36.40	.37	1.30	1.46	2.87	.31
30	montana	101	32.39	25.21	49.16	.83	7.05	.00	1.83	.00
31	nebraska	260	34.09	32.67	37.88	.00	1.95	4.05	.77	.00
32	nevada	804	44.71	14.52	35.79	.68	1.34	5.78	7.09	.12
33	new jersey	163	29.95	28.06	48.51	1.16	4.43	.00	.00	.00
34	new hampshire	2,666	61.40	20.58	29.05	.20	1.61	1.45	1.23	.07
35	new mexico	655	38.66	17.55	35.96	3.56	1.86	3.25	8.86	.12
36	new york	9,040	59.10	16.17	31.25	.76	.44	.91	1.26	.07
37	north carolina	2,554	47.21	13.93	43.89	.27	1.33	1.19	.03	.58
38	north dakota	61	32.77	36.34	74.03	.00	2.41	.00	5.25	.00
39	ohio	3,217	53.91	21.41	34.61	.06	1.30	1.14	.84	.42
40	oklahoma	1,819	45.76	19.87	36.80	.65	1.22	6.62	.87	.79
41	oregon	866	42.63	23.86	39.31	1.06	1.05	2.80	3.92	.33
42	pennsylvania	4,267	57.74	18.50	35.13	.48	.86	1.35	.72	1.02
44	rhode island	193	43.47	24.51	41.75	1.45	1.45	5.25	1.28	.64
45	south carolina	1,912	62.12	14.37	28.56	.16	1.42	2.15	.29	.24
46	south dakota	74	39.58	37.85	24.31	1.16	13.19	.00	.00	.00
47	tennessee	1,975	59.08	11.45	32.80	1.11	1.24	.62	1.00	.39
48	texas	10,399	54.40	14.94	35.95	1.07	1.41	2.11	1.39	.16
49	utah	436	29.45	34.46	38.54	1.37	1.32	6.05	2.90	.26
50	vermont	87	39.57	20.83	58.22	.00	2.32	.00	.00	.00
51	virginia	2,455	49.10	17.41	40.99	.27	1.82	.96	.17	.20
53	washington	1,574	41.71	18.95	42.17	1.32	1.31	6.70	3.65	.14
54	west virginia	536	44.14	15.17	44.21	3.29	1.24	.24	.00	.11
55	wisconsin	1,074	44.47	25.70	35.62	.74	1.48	3.67	5.21	.13
56	wyoming	139	36.32	37.08	40.08	1.88	1.78	.83	.00	.32

* Percentages greater than 100 due to multiple classification of homicides in capital-eligible categories

Table 3.

Capital Homicides by State by Total and Type of Killing (Percent) 1976-2008, Using Fagan-Geller-Zimring Estimation of Capital Eligibility, Single versus Multiple Categories of Killings*

FIPS	State	% Felony Murder Only	% Multiple Victim Only	% Child Victim Only	Institution Killing Only	% Organized Crime Only	% Youth Gang Only	% Sniper Only	% Multiple Criteria	% Police Killings**
1	alabama	51.14	18.20	16.15	.32	4.53	.48	1.08	7.50	2.78
2	alaska	29.96	45.57	15.45	.00	.00	.21	.64	10.48	4.72
4	arizona	37.13	33.31	14.14	1.12	3.79	3.68	.07	7.66	1.72
5	arkansas	47.12	25.78	13.02	.31	2.64	2.52	.27	8.74	2.22
6	california	34.76	14.58	7.18	.49	.95	35.72	.46	8.31	1.48
8	colorado	32.87	27.45	20.99	.41	6.26	3.07	.39	9.80	1.40
9	connecticut	42.51	23.84	14.06	1.00	2.44	3.59	.20	12.58	1.06
10	delaware	30.85	22.71	35.00	.90	.00	.00	.00	13.68	1.53
12	florida	41.45	35.78	12.76	.47	.74	.87	.05	7.76	1.53
13	georgia	60.52	19.39	12.94	.58	.95	.15	.03	6.88	.92
15	hawaii	36.21	25.41	28.27	1.44	1.59	1.22	.00	5.70	1.01
18	idaho	17.30	36.63	28.80	2.30	5.43	.61	.00	6.54	2.54
17	illinois	40.58	16.55	9.56	.11	3.63	24.27	.88	7.96	1.58
18	indiana	41.48	31.48	13.01	.62	1.70	1.90	.11	9.42	1.23
19	iowa	27.98	37.36	26.90	.00	1.73	1.44	.00	8.64	.86
20	kansas	29.31	39.05	20.14	.40	.58	1.48	.00	6.48	3.72
21	kentucky	43.29	30.66	19.07	.76	.85	1.08	.38	8.78	1.08
22	louisiana	50.73	28.82	10.37	.14	1.87	.86	.30	7.83	1.59
23	maine	37.05	27.63	25.86	.16	1.39	.00	.16	6.54	1.16
24	maryland	50.72	27.72	12.06	1.42	.27	.29	.16	6.54	1.16
25	massachusetts	36.62	27.23	14.08	.29	6.48	4.17	.25	11.13	2.64
26	midnight	48.82	17.78	11.78	.84	1.26	.37	.19	10.31	1.04
27	missouri	39.88	23.64	18.76	.93	2.10	6.05	.14	12.38	1.88
28	mississippi	52.02	22.36	11.82	.00	1.15	1.75	.31	9.21	3.23
29	missouri	43.37	26.62	16.02	.97	1.25	2.60	.31	10.01	1.30
30	montana	28.52	38.16	18.09	.83	.00	1.83	.00	11.00	7.05
31	nebraska	28.95	27.92	27.92	.00	4.05	.77	.00	8.89	1.95
32	nevada	38.67	27.88	13.81	.68	5.00	6.76	.12	7.82	1.34
33	new hampshire	20.76	38.25	25.81	1.16	.00	1.16	.00	10.96	4.48
34	new jersey	53.16	18.59	16.58	.20	1.24	1.15	.07	10.95	1.61
35	new mexico	39.29	28.07	14.90	3.38	3.25	8.07	.12	8.03	1.88
36	new york	63.27	24.75	13.74	.79	.80	1.19	.03	7.58	1.33
37	north carolina	42.60	37.78	11.69	.27	1.06	1.03	.58	6.45	1.33
38	north dakota	13.17	56.78	34.09	.00	.00	5.28	.00	15.85	2.41
39	ohio	46.17	24.14	17.38	.66	1.08	1.73	.42	10.81	1.30
40	oklahoma	40.17	27.92	16.76	.00	5.65	.75	.52	9.14	1.22
41	oregon	35.03	29.30	19.16	1.08	2.80	3.43	.11	10.50	1.05
42	pennsylvania	48.27	23.10	14.44	.39	1.11	1.11	.90	12.44	1.86
44	rhode island	36.02	27.81	20.82	1.45	2.95	1.25	.64	13.94	1.45
45	south carolina	56.77	22.08	12.85	.18	2.02	.23	.24	8.71	1.45
46	south dakota	35.42	20.14	34.36	.00	.00	.00	.00	5.58	13.78
47	tennessee	53.93	26.48	10.13	2.48	.00	.00	.00	6.56	1.24
48	TEXAS	48.04	27.51	12.67	1.05	1.78	1.25	.21	6.56	1.24
49	utah	24.28	27.63	30.29	1.37	4.44	2.22	.28	11.27	1.32
50	vermont	28.66	42.71	16.85	.00	.00	.00	.00	16.51	2.32
51	virginia	43.93	33.28	14.90	1.32	.88	.17	.20	7.78	1.82
53	washington	35.08	80.89	14.90	1.32	5.51	3.28	.14	11.48	1.31
54	west virginia	38.49	37.85	13.23	2.88	.24	.00	.00	7.98	1.24
55	wisconsin	36.88	24.50	20.49	.47	3.67	6.21	.00	11.55	1.48
56	wyoming	28.58	31.15	31.91	1.88	.83	.00	.52	10.58	1.78

* Police Killings may overlap with other criteria. Since data source is separate from the data source for the specific criteria, we show the percent of all capital-eligible crimes for this category.

1 The foregoing is true and correct and executed under penalty of perjury under the laws
2 of the United States and the State of California on November 4, 2010.

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Iowa City
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GEORGE WOODWORTH, Ph.D.

Appendix A: Resume of George Woodworth, Ph.D.

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GEORGE WOODWORTH

CURRICULUM VITAE

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Marital Status: Married with two children

Education:

B.A. Carleton College, Northfield, Minnesota, 1962
Ph.D. University of Minnesota, 1966

Employment:

Instructor, Department of Statistics, University of Minnesota, 1965-66.

Assistant Professor, Department of Statistics, Stanford University, 1966-71.

Assistent (Visiting Assistant Professor), Department of Mathematical Statistics, Lund Institute of Technology, Lund, Sweden, 1970-71 (on leave from Stanford).

Associate Professor, Department of Statistics, The University of Iowa, Iowa City, Iowa, 1971-1996.

Associate Director, Director (1973-1980), Acting Director (1982-3), Adviser (1984-present):
University of Iowa Statistical Consulting Center.

Associate Professor, Department of Preventive Medicine, Division of Biostatistics, University of Iowa, 1990-1996.

Professor, Department of Statistics and Actuarial Science, University of Iowa, 1996-.

Professor, Department of Preventive Medicine, Division of Biostatistics, University of Iowa 1996- .

Research Interests:

Bayesian Inference and Pedagogy

Smooth Bayesian Inference

Bayesian Experimental Design

Applications of Statistics in Biomedical Science, Behavioral Science, and Law and Justice

Multivariate Analysis and Discrete Multivariate Analysis

Dissertations Supervised:

Stanford University Ph.D.:

1. Reading, James (1970). "A Multiple Comparison Procedure for Classifying All Pairs out of k Means as Close or Distant".
2. Withers, Christopher Stroude (1971). "Power and Efficiency of a Class of Goodness of Fit Tests."
3. Rogers, Warren (1971). "Exact Null Distributions and Asymptotic Expansions for Rank Test Statistics."

University of Iowa, Ph.D.:

4. Huang, Yih-Min (1974). "Statistical Methods for Analyzing the Effect of Work-Group Size Upon Performance."
5. Scott, Robert C. (1975). "Smear and Sweep: a Method of Forming Indices for Use in Testing in Non-Linear Systems."
6. Hoffman, Lorrie Lawrence (1981). "Missing Data in Growth Curves."
7. Patterson, David Austin (1984). "Three-Population Partial Discrimination."
8. Mori, Motomi (1989). "Analysis of Incomplete Longitudinal Data in the Presence of Informative Right Censoring." (Biostatistics, joint with Robert Woolson)
9. Galbiati-Riesco, Jorge Mauricio (1990). "Estimation of Choice Models Under Endogenous/Exogenous Stratification."
10. Shin, Mi-Young (1993). "Consistent Covariance Estimation for Stratified Prospective and Case-Control Logistic Regression."
11. Lian, Ie-Bin (1993). "The Impact of Variable Selection Procedures on Inference for a Forced-in Variable in Linear and Logistic Regression."
12. Nunez Anton, Vicente A. (1993). "Analysis of Longitudinal Data with Unequally Spaced Observations and Time Dependent Correlated Errors."
13. Bosch, Ronald J. (1993). "Quantile Regression with Smoothing Splines."
14. Samawi, Hani Michel (1994). "Power Estimation for Two-Sample Tests Using Importance and Antithetic Resampling." (Biostatistics, joint with Jon Lemke)
15. Chen, Hungta (1995). "Analysis of Irregularly Spaced Longitudinal Data Using a Kernel Smoothing Approach." (Biostatistics)
16. Nichols, Sara (2000). "Logistic Ridge Regression." (Biostatistics)
17. Dehkordi, Farideh Hosseini (2001). "Smoothness Priors for Longitudinal Covariance Functions." (Biostatistics)
18. Meyers, Troy (2002) "Frequentist properties of credible intervals."
19. Zhao, Lili, (2006) "Bayesian decision-theoretic group sequential analysis with survival endpoints in Phase II clinical trials."
20. Chakravarty, Subhashish (2007) "Bayesian surface smoothing under anisotropy."

University of Iowa, MS:

19. Juang, Chifei (1993). "A Comparison of Ordinary Least Squares and Missing Information Estimates for Incomplete Block Data."
20. Wu, Chia-Chen (1993). "Time Series Methods in the Analysis of Automatically Recorded Behavioral Data."
21. Peng, Ying (1995). "A Comparison of Chi-Square and Normal Confidence Intervals for Variance Components Estimated by Maximum Likelihood."
22. Wu, Li-Wei (1996). "CART Analysis of the Georgia Charging and Sentencing Study."
23. Meyers, Troy (2000) "Bias Correction for Single-Subject Information Transfer in Audiological Testing."

Publications

Refereed Publications (Law review articles are reviewed and edited by law students):

1. Savage, I.R., Sobel, M., Woodworth, G.G. (1966), "Fine Structure of the Ordering of Probabilities of Rank Orders in the Two Sample Case," *Annals of Mathematical Statistics*, 37, 98-112.
2. Basu, A.P., Woodworth, G.G. (1967), "A Note on Nonparametric Tests for Scale," *Annals of Mathematical Statistics*, 38, 274-277.
3. Rizvi, M.M., Sobel, M., Woodworth, G.G. (1968), "Non-parametric Ranking Procedures for Comparison with a Control," *Annals of Mathematical Statistics*, 39, 2075-2093.
4. Woodworth, G.G. (1970), "Large Deviations, Bahadur Efficiency of Linear Rank Statistics," *Annals of Mathematical Statistics*, 41, 251-183.
5. Rizvi, M.H., Woodworth, G.G. (1970), "On Selection Procedures Based on Ranks: Counterexamples Concerning Least Favorable Configurations," *Annals of Mathematical Statistics*, 41, 1942-1951.
6. Woodworth, G.G. (1976), "t for Two: Preposterior Analysis for Two Decision Makers: Interval Estimates for the Mean," *The American Statistician*, 30, 168-171.
7. Hay, J.G., Wilson, B.D., Dapena, J., Woodworth, G.G. (1977), "A Computational Technique to Determine the Angular Momentum of a Human Body," *J. Biomechanics*, 10, 269-277.
8. Woodworth, G.G. (1979), "Bayesian Full Rank MANOVA/MANCOVA: An Intermediate Exposition with Interactive Computer Examples," *Journal of Educational Statistics*, 4(4), 357-404.
9. Baldus, DC., Pulaski, C.A., Woodworth, G.G., Kyle, F. (1980), "Identifying Comparatively Excessive Sentences of Death: A Quantitative Approach," *Stanford Law Review*, 33(1), 1-74.
10. Louviere, J.J., Henley, D.H., Woodworth, G.G., Meyer, J.R., Levin, I. P., Stoner, J.W., Curry, D., Anderson D.A. (1981), "Laboratory Simulation vs. Revealed Preference Methods for Estimating Travel Demand Models: An Empirical Comparison," *Transportation Research Record*, 797, 42-50.
11. Baldus, D.C., Pulaski, C.A., Woodworth, G.G. (1983), "Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience," *The Journal of Criminal Law and Criminology*, 74(3), 661-753.

12. Louviere, J.J., Woodworth, G.G. (1983), "Design and Analysis of Simulated Consumer Choice of Allocation Experiments: An Approach Based on Aggregate Data," *Journal of Marketing Research*, XX, 350-367.
13. Baldus, D.C., Pulaski, C.A., Woodworth, G.G. (1986), "Monitoring and Evaluating Contemporary Death Sentencing Systems: Lessons from Georgia," *U.C. Davis Law Review*, 18(4), 1375-1407.
14. Baldus, D.C., Pulaski, C.A., Woodworth, G.G. (1986), "Arbitrariness and Discrimination in the Administration of the Death Penalty: A Challenge to State Supreme Courts," *Stetson Law Review*, XV(2), 133-261.
15. Bober, T., Putnam, C.A., Woodworth, G.G. (1987), "Factors Influencing the Angular Velocity of a Human Limb Segment," *Journal of Biomechanics*, 20(5), 511-521.
16. Gantz, B.J., Tyler, R.S., Knutson, J.F., Woodworth, G.G., Abbas, P., McCabe, B.F., Hinrichs, J., Tye-Murray, N., Lansing, C., Kuk, F., Brown, C. (1988), "Evaluation of Five Different Cochlear Implant Designs: Audiologic Assessment and Predictors of Performance," *Laryngoscope*, 98(10), 1100-6.
17. Tye-Murray, N., Woodworth, G.G. (1989), "The Influence of Final Syllable Position on the Vowel and Word Duration of Deaf Talkers," *Journal of the Acoustical Society of America*, 85, 313-321.
18. Baker, R.G., Van Nest, J., Woodworth, G.G. (1989), "Dissimilarity Coefficients for Fossil Pollen Spectra from Iowa and Western Illinois During the Last 30,000 Years," *Palynology*, 13, 63-77.
19. Shymansky, J.A., Hedges, L.V., Woodworth, G.G. (1990), "A Reassessment of the Effects of 60's Science Curricula on Student Performance," *Journal of Research in Science Teaching*, 27(2), 127-144.
20. Tye-Murray, N., Purdy, S., Woodworth, G.G., Tyler, R.S. (1990), "Effect of Repair Strategies on Visual Identification of Sentences," *Journal of Speech and Hearing Disorders*, 55, 621-627.
21. Cadoret, R.C., Troughton, E.P., Bagford, J.A., Woodworth, G.G. (1990), "Genetic and Environmental Factors in Adoptee Antisocial Personality," *European Archives of Psychiatry and Neurological Sciences*, 239(4), 231-240.
22. Chakraborty, G., Woodworth, G.G., Gaeth, G.J., Ettenson, R. (1991), "Screening for Interactions Between Design Factors and Demographics in Choice-Based Conjoint," *Journal of Business Research*, 23(3), 219-238.
23. Kochar, S.C., Woodworth, G.G. (1991). "Rank order Probabilities for the Dispersion Problem," *Statistics & Probability Letters*, 14(4), 203-208.
24. Knutson, J.F., Hinrichs, J.V., Tyler, R.S., Gantz, B.J., Schartz, H.A., Woodworth, G.G. (1991), "Psychological Predictors of Audiological Outcomes of Multichannel Cochlear Implants: Preliminary Findings," *Annals of Otolaryngology, Rhinology & Laryngology*, 100(10), 817-822.
25. Knutson, J.F., Schartz, H.A., Gantz, B.J., Tyler, R.S., Hinrichs, J.V., Woodworth, G.G. (1991), "Psychological Change Following 18 Months of Cochlear Implant Use," *Annals of Otolaryngology, Rhinology & Laryngology*, 100(11), 877-882.
26. Kirby, R.F., Woodworth, C.H., Woodworth G.G., Johnson, A.K. (1991), "Beta-2 Adrenoceptor Mediated Vasodilation: Role in Cardiovascular Responses to Acute Stressors in Spontaneously Hypertensive Rats," *Clin. and Exper. Hypertension.- Part A, Theory and Practice*, 13(5), 1059-1068.

27. Tye-Murray, N., Tyler, R.S., Woodworth, G.G., Gantz, B.J. (1992), "Performance over Time with a Nucleus or Ineraid Cochlear Implant," *Ear and Hearing*, 13, 200-209.
28. Tye-Murray, N., Purdy, S.C., Woodworth, G.G. (1992), "Reported Use of Communication Strategies by SHHH Members: Client, Talker, and Situational Variables," *Journal of Speech & Hearing Research*, 35(3), 708-717.
29. Mori, M., Woodworth, G.G., Woolson, R.F. (1992), "Application of Empirical Bayes Inference to Estimation of Rate of Change in the Presence of Informative Right Censoring," *Statistics in Medicine*, 11, 621-631.
30. Shymansky, J.A., Woodworth, G.G., Norman, O., Dunkhase, J., Matthews, C., Liu, C.T. (1993), "A Study of Changes in Middle School Teachers' Understanding of Selected Ideas in Science as a Function of an In-Service Program Focusing on Student Preconceptions," *J. Res. in Science Teaching*, 30, 737-755.
31. Wallace, R.B., Ross, J.E., Huston, J.C., Kundel, C., Woodworth, G.G. (1993), "Iowa FICSIT Trial: The Feasibility of Elderly Wearing a Hip Joint Protective Garment to Reduce Hip Fractures," *J. Am. Geriatr. Soc.*, 41(3), 338-340.
32. Gantz, B.J., Woodworth, G.G., Knutson, J. F., Abbas, P.J., Tyler, R.S. (1993), "Multivariate Predictors of Success with Cochlear Implants," *Advances in Oto-Rhino-Laryngology*, 48, 153-67.
33. Mori, M., Woolson, R.F., Woodworth, G.G. (1994), "Slope Estimation in the Presence of Informative Right Censoring: Modeling the Number of Observations as a Geometric Random Variable," *Biometrics*, 50(1), 39-50.
34. Nunez-Anton, V., Woodworth, G.G. (1994), "Analysis of Longitudinal Data with Unequally Spaced Observations and Time Dependent Correlated Errors," *Biometrics*, 50(2), 445-456.
35. Baldus, D.C., Woodworth, G.G., Pulaski, C.A. (1994), "Reflections on the Inevitability of Racial Discrimination in Capital Sentencing and the Impossibility of Its Prevention, Detection, and Correction," *Washington and Lee Law Review*, 51(2), 359-430.
36. Cutrona, C.E., Cadoret, R.J., Suhr, J.A., Richards, C.C., Troughton, E. Schutte, K., Woodworth, G. G. (1994), "Interpersonal Variables in the Prediction of Alcoholism Among Adoptees: Evidence for Gene-Environment Interactions," *Comprehensive Psychiatry*, 35(3), 171-9.
37. De Fillippo, C.L., Lansing, C.R., Elfenbein, J.L., Kallaus-Gay, A., Woodworth, G.G. (1994), "Adjusting Tracking Rates for Text Difficulty via the Cloze Technique," *Journal of the American Academy of Audiology*, 5(6), 366-78
38. Gantz, B.J., Tyler, R.S., Woodworth, G.G., Tye-Murray, N. Fryauf-Bertschy, H. (1994), "Results of Multichannel Cochlear Implants in Congenital and Acquired Prelingually Deafened Children: Five Year Follow-Up," *Am. J. Otol.*, 15 (Supplement 2), 1-7.
39. Cadoret, R.J., Troughton, E., Woodworth, G.G. (1994), "Evidence of Heterogeneity of Genetic Effect in Iowa Adoption Studies," *Annals of the New York Academy of Sciences*, 708, 59-71.
40. Bosch, R., Ye, Y., Woodworth, G.G. (1995), "An Interior Point Quadratic Programming Algorithm Useful for Quantile Regression with Smoothing Splines," *Computational Statistics and Data Analysis*, 19, 613-613.
41. Cadoret, R.J., Yates, W.R., Troughton, E., Woodworth, G.G., Stuart, M.A. (1995), "Adoption Study Demonstrating Two Genetic Pathways to Drug Abuse," *Archives of General Psychiatry*, 52(1), 42-52.

42. Tye-Murray, N., Spencer, L., Woodworth, G.G. (1995), "Acquisition of Speech by Children who have Prolonged Cochlear Implant Experience," *Journal of Speech & Hearing Research*, 38(2), 327-37.
43. Cadoret, R.J., Yates, W.R., Troughton, E., Woodworth, G.G., Stewart, M.A. (1995), "Genetic-Environmental Interaction in the Genesis of Aggressivity and Conduct Disorders," *Archives of General Psychiatry*, 52(11), 916-924.
44. Tyler, R.S., Lowder, M.W., Parkinson, A.J., Woodworth, G.G., Gantz, B.J. (1995), "Performance of Adult Ineraid and Nucleus Cochlear Implant Patients after 3.5 Years of Use," *Audiology*, 34(3), 135-144.
45. Baldus, D, MacQueen, JC, and Woodworth GG. (1995) "Improving Judicial Oversight of Jury Damages Assessments: A Proposal for the Comparative Additur/Remittitur Review of Awards for Nonpecuniary Harms and Punitive Damages," with John C. MacQueen and George Woodworth, 80 Iowa Law Review 1109 (1995), 159 pages.
46. Parkinson, A.J., Tyler, R.S., Woodworth, G.G., Lowder, M., Gantz, B.J., (1996) "A Within-Subject Comparison of Adult Patients Using the Nucleus F0F1F2 and F0F1F2B3B4B5 Speech Processing Strategies," *Journal of Speech & Hearing Research*, Volume 39, 261-277.
47. Baldus, D., MacQueen, J.C., Woodworth, G.G., (1996) "Improving Judicial Oversight of Jury Damages Assessments: A Proposal for the Comparative Additur/Remittitur Review of Awards for Nonpecuniary Harms and Punitive Damages," *Iowa Law Review*, (80) 1109-1267.
48. Cadoret, Remi J., Yates, William R., Troughton, E., Woodworth, G.G. (1996) "An Adoption Study of Drug Abuse/Dependency in Females," *Comprehensive Psychiatry*, Vol. 37, No. 2, 88-94.
49. Tripp-Reimer, T., Woodworth, G.G., McCloskey, J.C., Bulechek, G. (1996), "The Dimensional Structure of Nursing Intervention," *Nursing Research* 45(1) 10-17.
50. Tyler RS. Fryauf-Bertschy H. Gantz BJ. Kelsay DM. Woodworth GG. (1997) "Speech perception in prelingually implanted children after four years," *Advances in Oto-Rhino-Laryngology*. 52:187-92.
51. Tyler RS, Gantz BJ, Woodworth GG, Fryauf-Bertschy H, and Kelsay DM. (1997) "Performance of 2- and 3-year-old children and prediction of 4-year from 1-year performance. *American Journal of Otology*. 18(6 Suppl):S157-9, 1997.
52. Miller CA, Abbas PJ, Rubinstein JT, Robinson BK, Matsuoka AJ, and Woodworth G. (1998) "Electrically evoked compound action potentials of guinea pig and cat: responses to monopolar, monophasic stimulation." *Hearing Research*. 119(1-2):142-54, 1998 May.
53. Knutson JF, Murray KT, Husarek S, Westerhouse K, Woodworth G, Gantz BJ, and Tyler RS. (1998) "Psychological change over 54 months of cochlear implant use." *Ear & Hearing*, 19(3):191-201, 1998.
54. Gfeller K, Knutson JF, Woodworth G, Witt S, and DeBus B. (1998) "Timbral recognition and appraisal by adult cochlear implant users and normal-hearing adults." *Journal of the American Academy of Audiology*, 9(1):1-19, 1998.
55. Baldus D, Woodworth G, Zuckerman D, Weiner NA, Broffitt B. (1998) "Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview with Recent Findings from Philadelphia," *Cornell Law Review*, 88:6, 1998.
56. Green GE. Scott DA. McDonald JM. Woodworth GG. Sheffield VC. Smith RJ. Carrier rates in the midwestern United States for GJB2 mutations causing inherited deafness. *JAMA*. 281(23):2211-6, 1999 Jun 16.

57. Gantz BJ. Rubinstein JT. Gidley P. Woodworth GG. Surgical management of Bell's palsy. *Laryngoscope*. 109(8):1177-88, 1999 Aug
58. Featherstone KA. Bloomfield JR. Lang AJ. Miller-Meeks MJ. Woodworth G. Steinert RF. Driving simulation study: bilateral array multifocal versus bilateral AMO monofocal intraocular lenses. *Journal of Cataract & Refractive Surgery*. 25(9):1254-62, 1999 Sep.
59. Weiler JM. Bloomfield JR. Woodworth GG. Grant AR. Layton TA. Brown TL. McKenzie DR. Baker TW. Watson GS. Effects of fexofenadine, diphenhydramine, and alcohol on driving performance. A randomized, placebo-controlled trial in the Iowa driving simulator. *Annals of Internal Medicine*. 132(5):354-63, 2000 Mar 7
60. Tyler RS. Teagle HF. Kelsay DM. Gantz BJ. Woodworth GG. Parkinson AJ. Speech perception by prelingually deaf children after six years of Cochlear implant use: effects of age at implantation. *Annals of Otolaryngology, Rhinology, & Laryngology - Supplement*. 185:82-4, 2000 Dec.
61. Ballard KJ. Robin DA. Woodworth G. Zimba LD. Age-related changes in motor control during articulator visuomotor tracking. *Journal of Speech Language & Hearing Research*. 44(4):763-77, 2001 Aug.
62. Gfeller K. Witt S. Woodworth G. Mehr MA. Knutson J. Effects of frequency, instrumental family, and cochlear implant type on timbre recognition and appraisal. *Annals of Otolaryngology, Rhinology & Laryngology*. 111(4):349-56, 2002 Apr.
63. Green GE. Scott DA. McDonald JM. Teagle HF. Tomblin BJ. Spencer LJ. Woodworth GG. Knutson JF. Gantz BJ. Sheffield VC. Smith RJ. Performance of cochlear implant recipients with GJB2-related deafness. *American Journal of Medical Genetics*. 109(3):167-70, 2002 May 1.
64. Weiler JM. Quinn SA. Woodworth GG. Brown DD. Layton TA. Maves KK. Does heparin prophylaxis prevent exacerbations of hereditary angioedema?. *Journal of Allergy & Clinical Immunology*. 109(6):995-1000, 2002 Jun.
65. Berkowitz RB. Woodworth GG. Lutz C. Weiler K. Weiler J. Moss M. Meeves S. Onset of action, efficacy, and safety of fexofenadine 60 mg/pseudoephedrine 120 mg versus placebo in the Atlanta allergen exposure unit. *Annals of Allergy, Asthma, & Immunology*. 89(1):38-45, 2002 Jul.
66. Baldus, D, Woodworth GG, Grosso, C., Christ, M. (2002) "Arbitrariness and Discrimination in the Administration of the Death Penalty: A Legal and Empirical Analysis of the Nebraska Experience (1973-1999)," with George Woodworth, Catherine M. Grosso, and Aaron M. Christ, 81 *Nebraska Law Review* 486 (2002), 271 pages.
67. Baldus, D, and Woodworth GG. (2003) "Race Discrimination in the Administration of the Death Penalty: An Overview of the Empirical Evidence with Special Emphasis on the Post-1990 Research," with George Woodworth, 39 *Criminal Law Bulletin* 194 (2003), 33 pages.
68. Kadane, J. and Woodworth G.G. (2004) "Hierarchical Models for Employment Decisions," *Journal of Business and Economic Statistics*, 1 April 2004, vol. 22, no. 2, pp. 182-193(12).
69. Woodworth, G.G. and Kadane, J.B. (2004) "Expert testimony supporting post-sentence civil incarceration of violent sexual offenders." *Law Probability and Risk*, 2004 3: 221-241.
70. Baldus, D. and Woodworth, G.G., "Race Discrimination and the Legitimacy of Capital Punishment: Reflections on the Interaction of Fact and Perception," 53 *DePaul Law Review* 1411 (2004).
71. Weiler K. Christ AM. Woodworth GG. Weiler RL. Weiler JM. "Quality of patient-reported outcome data captured using paper and interactive voice response diaries in an allergic

- rhinitis study: is electronic data capture really better?. *Annals of Allergy, Asthma, & Immunology*. 92(3):335-9, 2004 Mar.
72. Robin DA, Jacks A, Hageman C, Clark HM, Woodworth G., "Visuomotor tracking abilities of speakers with apraxia of speech or conduction aphasia," *Brain and Language*, Aug;106(2):98-106. 2008.
73. Woodworth, G.G. and Kadane, J. "Age and Time-Varying Proportional Hazards Model for Employment Discrimination," *Annals of Applied Statistics*, 2009 accepted pending revisions.
74. Zhao, L and Woodworth, G.G. "Bayesian decision sequential analysis with survival endpoint in phase II clinical trials," *Stat Med*, 2009, Feb 18.

Books, Chapters:

75. Bober, T., Hay, J.G., Woodworth, G.G. (1979), "Muscle Pre-Stretch and Performance," in *Science in Athletics*, eds. Juris Terauds and George G. Dales, Del Mar CA: Academic Publishers, pp. 155-166.
76. Hay, J.G., Dapena, J., Wilson, B.D., Andrews, J.G., Woodworth, G.G. (1979), "An Analysis of Joint Contributions to the Performance of a Gross Motor Skill," in *International Series on Biomechanics, Vol. 2B, Biomechanics VI-B*, eds. Erling Asmussen and Kuert Jorgensen, Baltimore: University Park Press, pp. 64-70.
77. Hay, J.G., Vaughan, C.L., Woodworth, G.G. (1980). "Technique and Performance: Identifying the Limiting Factors," in *Biomechanics VII-B*, eds. Adam Morecki, Kazimerz Fidelus, Krzysztof Kedzior, Andrzej Wit, Baltimore: University Park Press, pp. 511-520.
78. Woodworth, G.G. (1980). "Numerical Evaluation of Preposterior Expectations in the Two-Parameter Normal Model, with an Application to Preposterior Consensus Analysis," in *Bayesian Analysis in Econometrics and Statistics*, ed. Arnold Zellner, Amsterdam: North-Holland Publishing Co., pp. 133-140.
79. Hodges, L.V., Shymansky, J.A., Woodworth, G.G. (1989), *Modern Methods of Meta-Analysis: an NSTA Handbook*, Washington, D.C.: National Science Teachers Association.
80. Baldus, D.C., Woodworth, G.G., Pulaski, C.A. (1990), *Equal Justice and the Death Penalty: A Legal and Empirical Analysis*, Boston: Northeastern University Press.
81. Baldus, D., Pulaski, C., Woodworth GG (1992) "Law and Statutes in Conflict: Reflections on McCleskey v. Kemp," in *Handbook of Psychology and Law*, edited by Dorothy K. Kagehiro and William S. Laufer. New York: Springer-Verlag, 1992.
82. Baldus, D., Pulaski, C., Woodworth GG (1992) "Race Discrimination and the Death Penalty," with Charles J. Pulaski, Jr. and George Woodworth, in *The Oxford Companion to the Supreme Court of the United States*. New York: Oxford University Press, 1992, p 705-7.
83. Woodworth, G.G. (1994). "Managing Meta-Analytic Databases," in *The Handbook of Research Synthesis*, eds. Harris Cooper and Larry V. Hedges, New York: Russell Sage Foundation, pp. 177-189.
84. Lovelace, D. Cryer, J., Woodworth, G.G. (1994), *Minitab Handbook to Accompany Statistics for Business Data Analysis and Modelling, 2nd edition*, Belmont, CA: Wadsworth Publishing Company.
85. Tye-Murray, N. Kirk, K.L., Woodworth, G.G. (1994). "Speaking with the Cochlear Implant Turned On and Turned Off," in *Datenknovertierung, Reproduktion und Drick*, eds. I.J. Hochmair-Desoyer and E.S. Hochmair, Wien, Manz, pp. 552-556.

86. Baldus, D. MacQueen, JC, Woodworth GG. (1996) "Additur/Remittitur Review: An Empirically Based Methodology for the Comparative Review of General Damages Awards for Pain, Suffering, and Loss of Enjoyment of Life," with John C. MacQueen and George Woodworth, in *Reforming the Civil Justice System*, edited by Larry Kramer. New York: New York University Press, 1996, p 386, 30 pages.
87. Baldus, D, and Woodworth, GG. (1998) "Race Discrimination and the Death Penalty: An Empirical and Legal Overview," with George Woodworth, in *America's Experiment with Capital Punishment*, edited by James C. Acker, Robert M. Bohm, and Charles S. Lanier. Durham, NC: Carolina Academic Press, 1998, page 385, 32 pages.
88. Woodworth, George G. *Biostatistic: A Bayesian Introduction*. New York: John Wiley and Sons, September, 2004.

Unrefereed Articles, Reviews.

89. Libby, D.L., Novick, M.R., Chen, J.A., Woodworth, G.G., Hamer, R.M. (1981), "The Computer-Assisted Data Analysis (CADA) Monitor," *The American Statistician*, 35(3), 165-166.
90. Woodworth, G.G. (1987), "STATMATE/PLUS, Version 1.2," *The American Statistician*, 41(3), 231-233.
91. Hoffmaster, D., Woodworth, G.G. (1987), "A FORTRAN Version of the Super Duper Pseudorandom Number Generator," *Science Software Quarterly*, 3(2), 100-102.
92. Baldus, D.C., Woodworth, G.G., Pulaski, C.A. (1987) "Death penalty in Georgia remains racially suspect," *Atlanta Journal and Constitution*, September 6, 1987.
93. Hawkins, D., Conaway, M., Hackl, P., Kovacevic, M., Sedransk, J., Woodworth, G.G., Bosch, R, Breen, C. (1989) "Report on Statistical Quality of Endocrine Society Journals," *Endocrinology*, 125(4), 1749-53.
94. Woodworth, G.G. (1989). "Statistics and the Death Penalty," *Stats. The Magazine for Students of Statistics*, 2, 9-12.
95. Baldus, D.C., Pulaski, C.A., Woodworth, G.G. (1989), "Reflections on 'Modern' Death Sentencing Systems," Book review, *Criminal Law Forum*, 1, 190-197.
96. Baldus, D., Woodworth, G.G. (1993). "Proportionality: The View of the Special Master," *Chance, New Directions for Statistics and Computers*, 6(3), 9-17.
97. "Race Discrimination in America's Capital Punishment System since *Furman v. Georgia* (1972): The Evidence of Race Disparities and the Record of Our Courts and Legislatures in Addressing the Issue," with George Woodworth, Report to the A.B.A. Section of Individual Rights and Responsibilities (1997), 19 pages.
98. Baldus, David C., George Woodworth, David Zuckerman, Neil Alan Weiner, and Barbara Broffitt (2001). "The Use of Peremptory Challenges in Capital Murder Trials: A legal and Empirical Analysis," *University of Pennsylvania Journal of Constitutional Law*, February, 2001.
99. "Complement to Chapter 6. The WinBUGS Program," in *Bayesian Statistics: Principles, Models, and Applications, Second Edition*, by S. James Press, John Wiley and Sons, Inc., New York, 2002.

Convention Papers, other Oral Presentations:

100. Woodworth, G.G. (1983), "Analysis of a Y-Stratified Sample: The Georgia Charging and Sentencing Study," in *Proceedings of the Second Workshop on Law and Justice Statistics*, ed. Alan E. Gelfand, U.S. Department of Justice, Bureau of Justice Statistics, pp. 18-22.
101. Woodworth, G.G., Louviere, J.J. (1985), "Simplified Estimation of the MNL Choice Model using IRLS," Contributed talk at TIMS/ORSA Marketing Science Conference at Vanderbilt University.
102. Woodworth, G.G. (1985), "Recent Studies of Race- and Victim Effects in Capital Sentencing," *Proceedings of the Third Workshop on Law and Justice Statistics*, ed. G.G. Woodworth, U.S. Department of Justice, Bureau of Justice Statistics, pp. 55-58.
103. Woodworth, G.G., Louviere, J.J. (1988), "Nested Multinomial Logistic Choice Models Under Exogenous and Mixed Endogenous-Exogenous Stratification," *ASA Proceedings of the Business and Economics Statistics Section*, American Statistical Association, pp. 121-129.
104. Woodworth, G.G. (1989), "Trials of an Expert Witness," *ASA Proceedings of the Social Science Section*, American Statistical Association, pp. 143-146.
105. Kirby, R.F., Woodworth, C.H., Woodworth, G.G., Johnson A.K., (1989), "Differential Cardiovascular Effects of Footshock and Airpuff Stressors in Wistar-Kyoto and Spontaneously Hypertensive Rats," *Society for Neuroscience Abstracts*, 15, 274.
106. Woodworth, C.H., Kirby, R.F., Woodworth, G.G., Johnson, A.K. (1989), "Spontaneously Hypertensive and Wistar-Kyoto Rats Show Behavioral Differences but Cardiovascular Similarities in Tactile Startle," *Society for Neuroscience Abstracts*, 15, 274.
107. Woodworth, G.G., Mah, Jeng, Breiter, D. "Bayesian Experimental Design of Sequential and Nonsequential Medical Device Trials. Contributed Talk, Joint Statistical Meeting 2005, Minneapolis, MN

Unpublished Reports:

108. Baldus, D.C., Woodworth, G.G., Pulaski C.A. (1989). "Procedural Reform Study," *Inter-University Consortium for Political and Social Research: Criminal Justice Archive*.
109. Baldus, D.C., Woodworth, G.G., Pulaski C.A. (1989). "Charging and Sentencing Study," *Inter-University Consortium for Political and Social Research: Criminal Justice Archive*.

Work in Process:

110. Woodworth, G.G., *Statistical Issues in Recent Re-Analysis of Capital Charging and Sentencing Data*, read at John Jay College, February 21, 2007.
111. Woodworth, G.G., "Bayesian Experimental Design of Sequential Clinical Trials." To be submitted to *Statistics in Medicine*, 2009.
112. Woodworth, G.G., *Biostatistics II: Intermediate Bayesian Analysis*, Proposal accepted by John Wiley, December 2006, completion date May 1, 2009.

Professional Honors and Awards:

- 1987 Harry Kalven prize of the Law and Society Association (with David Baldus and Charles Pulaski).
- 1987 Iowa Educational Research and Evaluation Association, annual award "For Excellence in the Field of Educational Research and Evaluation for Best Educational Evaluation Study," (with Larry Hedges and James Shymansky).
- 1991 Gustavus Myers Center for the Study of Human Rights in the United States, selection of *Equal Justice and the Death Penalty* as an outstanding book on the subject of human rights (with David Baldus and Charles Pulaski).
- 1996 Elected Fellow of the American Statistical Association

Service Activities**Departmental Service:**

- University of Iowa Statistical Consulting Center:
 - Founder, Associate Director, Director (1973-1980)
 - Acting Director (1982-3)
 - Member of Steering Committee and Adviser (1984-present).

University Service:

- Outside member of over thirty Ph.D. dissertation committees, 1973-present.
- Woodworth, G.G., Lenth, R.V.L. (1982) "A Stratified Sampling Plan for Estimating Departmental and University-Wide Administration Effort."
- University of Iowa, Basic Mathematics Committee, January 1983-84.
- Statistics Advisor to the University of Iowa Journal of Corporation Law, 1984-85.
- University of Iowa, Research Council, 1984-87, Chairman 1986-87.
- University House Advisory Committee, 1986-87.
- Chairman, Political Science Review Committee, 1988-89.
- Interdisciplinary Ph.D. Program in Applied Mathematical Sciences, 1988-present.
- University of Iowa, Judicial Commission, 1979-81, 1990-93.
- University of Iowa, Liberal Arts Faculty Assembly, 1985-87, 1995-6.

Professional Service:

- NAACP Legal Defense and Education Fund, 1980-3: Statistical Analysis of the Georgia Charging and Sentencing Study, Expert testimony in *McCleskey vs. Zant* (decided in the U.S. Supreme Court).
- ASA Law and Justice Statistics Committee, 1982-1987: Member of two methodological review panels in Washington, DC. Organizer of two-day Workshop on Law and Justice Statistics, August 1985.
- ASA Visiting Lecturer Program, 1984-1988.
 - 1984 Invited talk at Culver-Stockton College
 - 1986 Invited talk at Moorhead State University
 - 1988 Invited talk at Grinnell College

Invited Participant, 1984, *Planning Session for Florida Capital Charging and Sentencing Study*, Florida Office of Public Defender, Richard H. Burr, Esq.

Editor, *Proceedings of the Third Workshop on Law and Justice Statistics*, American Statistical Association, 1985.

Invited Panelist, 1986 Law and Society Association Annual Meeting, Panel discussion of current state of capital sentencing research.

Invited Speaker, 1987 *Seminar-Workshop on Meta-Analysis in Research*, University of Puerto Rico, San Juan, Faculty of Education, Department of Graduate Studies.

Associate Editor, *Evaluation Review*, 1983-1986.

Baldus, D., Woodworth, G.G., Pulaski, C.A. (1989). Oral Testimony before the U.S. Senate Judiciary Committee (presented by D. Baldus).

Invited Participant, ASA Media Experts Program (1989).

Statistical Consultant to Special Master, David Baldus. State of New Jersey, Administrative Office of Courts -- Proportionality Review System. 1989-present.

ASA Law and Justice Statistics Committee, second appointment, 1993-95.

Baldus, D., Woodworth, G.G. (1993), "An Iowa Death Penalty System in the 1990's and Beyond: What Would it Bring?" Report submitted to the Senate Judiciary Committee, Iowa Legislature, February 24, 1993.

Baldus, D., MacQueen, J.C., Woodworth, G.G. (1993), "An Empirically-Based Methodology for Additur/Remittitur Review and Alternative Strategies for Rationalizing Jury Verdicts," Report prepared for the Research Conference on Civil Justice Reform in the 1990's.

Baldus, D.C., Woodworth G.G. (1995), "Proportionality Review and Capital Charging and Sentencing: A Proposal for a Pilot Study," Commonwealth of Pennsylvania, Administrative Office of Courts.

Session Chair, Joint Statistical Meeting, Minneapolis, 2005.

Session Discussant, 2006 FDA/Industry Statistics Workshop, Washington, DC, September 2006

Invited Speaker at a one-day conference on Race and Death Penalty Research, at John Jay College of Criminal Justice, CUNY, February 21, 2007.

Refereeing (since 1980):

- 1980: Journal of the American Statistical Association
- 1982: Journal of Educational Statistics
- 1983: Journal of Statistical Computation and Simulation
Annals of Mathematical Statistics
Evaluation Review (associate editor)
- 1984: Transportation Research
Law and Society Review
American Journal of Mathematical and Management Sciences
Journal of Educational Statistics
Evaluation Review (associate editor)
- 1985: Edited Proceedings of 3rd Workshop on Law and Justice Statistics
Evaluation Review (associate editor)
- 1986: Psychological Bulletin
National Science Foundation
Evaluation Review (associate editor)
- 1987: J. Amer. Statist. Assoc.

1988: Science (*ca. 1988*)
1990: Annals of Otolology, Rhinology & Laryngology
American Speech-Language-Hearing Association
Macmillan Publishing Company
Survey Methodology Journal
1991: International Journal of Methods in Psychiatric Research
1993: Multivariate Behavioral Research
1994: International Journal of Methods in Psychiatric Research
1995: SIAM Review
Duxbury Press
Acta Applicandae Mathematicae
1996: American Journal of Speech-Language Pathology
1998: Duxbury Press
2001: John Wiley and Sons, Inc.
2002: Addison-Wesley
2004: J. Amer. Statist. Assoc.
2005 J. Amer. Statist. Assoc.

Extramural Consulting and Pro Bono Work:

American College Testing	Kaiser Aluminum
Allergan	Electric Power Research Institute
Beling Consultants, Moline IL	NAACP Legal Defense and Education Fund
Bettendorf Iowa AEA	National Research Council
Coerr Environmental, Chapel Hill	Supreme Court of Nebraska
Defender Association of Philadelphia	Pittsburgh Plate Glass
Death Penalty Information Center	Rhone-Poullenc
Florida State Public Defender's Office	Stanford Law School
Gas Research Institute.	StarForms
Hoechst Marion Roussel / Aventis	Supreme Court of New Jersey
Guidant Corporation	Vigertone Ag Products
HON Corporation	Westinghouse Learning Corporation
Legal Services Corporation of Iowa	WMT news department
Iowa State Attorney General's Office	

Intramural Consulting:

I consult almost on a weekly basis with colleagues and students throughout the University, including at one time or another (but not limited to): Audiology, Biology, Exercise Physiology, Geology, Law, Marketing, Nursing, Otolaryngology, Physics, Psychology, Psychiatry, Science Education, the Iowa Driving Simulator, and the National Advanced Driving Simulator.

Expert testimony / depositions:

Robert R. Lang, Esq. (Legal Services Corporation of Iowa)
1982 Ruby vs. Deere (gender discrimination)

Mark R. Schuling, Iowa Assistant Attorney General.
1984 Burlington Northern Railroad Co. vs. Gerald D. Bair, Director (taxation)

Teresa Baustian (Iowa Asst. Atty. General - Civil Rights Division)
1988 Howard vs. Van Diest Supply Co. (age discrimination)

Walter Braud, Esq.
1988 Hollars et. al. vs. Deere & Co. et. al. (gender discrimination)

Mark W. Schwickerath, Esq.
1988 Schwickerath vs. Dome Pipeline, Inc. (effects of chemical spill)

Richard Burr, Esq.
1990 Selvage vs. State of Florida (capital sentencing)

Amanda Potterfield, Esq.
1990 Reed vs. Fox Pool Corporation (product liability)
1994 State of Iowa vs. Dalley (forensic identification via DNA)

Jerry Zimmerman, Esq.
1991 George Volk Case (age discrimination)
1993 Rasmussen vs. Rockwell (age discrimination)
1994 Hans vs. Courtaulds (age discrimination)

Thomas Diehl, Esq.
1992 State of Iowa vs. William Albert Harris (jury composition)

Diane Kutzko, Esq. (Iowa State Bar Association)
1995 Consultation on the validity of the Iowa bar exam.

John Allen, Esq.
1995 Buchholz vs. Rockwell (age discrimination)

Michael M. Lindeman, Esq.
1995 Beck vs. Koehring (age discrimination)

Timothy C. Boller, Esq.

1995 Larh vs. Koehring (age discrimination, see refereed publications, item 68)
Thomas C. Verhulst
1995 Carr vs. J.C. Penny (racial discrimination)
J. Nick Badgerow, Esq.
1995 Zapata et. al., vs. IBP, Inc. (racial/national origin discrimination)
David J. Goldstein, Esq., Faegre and Benson, Minneapolis
1999 Payless Cashways, Inc. Partners v. Payless Cashways (age discrimination)
Catherine Ankenbarndt, Deputy First Assistant Wisconsin State Public Defender
2001 Civil commitment hearing of Keith Rivas (Prediction of Sexual Recidivism)
Michael B. McDonald, Assistant Florida Public Defender
2001 Frye hearing in re Actuarial Prediction of Sexual Recidivism (see refereed
publications, item 69).
Greg Bal, Assistant Iowa Public Defender
2001 Civil commitment hearing of Lanny Taute (Prediction of Sexual Recidivism,
Harley C. Erbe, Esq. Walker Law Firm, Des Moines
2002 Campbell et al. v. Amana Company (Age Discrimination)
Texas State Counsel for Offenders, Huntsville, TX
2002 Daubert hearing in re Actuarial Prediction of Sexual Recidivism
Michael H. Bloom, Assistant Wisconsin Public Defender
2002 Detention of Morris F. Clement, Forest County Case No. 00 CI 01
(Prediction of Sexual Recidivism)
Federal Court Division, Defender Association of Philadelphia, Capital Habeas Corpus Unit
2002 Petitioner Reginald Lewis (racial discrimination)
2006 Commonwealth v. Baker (jury composition)
Stephen Snyder, Esq., Grey Plant Mooty Mooty and Bennett.
2006-7 (with Jay Kadane)

Appendix B: Tabulations of Special Circumstances.

Part 1. Analysis of California Supplementary Homicide Reports Data

1	SHR Data	Sole SC or w/ other(s)		Sole Special Circ.		Calculations
		Count	Percent ⁷	Count	Percent	
2	Felony Murder	11055	14.5	10007	13.1	Typical: (felony murder) 11055 = 28790 x 0.3840 ⁸ 10007 = 28790 x 0.3476 ⁹
3	Multiple Vics.	6458	8.5	4143	5.4	
4	Police Vic.	141	0.2	141	0.2	
5	Sniping	190	0.3	132	0.2	
6	Gang Related	11231	14.7	10284	13.5	
7	Child Killing	2519	3.3	2061	2.7	
8	Other	< 286	< 0.4	< 230	< 0.3	
9	all Capital	28790 ¹⁰	37.8			
10	minus sole Sniping	132	0.2			132 = 28790x0.0046 ¹¹
11	plus sole LIW	11411	15.0			11411 = 76225x0.15 ¹²
12	minus sole gang related, 01Jan98 to 07Mar00	1753	2.3			2.3 = 2.50x0.0.906 ¹³ 1753 = 0.023 x 76225
13	equals adjusted Capital	38316	50.3			
14	Total	76225				76225 = 28790/33.77 ¹⁴

Part 2. Analysis of the Narrowing Study of California M1, M2, and VM Convictions

15	M1, M2, VM Convictions	Sole SC or w/ other(s)		Sole SC	
		Count	Percent	Count	Percent
16	Felony Murder	6488	23.6	3640	13.3
17	Multiple Victims	1602	5.8	559	2.0
18	Police Victim	0	0.0	0	0.0
19	Lying in Wait	8020	29.2	4129	15.0
20	Gang related	2607	9.5	691	2.5
21	Other	4769	17.4	1822	6.6
22	any SC	16417	59.8	10841	39.5
23	Total	27453			

⁷ Percent of total SHR cases (76225)

⁸ Table 2, row 6, Percent Felony Murder

⁹ Table 3, row 6, Percent Felony Murder Only

¹⁰ Table 2, row 6, Total N of Capital Homicides

¹¹ Table 3, row 6, Percent Sniper Only

¹² Appendix B, part 2, table row 19, Sole SC Percent

¹³ 0.906 = (days between 01Jan78 and 08Mar00)/(days between 01Jan78 and 30Jun02) = 8102/8946

¹⁴ Table 1, last row, Percent of UCR Homicides that are Death Eligible (Capital)

EXHIBIT 42

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Prof. Craig Haney, Professor of Psychology, UC Santa Cruz
Ms. Lois Heaney, Consultant, National Jury Project West

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Statement to CCFAJ on the Death Penalty

Kent Scheidegger
Legal Director, Criminal Justice Legal Foundation


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Death by Geography: A County by County Analysis of the Road to Execution
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Natasha Minsker, Death Penalty Policy Director
American Civil Liberties Union of Northern California



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Prof. Linda E. Carter and Professor Mary Beth Moylan
University of the Pacific, McGeorge School of Law
Sacramento, California


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Response to Questions on Proportionality Review and Data Collection

Ellen Kreitzberg, Professor, Santa Clara School of Law


Michael Radelet, Professor, University of Colorado

Steven Shatz, Professor, University of San Francisco School of Law



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Attorney at Law

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Terry McCaffrey



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Wrongful Convictions in California Capital Cases


Stefanie Faucher, Program Director

Death Penalty Focus

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Robert D. Bacon

Attorney at Law

Oakland, California

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Terrica Redfield
Death Penalty Resource Counsel
National Association of Criminal Defense Lawyers
updated 4/18/08


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Sen. Raymond J. Lesniak
New Jersey State Senate
20th Legislative District

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Victim Liaison
California Crime Victims for Alternatives to the Death Penalty

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Murder Victims' Families for Human Rights

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Letter from Norman C. Hile on Focus Questions 5, 6, and 7

Orrick, Herrington, & Sutcliffe LLP
February 27, 2008

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RAND Corporation

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Dr. K. Michael Peddecord, Professor Emeritus of Public Health
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Yolo County Public Defender
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Elisabeth Semel
Clinical Professor of Law
Director, Death Penalty Clinic
School of Law, University of California at Berkeley

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Deputy Public Defender, Special Circumstances Case Coordinator
Los Angeles County Public Defender's Office

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Eva Paterson, President
February 19, 2008

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Stephen A. Edwards
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


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H. Mitchell Caldwell, Carol A. Chase, Christine Chambers Goodman
Professors of Law
Pepperdine University School of Law

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R. Clayton Seaman, Jr., Chair, Capital Case Committee

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Disparities in California's Death Penalty



Ramona Ripston, Chief Executive Officer
American Civil Liberties Union of Southern California

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Charging Practices of California District Attorneys in Death Penalty Cases
Natasha Minsker, Death Penalty Policy Director
American Civil Liberties Union of Northern California

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California People of Faith Working Against the Death Penalty

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Honorable Ron George
Chief Justice of California

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Honorable Arthur L. Alarcon
Senior Circuit Judge
United States Court of Appeals for the Ninth Circuit


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Honorable Gerald Kogan
former Chief Justice, Supreme Court of State of Florida
former Chief Prosecutor, Homicide and Capital Crimes Division, Dade County,
Florida
Co-Chair, Death Penalty Initiative, The Constitution Project



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Michael Radelet, Professor and Chair, Department of Sociology
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Ellen Kreitzberg, Professor of Law, Santa Clara University School of Law
Director, Death Penalty College

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Natasha Minsker, Death Penalty Policy Director
American Civil Liberties Union of Northern California

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JUNE 30, 2008

CALIFORNIA COMMISSION ON THE FAIR ADMINISTRATION OF JUSTICE

**REPORT AND RECOMMENDATIONS ON THE ADMINISTRATION
OF THE DEATH PENALTY IN CALIFORNIA.**

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INTRODUCTION: CHARGE AND NATURE OF INQUIRY.

The California Commission on the Fair Administration of Justice was established in 2004 by California State Senate Resolution No. 44 to carry out the following charges:

- (1) To study and review the administration of criminal justice in California to determine the extent to which that process has failed in the past, resulting in wrongful executions or the wrongful conviction of innocent persons;
- (2) To examine ways of providing safeguards and making improvements in the way the criminal justice system functions;
- (3) To make any recommendations and proposals designed to further ensure that the application and administration of criminal justice in California is just, fair, and accurate.

In carrying out these charges, the Commission has undertaken a thorough review and analysis of the administration of the death penalty in California. This is the first time since the California death penalty law was legislatively enacted in 1977 that any official body has undertaken a comprehensive review of its operation. The Commission funded a feasibility study by the Rand Corporation, and independent research by professors at California law schools, to examine particular aspects of death penalty administration in California.¹ A recent analysis of California's death row deadlock by Senior

¹ Professors Harry Caldwell, Carol Chase and Chris Chambers of Pepperdine University School of Law conducted research to identify the processes by which California District Attorneys decide to proceed with a homicide prosecution as a death penalty case; Professor Ellen Kreitzberg of Santa Clara University School of Law conducted research to identify which special circumstances were utilized in all cases

Judge Arthur Alarcon of the United States Court of Appeals for the Ninth Circuit was especially helpful to the Commission.² The Commissioners also considered the research and recommendations of numerous other academics and organizations who have studied the operation of California's death penalty law, as well as the laws of other states.

The Commission convened three public hearings, in Sacramento, Los Angeles and Santa Clara, and heard the views of 72 witnesses. The witnesses described a system that is close to collapse. The elapsed time between judgment and execution in California exceeds that of every other death penalty state.³ California now has the largest death row in the nation, with 670 awaiting execution.⁴

The initial witnesses before the Commission offered thoughtful proposals to address the problems of justice, fairness and accuracy in the administration of California's death penalty law. Based upon their

resulting in a death judgment in California since 1977; and Professors Linda E. Carter and Mary Beth Moylan of the University of the Pacific, McGeorge School of Law conducted research regarding the use of commutation in California death penalty cases. The results of this research are available on the Commission's website, www.ccfaj.org, and will be summarized in this Report.

² Arthur L. Alarcon, *Remedies for California's Death Row Deadlock*, 80 U.S.C.L. Rev. 697 (2007).

³ Latzer & Cauthern, *Justice Delayed? Time Consumption in Capital Appeals: A Multistate Study* (John Jay College of Criminal Justice, 2006).

⁴ The Death Penalty Information Center tracks the population of each State's death row based upon information from official prison sources. As of February, 2008, there were a total of 3,263 men and women on the nation's death rows.

presentations, subsequent witnesses were asked to respond to eleven “focus questions” compiled by the Commission.⁵

Commissioners heard the testimony of judges, prosecutors, and defense 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. A total of 66 written submissions addressing these questions were also received.

The Commission does not view its charge in Senate Resolution No. 44 as calling for a judgment on the morality of the death penalty. The Commissioners hold a broad spectrum of divergent views on the death penalty, some of which are reflected in individual statements attached to this report.

After careful study, the Commission finds itself in full agreement with California Chief Justice Ronald M. George in his conclusion that California’s death penalty system is dysfunctional.⁶

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

⁵ The “focus questions” are attached to this report as Appendix I.

⁶ Testimony of California Chief Justice Ronald M. George, January 10, 2008.

violations are succeeding in federal courts at a very high rate. Thus far, federal courts have rendered final judgment in 54 habeas corpus challenges to California death penalty judgments. Relief in the form of a new guilt trial or a new penalty hearing was granted in 38 of the cases, or 70%.⁷

The Chief Justice 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.” While some opponents of the death penalty might welcome such a prospect, the members of this Commission believe that doing nothing would be the worst possible course. 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,⁸ increase the emotional trauma experienced by murder victims’ families, and delay the resolution of meritorious capital appeals.

⁷ See Appendix II, *infra*. If a case is remanded for a new trial or a new penalty hearing, the defendant is removed from death row. The case is returned to the State courts to start over. At that point, there may be a disposition by a plea admitting to lesser criminal culpability or accepting a sentence of life without the possibility of parole (LAOP), a dismissal of charges or the death sentence, or a new guilt trial or penalty hearing before another jury. If it results in another death sentence, the process of direct appeal and habeas corpus petitions begins anew.

⁸ Whether the death penalty has a deterrent effect is a hotly contested issue. Compare Dr. Paul Rubin, Testimony Before the Subcommittee on the Constitution, Civil Rights, and Property Rights of the Committee on the Judiciary, U.S. Senate, Feb. 1, 2006, with Donohue & Wolfers, *Uses and Abuses of Empirical Evidence in the Death Penalty Debate*, 58 Stan. L. Rev. 791 (2005), and see Shepard, *Murders of Passion, Execution Delays, and the Deterrence of Capital Punishment*, 33 J. Legal Studies 283 (2004). If there is a deterrent value, however, it is certainly dissipated by long intervals between judgment of death and its execution.

The Commission heard moving testimony from the parents and other relatives of murder victims who await the execution of the perpetrator. Some described the anger and frustration they experience over continuing delays in the administration of the death penalty. Several have waited twenty-five or thirty years for the execution of the perpetrator of a vicious murder of a son or a daughter. Many others expressed opposition to the death penalty, arguing that they will receive no consolation from the execution of someone who murdered a family member. Both views received the respectful consideration of the Commission.

SUMMARY OF RECOMMENDATIONS

This report is divided into three parts. In Part A, the Commission identifies flaws in California's death penalty system that render it dysfunctional, and remedies we unanimously recommend to repair it. Repairing the system would enable California to achieve the national average of a twelve year delay between pronouncement of sentence and the completion of all judicial review of the sentence. In Part B, the Commission offers the Legislature, the Governor, and the voters of California information regarding alternatives available to California's present death penalty law. The Commission makes no recommendation regarding these alternatives. In

Part C, the Commission presents recommendations relating to miscellaneous aspects of the administration of California's death penalty law. We were not able to reach unanimous agreement upon all of these recommendations, and dissents are noted where applicable. Commissioner Jerry Brown, Attorney General of California, agrees in principle with some of the Commission's recommendations as set forth in his separate statement. Commissioner William Bratton, Chief of Police for the City of Los Angeles, abstains from the specific recommendations in this Report, and will issue a separate explanatory statement.

Part A: Why the system is broken, and what it will take to fix it.

In 1978, the people of the State of California expressed their support for the death penalty and, accordingly, the death penalty is the law of this State. However, it is the law in name only, and not in reality.

We currently have a dysfunctional system. The lapse of time from sentence of death to execution averages over two decades in California. Just to keep cases moving at this snail's pace, we spend large amounts of taxpayers' money each year: by conservative estimates, well over one hundred million dollars annually. The families of murder victims are cruelly deluded into believing that justice will be delivered with finality during their lifetimes. Those condemned to death in violation of law must wait years

until the courts determine they are entitled to a new trial or penalty hearing. 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. To reduce the average lapse of time from sentence to execution by half, to the national average of 12 years, we will have to spend nearly twice what we are spending now.

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. The California Commission on the Fair Administration of Justice unanimously recommends the following steps to achieve the goals of California's death penalty law:

1. The Commission recommends 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:

A. The Commission recommends that the backlog of cases awaiting appointment of counsel to handle direct appeals in death penalty cases be eliminated by expanding the Office of the State Public Defender to an

authorized strength of 78 lawyers. This will require a 33% increase in the OSPD Budget, to be phased in over a three year period.⁹

B. The Commission recommends that the backlog of cases awaiting appointment of counsel to handle habeas corpus proceedings in death penalty cases be eliminated by expanding the California Habeas Corpus Resource Center to an authorized strength of 150 lawyers. This will require a 500% increase in the CHCRC Budget, to be phased in over a five year period.¹⁰

C. The Commission recommends that the staffing of the Offices of the Attorney General which handle death penalty appeals and habeas corpus proceedings be increased as needed to respond to the increased staff of the Office of the State Public Defender and the California Habeas Corpus Resource Center.

D. The Commission recommends that funds be made available to the California Supreme Court to ensure that all appointments of private counsel to represent death row inmates on direct appeals and habeas corpus proceedings comply with ABA Guidelines 4.1(A), and are fully compensated at rates that are commensurate with the provision of high quality legal representation and reflect the extraordinary

⁹ Commissioner Hersek abstains from this recommendation.

¹⁰ Commissioner Laurence abstains from this recommendation.

responsibilities in death penalty representation. Flat fee contracts should not be utilized unless an hourly alternative is available, and any potential conflicts of interest between the lawyer maximizing his or her return and spending for necessary investigation, and expert assistance and other expenses are eliminated.

2. The Commission recommends that funds be appropriated to fully reimburse counties for payments for defense services pursuant to California Penal Code Section 987.9.

3. The Commission recommends that the California Legislature reexamine the current limitations on reimbursement to counties for the expenses of homicide trials contained in Government Code Sections 15200-15204.

4. The Commission recommends that California counties provide adequate funding for the appointment and performance of trial counsel in death penalty cases in full compliance with ABA Guidelines 9.1(B)(1), 3.1(B), and 4.1(A)(2). Flat fee contracts that do not separately reimburse investigative and litigation expenses should not be permitted. Such contracts should not be utilized unless an hourly alternative exists. In all cases, attorneys must be fully compensated at rates that are commensurate with the provision of high

quality legal representation and reflect the extraordinary responsibilities in death penalty representation.

Part B: Available Alternatives.

The remedies which the Commission has proposed in Part A will require the new investment of at least \$95 million dollars per year. We recognize that we call for this investment in the face of a budget crisis of great magnitude for California. The Commission has examined two alternatives available to California to reduce the costs imposed by California's death penalty law.

First, to reduce the number of death penalty cases in the system by narrowing the list of special circumstances that make one eligible for the death penalty, and second, to replace the death penalty with a maximum penalty of lifetime incarceration without the possibility of parole.

Using conservative rough projections, the Commission estimates the annual costs of the present system (\$137 million per year), the present system after implementation of the reforms recommended in Part A (\$232.7 million per year), a system in which significant narrowing of special circumstances has been implemented (\$130 million per year), and a system which imposes a maximum penalty of lifetime incarceration instead of the death penalty (\$11.5 million). There may be additional alternatives or

variations which the Commission has not considered. While the Commission makes no recommendations regarding these alternatives, we believe they should be presented so the public debate over the future of the death penalty in California will be fully informed.

Whether to do nothing, to make the investments needed to fix the current system, to replace the current system with a narrower death penalty law, or to replace capital punishment with lifetime incarceration are ultimately choices that must be made by the California electorate, balancing the perceived advantages gained by each alternative against the potential costs and foreseeable consequences. We hope the balancing required can take place in a climate of civility and calm discourse. Public debate about the death penalty arouses deeply felt passions on both sides. The time has come for a rational consideration of all alternatives based upon objective information and realistic assessments. As U.S. Supreme Court Justice John Paul Stevens observed in his recent concurrence in the judgment upholding execution by lethal injection:

The time for a dispassionate, impartial comparison of the enormous costs that death penalty litigation imposes on society with the benefits that it produces has certainly arrived.¹¹

¹¹ *Baze v. Rees*, No. 07-5439, U.S. Supreme Court (Stevens, J. concurring) (April 16, 2008). Justice Stevens took particular note of California's death penalty stalemate:

Some argue that these costs are the consequence of judicial insistence on unnecessarily elaborate and lengthy appellate procedures. To the contrary, they result "in large part from the States' failure to apply constitutionally sufficient procedures at the time of initial [conviction or] sentencing." *Knight v. Florida*, 528 U.S. 990, 998 (1999) (Breyer, J., dissenting from denial of

Part C: Administrative Reforms.

In the course of its work, the Commission examined many aspects of the administration of California's death penalty law, including the California Supreme Court backlog of undecided cases, racial and geographic disparities in employment of the death penalty, the unavailability of accurate information regarding the administration of the death penalty, the transparency of prosecutorial decision-making, and the implementation of the Governor's clemency power. We were not able to achieve unanimous agreement with respect to some of these issues, but a majority of the Commission concurs in all of the following recommendations:

1. The Commission recommends that upon the implementation of the Recommendations in Part A of this Report, serious consideration be given to a proposed constitutional amendment to permit the California Supreme Court to transfer fully briefed pending death penalty appeals from the Supreme Court to the Courts of Appeal. This amendment should not be adopted without the provision of adequate staff and

certiorari). They may also result from a general reluctance by States to put large numbers of defendants to death, even after a sentence of death is imposed. Cf. *Tempest, Death Row Often Means Long Life: California condemns many murderers, but few are ever executed*, L.A. Times, Mar. 6, 2006, p. B1 (noting that California death row inmates account for about 20% of the Nation's death row population, but that the State accounts for only 1% of the Nation's executions). In any event, they most certainly are not the fault of judges who do nothing more than ensure compliance with constitutional guarantees prior to imposing the irrevocable punishment of death.

resources for the Courts of Appeal, and provisions for ongoing monitoring by the Supreme Court.¹²

2. The Commission recommends that upon the implementation of the Recommendations in Part A of this Report, changes to California statutes, rules and policies be seriously considered to encourage more factual hearings and findings in state habeas proceedings in death penalty cases, including a proposal to require petitions be filed in the Superior Court, with right of appeal to the Courts of Appeal and discretionary review by the California Supreme Court.

3. The Commission recommends the establishment of a California Death Penalty Review Panel, to be composed of judges, prosecutors, defense lawyers, law enforcement representatives and victim advocates appointed by the Governor and the Legislature. It should be the duty of this Panel to issue an annual report to the Legislature, the Governor and the courts, gauging the progress of the courts in reducing delays, analyzing the costs of and monitoring the implementation of the recommendations of this Commission, and examining ways of providing

¹² Commissioners Bellas, Cottingham, Hill, Hing, Moulds, Ridolfi and Totten oppose this recommendation.

safeguards and making improvements in the way the California death penalty law functions.¹³

4. The Commission recommends that reporting requirements be imposed to systematically collect and make public cumulative data regarding all decisions by prosecutors in murder cases whether or not to charge special circumstances and/or seek the death penalty, as well as the disposition of such cases by dismissal, plea or verdict in the trial courts. The Legislature should impose a requirement upon courts, prosecutors and defense counsel to collect and report any data other than privileged material designated by the California Death Penalty Review Panel which may be necessary: (1) to determine whether demographics affect decisions to implement the death penalty, and if so, how; (2) to determine what impact decisions to seek the death penalty have upon the costs of trials and post-conviction review; and (3) to track the progress of potential and pending death penalty cases to predict the future impact upon the courts and correctional needs. The information should be reported to the California Department of Justice and the

¹³ Commissioners Hill, Mayorkas and Totten oppose this recommendation.

California Death Penalty Review Panel. The information reported should be fully accessible to the public and to researchers.¹⁴

5. The Commission recommends that each District Attorney Office in California formulate a written Office Policy describing when and how decisions to seek the death penalty are made, such as who participates in the decisions, and what criteria are applied. Such policies should also provide for input from the defense before the decision to seek the death penalty is made.

6. The Commission recommends that Article V, Section 8(a) of the California constitution be amended to read as follows:

Art. V, Section 8(a). Subject to application procedures provided by statute, the Governor, on conditions the Governor deems proper, may grant a reprieve, pardon, and commutation, after sentence, except in case of impeachment. The Governor shall report to the Legislature each reprieve, pardon, and commutation granted *or denied*, stating the pertinent facts and the reasons for granting it. ~~The Governor may not grant a pardon or commutation to a person twice convicted of a felony except on recommendation of the Supreme Court, 4 judges concurring.~~

7. The Commission recommends that Penal Code Section 4813 be amended to make it discretionary rather than mandatory that requests for clemency by a twice convicted felon be referred to the Board of Prison Terms for a written recommendation.

¹⁴ Commissioners Boscovich, Cottingham, Dunbar, Hill, Mayorkas, Fox and Totten oppose this recommendation.

PART A: WHY THE SYSTEM IS BROKEN, AND WHAT IT WILL TAKE TO FIX IT.

1. California's Death Penalty Law.

The current California death penalty law was adopted by popular initiative in 1978, after the United States Supreme Court declared that providing guidance to fact-finders to narrow the exercise of their sentencing discretion was required by the Eighth Amendment prohibition of cruel and unusual punishment, incorporated by the due process clause of the Fourteenth Amendment to the United States Constitution.¹⁵

California law requires three separate findings before a sentence of death may be imposed. First, the fact-finder (normally a jury, unless the right to jury trial has been waived) must determine that the defendant is guilty of first-degree murder.¹⁶ Second, the fact-finder must determine that one or more of twenty-one separately enumerated "special circumstances" is true.¹⁷ Both of these findings require proof beyond a reasonable doubt

¹⁵ *Furman v. Georgia*, 408 U.S. 238 (1972); *Gregg v. Georgia*, 428 U.S. 153 (1976).

¹⁶ California Penal Code Section 189 defines first degree murder to include "all murder which is perpetrated by means of a destructive device or explosive, a weapon of mass destruction, knowing use of ammunition designed primarily to penetrate metal or armor, poison, lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing," murder committed in the perpetration of any of thirteen enumerated felonies [arson, rape, carjacking, robbery, burglary, mayhem, kidnapping, train wrecking, torture, sodomy, lewd acts against a child, unlawful oral copulation, and unlawful sexual penetration], and murder perpetrated "by means of discharging a firearm from a motor vehicle, intentionally at another person outside of the vehicle with the intent to inflict death."

¹⁷ California Penal Code Section 190.2 (a) defines twenty-two special circumstances. The special circumstance enumerated in Section 190.2(a)(14) (the murder was "especially heinous, atrocious or cruel")

during the initial “guilt phase” of the trial. If the defendant is convicted of first-degree murder and a special circumstance is found true, a “penalty phase” trial follows, at which the fact-finder considers evidence of “any matter relevant to aggravation, mitigation, and sentence.”¹⁸ At the conclusion of the penalty phase, the jury is instructed as follows:

Determine which penalty is appropriate and justified by considering all the evidence and the totality of any aggravating and mitigating circumstances. Even without mitigating circumstances, you may decide that the aggravating circumstances, are not substantial enough to warrant death. To return a judgment of death, each of you must be persuaded that the aggravating circumstances both outweigh the mitigating circumstances and are also so substantial in comparison to the mitigating circumstances that a sentence of death is appropriate and justified.¹⁹

California’s definition of special circumstances gives broad discretion to prosecutors to decide whether a homicide should be prosecuted as a death penalty case. A narrower death penalty law was initially enacted by the California Legislature in 1977; the enactment of the Briggs Initiative one year later more than doubled the number of special circumstances itemized under Penal Code Section 190.2, by adding five more “victim” circumstances, four more “felony murder” circumstances, and two more “motive” circumstances. In addition, the initiative removed the

was declared unconstitutional by the California Supreme Court in *People v. Superior Court (Engert)*, 31 Cal.3d 797 (1982).

¹⁸ California Penal Code Section 190.3.

¹⁹ CAL. CRIM. Jury Instruction No. 766 (2008).

requirements in the pre-Briggs statute that the state had to prove that a murderer possessed the intent to kill before he or she could be eligible for the death penalty, and that an accomplice was personally present and physically aided the death-causing acts before he could be eligible for the death penalty. Under the death penalty statute now in effect, 87% of California's first degree murders are "death eligible," and could be prosecuted as death cases.²⁰

In 1978, under the pre-Briggs statute enacted by the Legislature, only seven death sentences were handed down in California. The number tripled to 20 in 1979, then climbed to an average of 32 new death judgments per year during the twenty-one year period from 1980 to 2000. Since 2000, the number of new death judgments has declined to an average of 20 per year. The following chart shows the growth of California's death row from 1978 through 2007.

²⁰ Steven F. Shatz and Nina Rivkind, *The California Death Penalty Scheme: Requiem for Furman?*, 72 N.Y.U. L. Rev. 1283, 1331 (December, 1997).

CALIFORNIA DEATH JUDGMENTS AND DEATH ROW POPULATION²¹

1978 - 2007

<u>Year</u>	<u>New Death Judgments</u>	<u>Death Row Population</u>
1978	7	7
1979	20	25
1980	23	42
1981	39	80
1982	39	113
1983	35	143
1984	27	161
1985	16	159
1986	21	179
1987	25	203
1988	34	223
1989	33	247
1990	33	279
1991	26	305
1992	40	345
1993	34	374
1994	21	391
1995	38	426
1996	40	461
1997	40	493
1998	32	518
1999	42	558
2000	33	589
2001	25	610
2002	17	618
2003	22	639
2004	12	642
2005	22	654
2006	22	662
2007	20	670

²¹ California Dept. of Justice, Criminal Justice Statistics Center, *Homicide in California, 2005*, Table 35. 2006 and 2007 statistics courtesy of California Appellate Project.

The death row population does not precisely correspond with the cumulative number of new death judgments rendered each year. This is because death sentences may be set aside by the courts, persons may die in prison without being executed, be re-sentenced to death, removed pending retrial, re-sentenced to a penalty less than death, or freed.

The Commission's researchers identified 822 sentences of death imposed in California from 1977 through 2007, upon 813 different defendants. (Nine defendants had sentences of death in more than one county). The difference between the 813 individuals sentenced to death and the 2007 population of California's death row (670) is attributable to deaths by natural causes (38), suicides (14), executions (13), and death judgments which have been reversed by the courts and not reinstated on remand (98).²²

The number of persons on California's death row is currently driven by factors over which we have no direct control. If the current average of 20 new death judgments per year is maintained, full implementation of the Commission's recommendations could begin to reduce the size. But the backlog is now so severe that California would have to execute five

²² Many of the reversals occurred from 1979 through 1986, when the California Supreme Court reversed 59 of 64 judgments of death it reviewed. Since the removal of three Justices in the election of 1986 and their subsequent replacement, the affirmance rate of the California Supreme Court for death judgments has exceeded 90%. See Uelmen, *Review of Death Penalty Judgments By the Supreme Courts of California: A Tale of Two Courts*, 23 Loyola (L.A.) L. Rev. 237 (1989). In recent years, 32 California death judgments have been set aside by federal courts in habeas corpus proceedings. Of the federal habeas petitions of California death row inmates decided by federal courts since 1978, some relief has been granted in 70% of the cases.

prisoners per month for the next twelve years just to carry out the sentences of those currently on death row.

2. Excessive Delay in California.

A defendant sentenced to death in California has a right to three stages of review of the conviction and sentence: an automatic appeal directly to the California Supreme Court; a petition for a writ of habeas corpus filed in the California Supreme Court; and a federal habeas corpus petition filed in the Federal District Court.²³

At each of these three stages, the defendant is entitled to the appointment of counsel if he or she is indigent. All of the 670 inmates on California's death row qualify as indigents, although counsel has been retained in one case (Scott Peterson). Review of the California Supreme Court's decision of the direct appeal and the state habeas corpus petition can be sought in the United States Supreme Court by petition for a writ of *certiorari*. A Federal District Court ruling on a federal habeas corpus petition can be appealed to the United States Court of Appeals for the Ninth Circuit, and review of that Court's decision can be sought in the United

²³ Habeas corpus petitions provide a vital means of determining whether constitutional standards have been met and a defendant received effective assistance of counsel at the guilt and penalty phases of the trial. An independent investigation is required, and it often uncovers mitigating evidence that was available but was not presented at trial. The leading ground for reversal of death verdicts in California in both state and federal habeas proceedings is a denial of the constitutional right to effective assistance of counsel.

States Supreme Court. A defendant can also petition the Governor for clemency prior to his or her execution.

The United States Department of Justice has tracked the elapsed time from sentence to execution for all defendants who have been executed in the United States since 1978. The average lapse of time has grown steadily throughout the United States, from an average of 4.25 years during the period of 1977 to 1983, to an average of 12.25 years in 2005.²⁴ The average lapse of time between pronouncement of a judgment of death and execution in California is 17.2 years, but using an “average” number may be misleading since only thirteen have been executed.²⁵

While it is widely assumed that delays benefit those confined on death row by prolonging their lives, it should be noted that California inmates with meritorious claims are also denied prompt disposition of those claims. In cases where the judgment of guilt and/or the sentence were vacated between 1987 and 2005, the average delay was 11 years. California death row inmates whose convictions or sentences were vacated by a federal court waited an average of 16.75 years.²⁶

²⁴ U.S. Bureau of Justice Statistics, 2006:11, table 11.

²⁵ Two of the California executions have been of “volunteers,” who withdrew their appeals and habeas petitions and requested execution.

²⁶ Alarcon, *Remedies for California’s Death Row Deadlock*, *supra* n 2.

A recent study by Senior Judge Arthur Alarcon of the U.S. Court of Appeals for the Ninth Circuit identified the critical periods of delay that contribute to California exceeding the national average.²⁷

First is the delay in appointing counsel to handle the direct appeal. There are currently 79 defendants on death row who have not yet had counsel appointed to handle their direct appeal to the California Supreme Court. There is now a wait of 3 to 5 years before appellate counsel is appointed. Delay in appointing appellate counsel also delays certification of the accuracy of the record, since the accuracy of the record cannot be certified until appellate counsel is appointed.²⁸

Second is the delay in scheduling the case for a hearing before the California Supreme Court after all of the briefs have been submitted. The California Supreme Court now has a backlog of 80 fully briefed automatic appeals in death cases awaiting argument. The Court ordinarily hears 20-25 of these cases each year, so the wait for an oral argument now averages 2.25 years.

Third is the delay in appointing counsel for the state habeas corpus petition. There are now 291 inmates on California's death row who do not

²⁷ *Id.*

²⁸ California Penal Code Section 190.8(g) requires the trial court to certify the record for *accuracy* no later than 120 days after the record has been delivered to appellate counsel. Certification of the record for *completeness* ordinarily takes place within 90 days of the imposition of the death sentence.

have counsel appointed to handle their habeas corpus petitions. Delays of 8-10 years after sentence in appointing habeas counsel mean that investigation and preparation of habeas petitions is usually delayed until after the direct appeal is decided. Prompt appointment of habeas counsel would permit the habeas petition to be prepared while the appellate briefing is being prepared, so it can be promptly filed shortly after the direct appeal is decided, if the death sentence is affirmed.

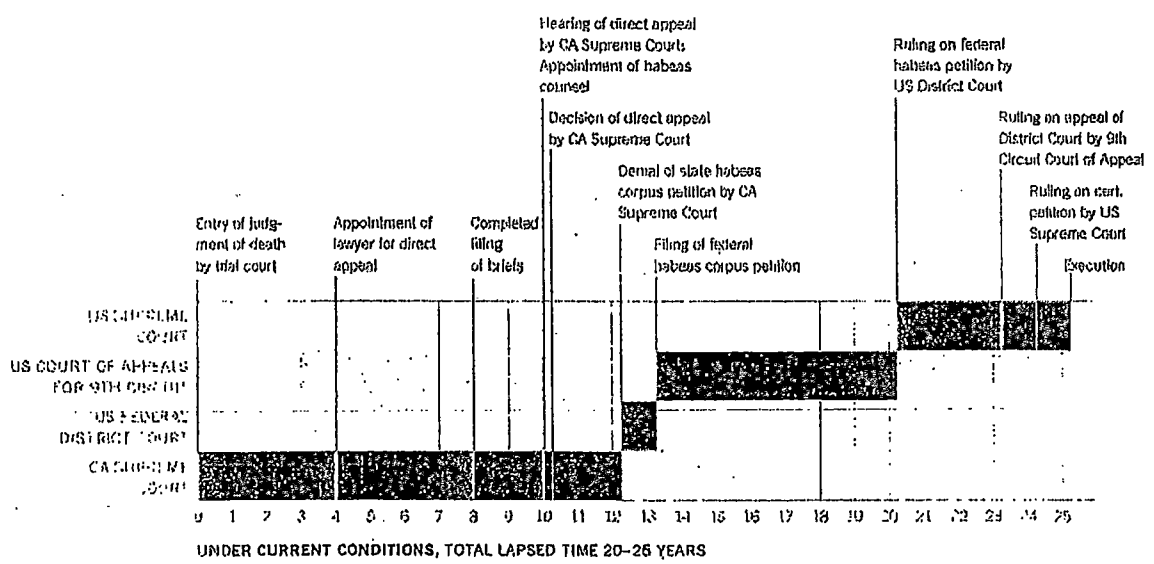
Fourth is the delay in deciding state habeas corpus petitions. The California Supreme Court currently has 100 fully briefed habeas corpus petitions awaiting decision. While these cases are rarely decided by published opinions, there is now an average delay of 22 months between the filing of the petition and the decision of the California Supreme Court.

Fifth is the delay in deciding federal habeas corpus petitions. The average delay from the filing of a habeas petition to the grant or denial by a federal district court is 6.2 years in California cases.²⁹ Another 2.2 years are consumed by appeals to the Ninth Circuit. Much of this delay is attributable to the absence of a published opinion and/or an evidentiary hearing in the state courts. Often, the federal courts cannot ascertain why state relief was denied. While the Antiterrorism and Effective Death Penalty Act

²⁹ Alarcon, *supra* n.2 at, 707-708 .

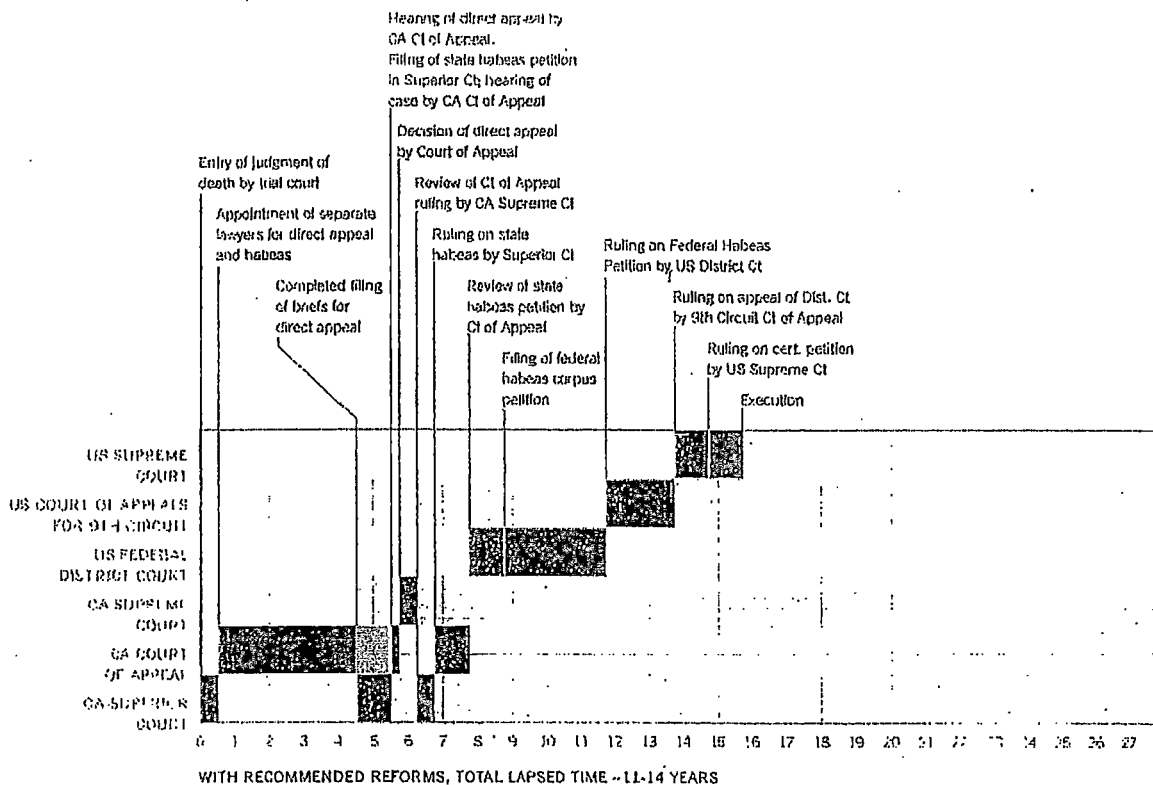
(AEDPA)³⁰ requires federal deference to state factual findings and legal conclusions, the typical denial of a habeas petition in a death case by the California Supreme Court contains neither.

The following chart summarizes the lapse of time at each of the various stages as the system currently operates in California. The total lapsed time from judgment of death to execution is 20-25 years.



³⁰ In *Williams v. Taylor*, 529 U.S. 362 (2000), the Supreme Court held that the Antiterrorism and Effective Death Penalty Act (AEDPA) imposes a deferential standard of review that precludes a federal habeas court from granting relief based simply on its independent assessment of federal law. Under AEDPA, federal habeas courts must defer to a state court's rejection of a petitioner's constitutional claim unless the state court's decision is either contrary to or involves an unreasonable application of established federal law.

The Commission recommends a series of related reforms that have the potential to reduce the California delay to the national average of 11-14 years. The following chart summarizes the potential effects of these proposed reforms:



Delays grow worse every year. As the population of California's death row has grown, the length of the delay between sentence and disposition of appellate reviews has grown as well. Thirty persons have been on California's death row for more than 25 years; 119 have been on death row for more than 20 years; and 240 have been on death row for more

than 15 years.³¹ The delay between sentence and execution in California is the longest of any of the death penalty states.³²

3. Ineffective Assistance of Counsel.

Delay in post-conviction review is not the only dysfunction in California's death penalty law. Federal courts are granting relief in 70% of the California death judgments they review, most often because of ineffective assistance of counsel at the trial level.³³ Thus, the appointment and performance of qualified trial counsel, and the resources available to counsel to adequately investigate and prepare the case, are subjects of serious concern in the administration of California's death penalty law.

For counties without a public defender, the appointment of trial counsel for death penalty cases is left to the discretion of the trial court,

³¹ Alarcon, *supra* n. 2 at p. 748.

³² One might fairly ask, why can't California be as efficient as Florida, Texas or Virginia? The next two largest death rows after California are Florida with 397 and Texas with 393. Florida has carried out 64 executions since 1978, Texas has executed 405, and Virginia has executed 94. Virginia is the most expeditious in disposing of death penalty direct appeals, averaging less than one year compared to the national average of four years. No one has been on Virginia's death row longer than ten years. In Texas, the average delay for the direct appeal is three years. The average time on death row before execution in Texas is 10.26 years. The average in Florida is 14 years. Virginia now has a backlog of only 23 cases. It should also be noted, however, that Florida, Virginia and Texas have high rates of exonerations of innocent persons, including death row inmates. Florida has had 22 death row exonerations, more than any other state. Since 1989, there have been 33 exonerations in Texas by DNA. Eight death row inmates have been exonerated. Virginia has recorded eight exonerations, all but one by DNA. Two of the exonerees were sentenced to death. It is also worth noting that none of these states have experienced the serious backlog that has affected the California Supreme Court. The Virginia Supreme Court receives an average of three new death judgments a year. In Texas, death penalty appeals are not heard by the State Supreme Court, but by a special Court of Criminal Appeals that does not have the responsibility of determining state law in other than criminal cases. The Florida Supreme Court reviews all death sentences for proportionality, and has the highest reversal rate in the nation for death penalty cases.

³³ See Appendix II, *infra*.

subject to California Rules of Court, Rule 4.117, which defines the minimum qualifications for appointed trial counsel in capital cases. In most cases, two attorneys are appointed, one to act as lead counsel, and one to serve as associate counsel.³⁴ Some counties appoint a single lawyer.³⁵ The American Bar Association Guidelines recommend that the defense team for capital cases should consist of no fewer than two lawyers, an investigator, and a mitigation specialist from the outset of representation.³⁶ Typically, associate counsel directs an intensive investigation of the defendant's social history and background, to develop potential evidence of mitigation for the penalty phase.

In Los Angeles County, approximately half of the ongoing death penalty cases are handled by the Public Defender, and half are handled by

³⁴ Lead counsel must have ten years of criminal litigation experience, including at least two murder cases tried to conclusion. Associate counsel must have three years of criminal litigation experience, including three serious felony cases tried to conclusion. The court may appoint an attorney who does not meet all required qualifications if it makes a finding that "the attorney demonstrates the ability to provide competent representation to the defendant." California Rule of Court Rule 4.117(i) requires the filing of an order of appointment which certifies that appointed counsel meets the necessary qualifications. A recent survey found that 42 of California's 58 County Superior Courts had no such orders on file. Testimony of Prof. Elisabeth Semel, Director of Death Penalty Clinic, University of California Law School at Berkeley, Feb. 20, 2008.

³⁵ Testimony of Prof. Semel, February 20, 2008, at pp. 14-15.

³⁶ American Bar Association, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, Guideline 4.1 (A)(1) (Revised Edition, Feb. 2003):

4.1 A. The Legal Representation plan should provide for the assembly of a defense team that will provide high quality legal representation.

1. The defense team should consist of no fewer than two attorneys qualified in accordance with Guideline 5.1, an investigator, and a mitigation specialist.
2. The defense team should contain at least one member qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments.

the Alternate Public Defender or appointed counsel. Under Rule 4.117(g), public defender offices are supposed to assign deputies who otherwise meet the requisite qualifications for direct appointment, but no certification of those qualifications is required. Many county public defender offices assign two counsel to every death eligible case when the appointment is initially accepted. Where private counsel is appointed, however, only one lawyer is ordinarily appointed until the decision is made to file the case as a death case, which will not occur until after the preliminary hearing, as much as one year later. This may delay the mitigation investigation to the prejudice of the defendant. The results of mitigation investigations are frequently employed to persuade the district attorney not to seek the death penalty. If the investigation is delayed until second counsel is appointed, the decision to seek the death penalty has already been made.

The payment of appointed counsel varies from one county to another. At least four counties use flat-fee contracts negotiated on a case-by-case basis.³⁷ The flat fee typically includes investigative and paralegal expenses, creating a conflict of interest for the lawyer when these services will reduce his or her return on the contract. The bids for flat-fee contracts must be submitted before the lawyer has fully investigated the case, which creates a

³⁷ Testimony of Prof. Elisabeth Semel, Feb. 20, 2008, at pp. 19-23.

risk of underbidding. The Committee learned that there is a declining pool of competent experienced criminal defense lawyers who are willing to accept employment to handle death penalty trials, because they are not supplied sufficient funding to provide competent representation.³⁸

4. The Risk of Wrongful Executions, Wrongful Convictions and Wrongful Death Sentences.

The Commission has learned of no credible evidence that the State of California has ever executed an innocent person. Nonetheless, the Commission cannot 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. All of the factors previously identified by the Commission as enhancing the risk of wrongful convictions are equally present in capital and non-capital trials. Nationally, there were 205 exonerations of defendants convicted of murder from 1989 through 2003. Seventy-four of them had been sentenced to death. Fourteen of these 205 murder cases took place in California.³⁹ Since 1979, six defendants sentenced to death, whose convictions were reversed and remanded, were subsequently acquitted or had their murder charges dismissed for lack of

³⁸ Testimony of Clifford Gardner, Feb. 20, 2008.

³⁹ Gross, Jacoby, Matheson, Montgomery & Patil, *Exonerations in the United States, 1989 Through 2003*, 95 J. of Crim. Law & Criminology 523 (2005).

evidence.⁴⁰ While DNA testing was not available and these defendants were not officially exonerated, the reversal of their convictions freed them. A subsequent acquittal or dismissal of charges renders them legally not guilty, although there was no determination of “factual innocence” pursuant to California Penal Code Section 851.8 in these cases.

Nationally, erroneous eye-witness identifications have been identified as a factor in 80% of exonerations, and false confessions were a factor in 15%.⁴¹ California State Public Defender Michael Hersek reported to the Commission that of the 117 death penalty appeals currently pending in his office, seventeen featured testimony by in-custody informants, and another

⁴⁰ In 1979, the California Supreme Court reversed the 1976 conviction and death sentence of Ernest Graham for the murder of a state correctional officer because prosecutors improperly excluded prospective African-American jurors. The defendants were convicted of violating Penal Code section 4500, aggravated assault by a life prisoner. At the time the offense was committed, section 4500 prescribed the death penalty as the automatic, mandatory punishment whenever the assault was directed against a non-prisoner and resulted in the victim's death within a year and a day. *People v. Allen*, 23 Cal.3d 286 (1979). After his fourth trial on remand, Graham was acquitted by the jury. In 1984, the California Supreme Court reversed the 1980 conviction and death sentence of Jerry Bigelow for the murder of a kidnap victim. *People v. Bigelow*, 37 Cal.3d 731 (1984). In a 1988 retrial, Bigelow was acquitted. Morain, *Inmate Walks Away From Death Row After His Acquittal*, Los Angeles Times, July 6, 1989. In 1985, the California Supreme Court reversed the 1979 conviction and death sentence of Patrick Croy for the murder of a police officer in Placer County, although the Court upheld a conspiracy conviction. In a 1990 retrial, Croy was acquitted of the murder, but placed on probation for the conspiracy charge. After Croy was returned to prison in 1997 for a probation violation, the conspiracy charge was vacated in federal court, and Croy was released in 2005. In 1996, the California Supreme Court vacated the 1981 conviction and death sentence of Troy Lee Jones for murder. The Fresno County District Attorney dismissed all charges against Jones in November, 1996. In 1988, the California Supreme Court vacated the 1983 death sentence of Oscar Lee Morris for murder, for prosecutorial misconduct in not revealing leniency granted to a witness in exchange for his testimony. *People v. Morris*, 46 Cal.3d 1 (1988). Ten years later, his conviction was vacated, when the witness admitted he had fabricated the entire case against Morris. Morris was released in 2000, when the Los Angeles County District Attorney declined to retry him. In 1989, the California Supreme Court overturned the 1981 death sentence of Lee Perry Farmer, Jr. for murder. *People v. Farmer*, 47 Cal.3d 888 (1989). A 1991 penalty phase retrial resulted in a life sentence. In 1997, the Ninth Circuit Court of Appeals overturned his conviction because of ineffective assistance of counsel. At a 1999 retrial, Farmer was acquitted of the murder.

⁴¹ *Supra* n. 39 at p. 544.

six included testimony by informants who were in constructive custody.⁴²

The Commission's recommendations to reduce the risks of wrongful convictions resulting from erroneous eye-witness identifications, false confessions, and testimony by in-custody informants, although enacted by the Legislature, were all vetoed by Governor Arnold Schwarzenegger. These factors remain as risks in all criminal cases in California, including death penalty cases.

Identifying "wrongful" death sentences presents greater complexity, since 87% of those charged with murder in California are eligible for the death penalty, but fewer than 10% of these defendants are sentenced to death.⁴³ By definition, these death sentences would not be "wrongful" in the same sense that convictions would be "wrongful," if the defendant were properly convicted of the underlying murder. Yet if the defendant were inappropriately singled out for a death sentence, or if his lack of economic resources increased the probability of his death sentence, or if his lawyer failed to present mitigating evidence that might have convinced a jury to opt for a life sentence, or if the prosecutor suppressed exculpatory evidence, we

⁴² California Commission on the Fair Administration of Justice, *Report and Recommendations Regarding Informant Testimony*, p. 2 (2007).

⁴³ Steven F. Shatz and Nina Rivkind, *The California Death Penalty Scheme: Requiem for Furman?*, 72 N.Y.U. L. Rev. 1283, 1331 (December, 1997).

would certainly conclude that his death sentence was “wrongful.” An illustrative example can be found in the recent ruling of the California Supreme Court in the case of *In Re Adam Miranda*, No. SO58528 & SO60781 (May 5, 2008). The defendant was convicted of a robbery-murder in Los Angeles in 1982. His conviction was affirmed in 1987, and three prior petitions for habeas corpus were denied. Yet, after 26 years on death row, the unanimous Court vacated his death sentence and remanded for a possible new penalty trial. The only evidence in aggravation offered at Mr. Miranda’s penalty trial was the testimony of Joe Saucedo that the defendant had also murdered another individual two weeks before the capital crime, after an argument over drugs. Saucedo had himself been charged with that murder, but after he testified against Miranda, the charge was reduced and he was granted probation. In 1996, it was disclosed to Miranda for the first time that the prosecutor had a handwritten letter from a fellow prisoner of Saucedo’s, recounting in detail how Saucedo described committing the murder himself. The Court concluded this was a clear violation of the prosecutor’s obligations to disclose exculpatory evidence under *Brady v. Maryland*, 373 U.S. 83 (1963).⁴⁴ Miranda is not “innocent,” nor was he

⁴⁴ See California Commission on the Fair Administration of Justice, REPORT AND RECOMMENDATIONS ON COMPLIANCE WITH THE PROSECUTORIAL DUTY TO DISCLOSE EXCULPATORY EVIDENCE. (March 6, 2008).

“wrongfully convicted,” but we would certainly conclude his death sentence was “wrongful.”

A national study of all death sentences imposed from 1973 to 1995 revealed that 82% (247 out of 301) of the capital judgments that were reversed and returned for a retrial or a new penalty hearing were replaced with a sentence *less* than death, or *no* sentence at all. In the latter regard, 7% (22/301) of the reversals for serious error resulted in a determination on retrial that the defendant was *not guilty* of the capital offense.⁴⁵

5. Recommendations for the Trial of Death Penalty Cases.

The decision to seek the death penalty in a pending murder prosecution triggers a number of consequences that affect the duration, complexity and cost of the trial proceedings. Death penalty trials clearly take longer and cost more than murder trials in which the death penalty is not sought.

Unfortunately, we have only a rough estimate of how many death penalty trials are taking place each year in California. The trials that result in a judgment of death and put an additional inmate on death row are a fraction of the cases that are actually tried, and an even smaller fraction of the cases that are death-eligible. During a five-year period in the early

⁴⁵ Liebman et al., *A Broken System: Error Rates in Capital Cases, 1973-1995* (Columbia Law School, 2000).

1980's, the State Public Defender was systematically collecting data about ongoing death cases. At that time, for every 100 cases that were charged as capital cases, 40 actually went to trial on the guilt phase, 20 went to penalty phase, and 10 resulted in a judgment of death.⁴⁶ The rate of juries returning verdicts of death may have declined since then, but the Commission could not ascertain this rate because no one is keeping track.⁴⁷ If the rate is still the same, the twenty annual death judgments we currently see are the product of 200 cases per year in which special circumstances are charged, of which 80 cases proceed to trial, and 40 cases proceed to penalty phase.

When California's death penalty law was originally enacted, the legislature recognized that the trial of death penalty cases would impose serious financial burdens upon counties. Section 987.9 was added to the California Penal Code, to provide that defense counsel in capital cases "may request the court for funds for the specific payment of investigators, experts, and others for the preparation or presentation of the defense," and further provides "the Controller may reimburse extraordinary costs in unusual cases

⁴⁶California Appellate Project, RECAP RE:CAPITAL LITIGATION, Issue 10, June 17, 1985. Collecting all statewide special circumstance filings from August 11, 1977 through December 31, 1984, CAP reported 2,219 filings, 960 guilty trials, 394 penalty trials, and 190 death verdicts, with 372 cases still pending.

⁴⁷ The Los Angeles County Public Defender's Office reports that they normally have 60 cases at a time in their office that are death-eligible, but only 10-12 of those cases will typically go to trial as death cases. Testimony of Greg Fisher, Deputy Public Defender; Special Circumstance Case Coordinator, Los Angeles County Public Defender's Office, Feb. 20, 2008.

if the County provides sufficient documentation of the need for those expenditures.” In fact, no funds have been appropriated for such reimbursement for more than fifteen years, leaving counties to foot the bill. As a result, the willingness of courts to grant Section 987.9 requests varies significantly from county to county, with greater reluctance to grant requests in cash-strapped counties. Access to investigators and experts necessary for the defense of death penalty cases should not depend upon the vagaries of county budgets. The State of California should meet the obligation undertaken as part of the original death penalty law, to reimburse counties for funds awarded pursuant to California Penal Code Section 987.9. The Commission recommends that counties be fully reimbursed for payments for defense services pursuant to California Penal Code Section 987.9. The estimated annual cost of Section 987.9 payments for death penalty cases in Los Angeles County in 2007 was \$4.5 million.⁴⁸ Los Angeles County accounts for approximately one-third of California’s death sentences. Thus, this recommendation will require an annual shift of roughly \$13.5 million of the current cost of death penalty trials in California from the counties to the State.

⁴⁸ Email to Commission from Robert B. Kalunian, Chief Deputy Public Defender, Los Angeles County, May 14, 2008.

Another device for the State to reimburse smaller counties for the costs incurred in connection with homicide trials is provided by California Government Code Section 15200-15204. This provides that costs incurred by the district attorney, sheriff and public defender or court-appointed attorneys, except normal salaries and expenses, can be reimbursed by the State "if such costs will seriously impair the finances of the county." There are two limitations upon these provisions that should be revisited by the Legislature, however. Reimbursement is limited to costs "in excess of the amount of money derived by the county from a tax of 0.0125 of 1 percent of the full value of property assessed for purposes of taxation within the county." Section 15202(b). This formula will subject both the State and smaller Counties to unpredictable fluctuations as property assessments rise and fall in today's housing market. Such factors have no relationship to the need for reimbursement of unpredictable costs of homicide trials.

Second, Sections 15202(b) and 15202.1(a) require advance approval of the Attorney General to reimburse costs of travel in excess of 1,000 miles. Insofar as it applies to travel by defense counsel in homicide cases, this is an inappropriate limitation. The Attorney General will be opposing counsel in any appeals, creating a conflict of interest. The Commission recommends that the California Legislature reexamine the limitations on reimbursement

to counties for the expenses of homicide trials contained in Government Code Sections 15200-15204.

In an effort to identify the costs of death penalty trials, the ACLU of Northern California, through a series of Public Records Act requests, obtained all documents pertaining to reimbursements to smaller counties for homicide trials for a ten year period, 1996 through 2005. The records encompass claims submitted by 20 counties in 21 identifiable homicide trials and 317 unidentified trials and hearings. The state paid \$45.8 million to reimburse counties during this ten-year period. The request yielded relatively comprehensive accounting for ten trials each involving a single defendant. Eight of these trials were death penalty cases, and two were not. The three most expensive cases were the Charles Ng trial (\$10.9 million to Calaveras County),⁴⁹ the Donald Bowcutt case (\$5 million to Siskiyou County),⁵⁰ and the Scott Peterson case (\$3.2 million to Stanislaus County).⁵¹ Comparing the least expensive death penalty trial to the most expensive non-death trial yielded a difference of \$1.1 million more for the death case, but it

⁴⁹The Ng trial costs included \$1.24 million for Court expenses, \$2.2 million for Prosecution expenses, and \$6.42 million for Defense expenses.

⁵⁰ The Bowcutt reimbursement was an advance payment of \$5 million for anticipated costs. Actual costs were not documented.

⁵¹ The Peterson reimbursement included \$1.4 million for prosecution expenses and \$1.4 million to the City of Modesto for police expenses. Defense expenses were not reimbursed, since Peterson had retained counsel.

is impossible to project this difference to all death penalty trials. As the author of this study concedes, “Because there is no consistent or comprehensive tracking of trial level costs across the state and so many costs are hidden, it is impossible to say for certain how much more counties are spending in pursuit of execution.”⁵² It can certainly be said that death penalty trials take longer and cost considerably more than non-death murder trials. The records reviewed also confirm that it is feasible to track the trial level costs in death penalty cases, if a uniform system of reporting data is imposed.

During the penalty phase, it is the obligation of defense counsel to present all available mitigating evidence which might persuade the jury to reject a penalty of death. The leading cause of reversal of death judgments in California is the failure of counsel to adequately investigate potential mitigating evidence. In subsequent habeas corpus proceedings, in which funds are made available for a complete investigation of the defendant’s background, evidence is uncovered which, if presented at the penalty phase, might have persuaded a jury to reject a death sentence. In *Wiggins v. Smith*, 539 U.S. 510 (2003), the U. S. Supreme Court held that trial counsel’s

⁵² Natasha Minsker, *The Hidden Death Tax: The Secret Costs of Seeking Execution in California*, A Report by the ACLU of Northern California, p.32 (2008).

failure to investigate the defendant's background and to present evidence of the defendant's unfortunate life history at the penalty phase of his trial was a violation of defendant's Sixth Amendment right to counsel, because his failure had fallen below the standard of reasonableness under prevailing professional norms. In defining prevailing professional norms, the Court relied upon the guidelines for capital defense work articulated by the American Bar Association (ABA Guidelines), "standards to which we long have referred as 'guides to determining what is reasonable.'" *Id.* at 524. The Court cited the "well-defined norm" of Section 11.4.1 (C), which provides that investigations into mitigating evidence "should comprise efforts to discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor."⁵³

In a number of cases, the California Supreme Court has concluded that defense counsel's investigation of mitigating circumstances was inadequate, requiring reversal of the jury's penalty determination in a death case.⁵⁴ Most recently, in *In Re Lucas*, 33 Cal. 4th 682 (2004), the California Supreme Court followed the *Wiggins* case in finding defense counsel's

⁵³ In the February, 2003 Revised Edition of the Guidelines, portions of Guideline 11.4.1(C) were moved to Guidelines 10.5 and 10.7. Guideline 10.7 (A) now provides: "Counsel at every stage have an obligation to conduct thorough and independent investigations relating to the issues of both guilt and penalty." The commentary to the Guideline lists all of the elements of an appropriate investigation.

⁵⁴ *In Re Marquez*, 1 Cal. 4th 584 (1992); *In Re Jackson*, 3 Cal. 4th 578 (1992).

representation at the penalty phase constitutionally defective, because his tactical decisions were not informed by an adequate investigation of available mitigating evidence. The Court concluded:

Lead counsel's failure to investigate petitioner's early social history was not consistent with established norms prevailing in California at the time of trial, norms that directed counsel in death penalty cases to conduct a reasonably thorough independent investigation of the defendant's social history – as agreed by respondent's own expert *and as reflected in the American Bar Association standards relied upon by the court in the Wiggins case.*⁵⁵

The *Wiggins* and *Lucas* rulings clearly recognize the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases as establishing norms for competent representation in death penalty cases. The Commission has learned that in a number of important instances, the provisions for appointment of trial counsel in California death penalty cases do not meet the standards of the ABA Guidelines:

1. The ABA Guidelines provide that flat fees, caps on compensation, and lump-sum contracts are improper in death penalty cases.

Guideline 9.1 (B)(1).⁵⁶ In a number of California counties, flat fee

⁵⁵ 33 Cal. 4th at 725 (emphasis supplied).

⁵⁶ ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, Guideline 9.1.B: Counsel in death penalty cases should be fully compensated at a rate that is commensurate with the provision of high quality legal representation and reflects the extraordinary responsibilities in death penalty representation.

1. Flat fees, caps on compensation, and lump-sum contracts are improper in death penalty cases.

contracts have become the prevailing method of appointment of counsel in death cases.

2. The ABA Guidelines recommend that the selection of lawyers for particular cases should be by a responsible agency that is “independent of the judiciary.” Guideline 3.1 (B).⁵⁷ In many California counties, appointments of trial counsel in death penalty cases are made by the courts.
3. The ABA Guidelines recommend that the defense team consist of “no fewer than two attorneys..., an investigator, and a mitigation specialist.” Guideline 4.1 (A)(2).⁵⁸ In some California cases, a single lawyer is appointed, or the appointment of a second lawyer is delayed.

The Commission recommends that California counties provide adequate funding for the appointment and performance of trial counsel in death penalty cases in full

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2. Attorneys employed by defender organizations should be compensated according to a salary scale that is commensurate with the salary scale of the prosecutor’s office in that jurisdiction.
 3. Appointed counsel should be fully compensated for actual time and service performed at an hourly rate commensurate with the prevailing rates for similar services performed by retained counsel in the jurisdiction, with no distinction between rates for services performed in or out of court. Periodic billing and payment should be available.

⁵⁷ ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, Guideline 3.1 (B) provides:
The responsible agency should be independent of the judiciary and it, not the judiciary or elected officials, should select lawyers for specific cases.
Under Guideline 3.1 (C), the Responsible Agency must be either a defender organization or an independent authority run by defense attorneys with demonstrated knowledge and expertise in capital representation.

⁵⁸ See fn. 36, *supra*.

compliance with ABA Guidelines 10.7 (A), 9.1(B)(1), 3.1(B), and 4.1(A)(2). Flat fee contracts that do not separately reimburse investigative and litigation expenses should not be permitted. Such contracts should not be utilized unless an hourly alternative exists. In all cases, attorneys must be 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 cost of meeting the standards of the Guidelines is very difficult to estimate, but it will be substantial. The Guidelines should be met in every potential capital case from the outset. Thus, two qualified counsel as well as an investigator and mitigation specialist should be appointed for as many as 200 cases each year, even though only 20 of them may end in a judgment of death. The breadth of our death penalty law requires a much heavier investment at the trial level than for the appeals or habeas proceedings, since in nine out of ten cases, a case in which the investment has been made will not result in a death judgment. Adequate representation by a full complement of two attorneys, an investigator and a mitigation specialist at the outset of the case may save money in the long run, however, if it results in a decision by the prosecutor not to seek the death penalty.

6. Recommendations for the Direct Appeal of Death Penalty Cases.

The California Supreme Court has exclusive jurisdiction to consider appeals from a judgment of death in California. Since 1935, appeal has been automatic in all death cases.⁵⁹ After the filing of the trial record in the California Supreme Court,⁶⁰ indigent death row inmates must await the appointment of counsel to handle the appeal. Currently, a delay of three to five years elapses before counsel is appointed. Once counsel is appointed, he or she must read the record which averages in excess of 9,000 pages of Reporter's and Clerk's transcripts, research the law, and then file an opening brief with the Court. The average delay between appointment of counsel and the filing of the opening brief is 2.74 years. The prosecution, represented by the California Attorney General, then files a responsive brief, ordinarily within six months. The defendant is then permitted to file a reply brief, again ordinarily within six months. The case then awaits the scheduling of an oral argument before the Supreme Court. Currently, the Court has 80 fully-briefed death appeals awaiting oral argument. Since the

⁵⁹ California Penal Code Section 1239. Section 1239 was enacted when a defendant was executed while his appeal was still pending, due to confusion whether he had filed a notice of appeal. See Alarcon, *Remedies for California's Death Row Deadlock*, *supra* n.2 at 714-15.

⁶⁰ Delays in the certification of the record by the trial court have been substantially reduced by the 1996 enactment of California Penal Code Section 190.8 (d), which requires the trial court to certify the record for completeness and for incorporation of all corrections no later than 90 days after imposition of a death sentence, unless good cause is shown. Certification of the *accuracy* of the record, however, must await the appointment of appellate counsel.

Court ordinarily hears only 20-25 of these cases per year, the wait for oral argument will be 2-3 years. A decision is announced within 90 days after the case is argued and submitted. Thus, the average delay between judgment of death and final disposition of the automatic appeal is currently between 11.7 and 13.7 years. The duration of this delay has steadily increased. For condemned prisoners convicted between 1978 and 1989, the average delay was 6.6 years. For condemned prisoners convicted between 1990 and 1996, the average delay was 10.7 years. The Supreme Court has issued only one opinion disposing of an automatic appeal of a prisoner convicted after 1997.⁶¹

Delays in the appointment of counsel to handle direct appeals are attributable to the small pool of qualified California lawyers willing to accept such assignments. Many of the experienced appellate lawyers who have handled California death cases are retiring or decline to take new cases that will tie them up for ten or twelve years. The requisite qualifications for appointment to handle death penalty appeals before the California Supreme Court appear in Rule 8.605(d) of the California Rules of Court. A lawyer must have four years of active practice of law, including service as counsel of record in seven completed felony appeals, including at least one murder

⁶¹ Alarcon, *supra* n. 2 at 722-23.

case, or service as counsel of record in five completed felony appeals and as supervised counsel in two death penalty appeals. Completion of training and demonstrated proficiency in appellate skills is also required. The State Public Defender can accept appointment, but must assign deputies who meet these minimum qualifications.

The State Public Defender was created in 1976 to handle indigent appellants in all criminal cases. In the early 1990's, under a gubernatorial directive, the office was asked to focus on capital cases only. In 1997, the office was expanded to 128 funded positions, which somewhat alleviated the backlog of 170 death row inmates then awaiting appointment of counsel to handle their direct appeal. That backlog has now been reduced to 79 inmates. But by 2003, budget cuts reduced the staff of the State Public Defender by 41 positions, more than half of which were attorneys. With an annual budget of approximately \$12 million, the office is currently handling 125 automatic appeals for death row inmates, and cannot accept additional appointments. The office is facing another 10% cut in next year's budget, which will result in the loss of additional attorney positions.

There is no dearth of lawyers who want to make a career of death penalty defense within the security of an agency setting. The Office of State Public Defender has a pool of 150 applicants for attorney positions. These

positions provide excellent training for those who will fill the ranks of appointed lawyers in the future. The most direct and efficient way to reduce the backlog of death row inmates awaiting appointment of appellate counsel would be to again expand the Office of the State Public Defender. Instead, California is cutting its budget and reducing its staff.

Currently, private lawyers who accept an appointment to handle death row appeals are compensated at a rate of \$145 per allowable hour.⁶² In determining how many hours are allowable for a given task, the Court sets benchmarks, which create presumptions of what will and what will not be paid. Lawyers handling death penalty appeals in California complain that the benchmarks are set too low, and the hassle of challenging them is demeaning and time-consuming. The Commission learned that at least twenty of the lawyers handling California death penalty appeals can no longer afford to live in California, and are currently residing in other states. For the level of experience required and the rigorous demand of death appeals, the low level of income is certainly a significant factor in the decline of the pool of attorneys available to handle death penalty appeals.

The payment of appointed lawyers to handle death penalty appeals in California does not meet the standard established by the federal courts for

⁶² See <http://www.courtinfo.ca.gov/courts/supreme/documents/SupremeCourtBrochure2008.pdf>.

lawyers appointed to handle federal habeas corpus proceedings in death cases. The Ninth Circuit rate varies from \$135 to \$170 per hour, depending upon the level of experience. Judge Alarcon concludes:

The California legislature must provide sufficient funds to compensate qualified lawyers who are willing to accept an appointment to represent death row inmates in their automatic appeals. There is no justification for the Legislature's failure to address the longstanding shortage of qualified counsel. Private practitioners who can bear the financial sacrifice of accepting court-appointment at the present hourly rates are scarce.⁶³

Chief Justice Ronald M. George expressed his full agreement with Judge Alarcon's call for more funding for counsel.⁶⁴ The California Supreme Court has an annual budget of \$15,406,000 to compensate and reimburse expenses for appointed lawyers doing both direct appeals and habeas corpus cases for death row inmates. \$5.585 million of that is allocated to the California Appellate Project (CAP), which maintains a full time staff of 40 (18 attorneys) in San Francisco to supervise and assist private lawyers who accept appointments to handle death penalty appeals. Currently, 188 private lawyers have contracted with the Court to handle direct appeals, and 141 have accepted appointment to provide representation in habeas corpus proceedings. The Commission recommends that the remaining backlog of cases awaiting appointment of counsel to handle direct appeals in death

⁶³ Alarcon, *supra* n. 2 at 734.

⁶⁴ Testimony of Chief Justice Ronald M. George, p. 7.

penalty cases be eliminated by expanding the Office of the State Public Defender. This will require increasing the OSPD budget to \$16 million per year, a one-third increase over its current budget. The increase could be phased in over a four year period.

The existing appointments of private lawyers should, of course, be continued, and the budget of CAP should be maintained. With enhanced staffing, OSPD would be able to take on 18-20 new appointments per year to handle death penalty appeals. The current backlog of 79 unrepresented death row inmates could be reduced to a one year wait if the number of new death judgments does not begin to increase again. The Commission recommends that, to the extent appointments of private counsel are utilized, such appointments should comply with ABA Guideline 4.1(A)(2),⁶⁵ and should be fully compensated at rates that are commensurate with the provision of high quality legal representation and reflect the extraordinary responsibilities in death penalty representation. Flat fee contracts should not be utilized unless an hourly alternative is available, and any potential conflicts of interest between the lawyer maximizing his or her return and spending for necessary investigation, and expert assistance and other expenses are eliminated.

⁶⁵ See fn. 36, *supra*.

7. Recommendations for State Habeas Corpus Review of Death Judgments.

In addition to the direct appeal, a defendant sentenced to death is also permitted to file a petition for a writ of habeas corpus in the California Supreme Court. A habeas corpus petition challenges the legality of a prisoner's confinement based upon factual issues that normally cannot be determined by the appellate record, such as whether the defendant received effective assistance of counsel, or the availability of new evidence of innocence that was not available at trial. Frequently, a claim of ineffective assistance of counsel requires a reinvestigation of the case, to demonstrate that additional evidence was available that could have been presented to mitigate the sentence, but was not due to the inadequacy of counsel's pretrial investigation. Representation of the prisoner in habeas corpus proceedings includes the duty to review the trial records; conduct an investigation of potential constitutional and statutory defects in the judgment of conviction or death sentence; prepare and file a petition for a writ of habeas corpus; represent the prisoner at the hearing to set an execution date pursuant to Penal Code section 1227; and prepare a request for executive clemency from the Governor of California.

Currently, 291 California death row inmates do not have habeas counsel. The average wait to have habeas counsel appointed is eight to ten

years after the imposition of sentence. Attorneys representing death row inmates in state habeas proceedings have three years from the date of their appointment to file a state habeas petition. If counsel is appointed while the direct appeal is still pending, the investigation can be concluded and the petition filed shortly after the appeal is decided, if the death sentence is affirmed. The average delay between the filing of a state petition for a writ of habeas corpus and the filing of the California Supreme Court's decision is 22 months. In the vast majority of cases, the California Supreme Court decides the case on the basis of an informal response from the Attorney General. Out of 689 state habeas corpus proceedings filed in the Supreme Court since 1978, the Court has issued orders to show cause, requiring the Attorney General to respond to the petition, in only 57 cases, and held evidentiary hearings only 31 times.⁶⁶

Initially, the California Supreme Court attempted to consolidate its consideration of the direct appeal and the habeas petition, appointing the same lawyer to handle both. That proved impractical for a variety of reasons.⁶⁷ California Government Code Section 68663 now provides for

⁶⁶ Alarcon, *supra* n. 2, at p. 741.

⁶⁷ Representing death row inmates on direct appeal and representing them on habeas corpus call for different skill sets that are rarely found in the same lawyer. By experience, training and inclination, appellate lawyers are rarely interested in assuming responsibility for habeas representation, and vice versa.

separate counsel to be appointed unless the prisoner and counsel request representation by the same attorney in both aspects of the capital case.

While the Court now appoints separate lawyers to handle the direct appeal and the habeas petition, the appointment of the habeas lawyer lags far behind the appointment of the appellate lawyer, creating a variety of problems. First, the factual investigation of habeas claims is delayed for many years. Inevitably, records are lost, witnesses become unavailable, and memories fade. Second, the one-year statute of limitations upon federal habeas claims begins to run when the State direct appeal proceedings have concluded. If a state habeas claim is not filed within that period, federal habeas review may be unavailable. Speeding up the disposition of death penalty appeals and addressing the delays in appointment of habeas counsel go hand in hand, since inmates must have habeas counsel while the clock is running on their federal habeas rights.

Those that have lawyers for their habeas proceedings are represented by private attorneys who accept appointment from the California Supreme Court, or lawyers employed by the California Habeas Corpus Resource Center [HCRC]. Established in 1998, HCRC is authorized to employ up to 34 attorneys to handle death penalty habeas petitions in state and federal

court. With an annual budget of \$14.9 million,⁶⁸ it has provided representation that meets the ABA Guidelines for 70 clients in state habeas corpus proceedings. A total of 141 habeas cases are now being handled by private court appointed counsel.

Private lawyers appointed to handle habeas claims must meet qualifications similar to those required for appointment to handle direct appeals.⁶⁹ In addition, if an evidentiary hearing is ordered, the lawyer must have trial experience, or engage an attorney who has such experience.⁷⁰ Like the attorneys handling appeals, appointed habeas counsel are paid \$145 per hour. In addition, a recently increased maximum of \$50,000 is available to cover expenses. The expenses for a habeas investigation and the retaining of necessary experts can easily exceed this maximum. Frequently, volunteer counsel handling habeas proceedings pay out of pocket expenses far in excess of available reimbursement, on a pro bono basis.⁷¹ Currently, the State Supreme Court allocates approximately half of its \$15.4 million annual

⁶⁸ The HCRC receives \$13.9 million from the State's General Fund, and is authorized to receive up to \$1 million from the federal government in reimbursements for work done in federal court. Given the backlog of death-row inmates needing appointment of state habeas corpus counsel, the HCRC has focused its efforts on state appointments, and accepted only nine federal appointments.

⁶⁹ Rule 8.605 (e), California Rules of Court.

⁷⁰ Rule 8.605 (g), California Rules of Court.

⁷¹ For the successful habeas petition in *In Re Lucas*, 33 Cal.4th 682 (2004), the law firm of Cooley Godward LLP provided 8,000 hours of pro bono attorney time, 7,000 hours of paralegal time, and litigation expenses of \$328,000. Testimony of Elisabeth Semel, February 28, 2008.

capital defense budget to habeas counsel. At this level of funding, there is little prospect that appointed private lawyers can ever meet the needs of the 284 unrepresented death row inmates for habeas counsel. California Appellate Defense Counsel, an organization of lawyers who accept appointments in capital cases, recently surveyed its membership to identify lawyers willing to accept habeas cases if expense reimbursement were increased to the current \$50,000 level. They received one positive response.⁷²

Representation by appointed private lawyers does not currently meet ABA Guidelines. Just as in the case of trial counsel, lump sum contracts are sometimes utilized, payment is lower than federal rates, and two counsel are not always appointed. Private lawyers are reluctant to accept appointments, knowing the client would receive better representation from HCRC. As one such lawyer told the Commission:

If you want private counsel to shoulder the burden, you have to fund them at the level you would fund a public agency so that we have investigators, paralegals, etc. so that when we file a petition, if you don't win in State Court, at least you don't hurt the clients by filing a petition that doesn't have all the claims and facts that need to be in that petition.⁷³

⁷² Testimony of Clay Seaman, February 28, 2008.

⁷³ Testimony of Cliff Gardner, February 28, 2008.

The Commission recommends that the need for additional habeas counsel be immediately met by expanding the California Habeas Corpus Resource Center to an authorized strength of 150 lawyers, phased in over a five year period. This will require a five-fold increase over the current \$14.9 million annual budget of HCRC. The Commission also recommends that, to the extent they are available for conflicts, such appointments include qualified lawyers employed by the State Public Defender as well as private lawyers. Such appointments should comply with ABA Guideline 4.1(A)(2),⁷⁴ and should be fully compensated at rates that are commensurate with the provision of high quality legal representation and reflect the extraordinary responsibilities in death penalty representation. Flat fee contracts should not be utilized unless an hourly alternative is available, and any potential conflicts of interest between the lawyer maximizing his or her return and spending for necessary investigation, and expert assistance and other expenses are eliminated.

⁷⁴ See fn. 36, *supra*

8. Recommendations for Federal Habeas Corpus Review of California Death Judgments.

A state prisoner, including one under sentence of death, may file an application for a writ of habeas corpus in federal court “on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.”⁷⁵ Federal courts can grant a request for the appointment of counsel, who can be paid and reimbursed for expenses from federal funds.⁷⁶ A federal application for habeas corpus cannot be granted “unless it appears that . . . the applicant has exhausted the remedies available in the courts of the State.”⁷⁷ Thus, a federal application would be filed after the direct appeal and habeas petition in state court have been denied or rejected. The federal petition must be filed within one year of the conclusion of the state direct appeal, but this period is stayed while a state habeas petition is pending.

Access to federal habeas review is a crucial step for death row inmates, especially in states with a high rate of death penalty affirmance. A national study conducted by Columbia University researchers examined the review of all death judgments from 1973-1995, and found that 59% were

⁷⁵ 28 U.S.C. Section 2254 (a).

⁷⁶ 18 U.S.C. Section 3599 (a)(2).

⁷⁷ 28 U.S.C. Section 2254 (b)(1)(A).

affirmed by state supreme courts.⁷⁸ A more recent study of fourteen death penalty states from 1992 through 2002 reported an affirmance rate of 73.7% in death appeals.⁷⁹ The California Supreme Court has affirmed death judgments at a rate in excess of 90% since 1987, and denied state habeas relief at an even higher rate. The Liebman study found that 40% of death judgments reviewed on federal habeas corpus were set aside, and this number increased where the state courts had a higher affirmance rate than the national average. In California, 70% of habeas petitioners in death cases have achieved relief in the federal courts, even though relief was denied when the same claims were asserted in state courts. There may be a number of explanations for this, including the availability of sufficient funds for investigation of the defendant's claims in federal court, the opportunity to develop a more comprehensive record at a federal evidentiary hearing, and the greater independence of federal judges with lifetime appointments.

The average delay from the filing of an application for federal habeas relief in a California death case until the grant or denial of relief by a federal district judge is 6.2 years. If the federal petition includes claims that have not been exhausted in state court, the court can stay the proceedings while

⁷⁸ Liebman et al., *A Broken System: Error Rates in Capital Cases, 1973-1995* (June, 2000).

⁷⁹ Latzer & Cauthen, *Justice Delayed? Time Consumption in Capital Appeals: A Multistate Study*, p. 23 (2005).

the defendant returns to state court to exhaust the remedies available in the state courts.⁸⁰ This increases the delay in disposing of the federal habeas petition by two years. Because California does not provide adequate resources to lawyers handling state habeas claims, 74% of federal habeas applications filed by California death row inmates are stayed for the exhaustion of state remedies.⁸¹ Thus, the under-funding of state habeas proceedings in California increases the burden on federal courts and delays the administration of justice:

The failure of the California legislature to provide sufficient funding to permit state habeas counsel to investigate each death row inmate's federal constitutional claims cannot be understated. It shifts to the federal government the burden of providing sufficient funds to permit federal habeas counsel to discover evidence to demonstrate additional federal constitutional violations.⁸²

The grant or denial of habeas relief by the federal district court can then be appealed to the U.S. Court of Appeals for the Ninth Circuit. The average delay for appellate review, including a petition for en banc review and a petition for certiorari to the U.S. Supreme Court is 4.2 years.⁸³

Continuity of representation by the same lawyer in both state and federal habeas corpus proceedings helps to reduce many of the delays that

⁸⁰ *Rose v. Lundy*, 455 U.S. 509 (1982).

⁸¹ Alarcon, *supra* n. 2, at p. 749.

⁸² *Id.* at p. 748.

⁸³ *Id.* at p. 749.

now occur in state and federal habeas proceedings, especially where exhaustion of claims in state court is a problem. With private appointed lawyers, however, continuity cannot be assured. The appointment authority of the California Supreme Court only extends to state habeas proceedings. Representation by HCRC, on the other hand, assures continuity of representation, since the agency is available to accept federal appointments after the state proceedings are concluded, and seeks to investigate and present all federal constitutional claims in state court before a federal petition is filed. Thus, a return to state court for exhaustion of claims may be obviated. Currently, only 7.3% of the habeas appointments of HCRC are for purposes of exhaustion, while 23.7% of the habeas appointments of private attorneys are for exhaustion purposes. The Commission recommends that continuity of representation by the same attorney for state and federal habeas claims be encouraged. The Commission's recommendation that the unmet need for habeas counsel be met by expanding HCRC, rather than expanding the number of appointments of private counsel, would address the need for continuity of counsel between state and federal habeas proceedings.

PART B: AVAILABLE ALTERNATIVES.

In addition to the choices presented in Part A, to leave the present broken system in place, or to provide the recommended resources to enable California to achieve the national average in death penalty delays, the Commission examined two other available alternatives: a significant narrowing of special circumstances to reduce the number of death penalty cases coming into the system, or replacing the death penalty with a maximum sentence of lifetime incarceration. The Commission makes no recommendation regarding these alternatives, but presents information regarding them to assure a fully informed debate. An effort is made to compare the costs for all four of these alternatives, but the figures presented are only rough estimates, due to the unavailability of accurate data.

1. The Alternative of Narrowing the List of Special Circumstances.

Several of the witnesses who testified before the Commission suggest the primary reason that the California Death Penalty Law is dysfunctional is because it is too broad, and simply permits too many murder cases to be prosecuted as death penalty cases. The expansion of the list of special circumstances in the Briggs Initiative and in subsequent legislation, they suggest, has opened the floodgates beyond the capacity of our judicial system to absorb. As former Florida Supreme Court Chief Justice Gerald

Kogan told the Commission, having 21 special circumstances is “unfathomable. The problem is the front-end of the system. There are too many people eligible to receive the death penalty.”⁸⁴ A number of research projects have concluded that the narrower the category of those eligible for the death penalty, the less the risk of error, and the lower the rate of racial or geographic variation.⁸⁵

An initiative of the Constitution Project, based in Washington, D.C., established a blue-ribbon bipartisan commission of judges, prosecutors, defense lawyers, elected officials, FBI and police officials, professors and civic and religious leaders to examine the administration of the death penalty throughout the United States. The Constitution Project achieved broad consensus on two key recommendations to reserve capital punishment for the most aggravated offenses and most culpable offenders:

5. Death Penalty Eligibility Should Be Limited to Five Factors:

The murder of a peace officer killed in the performance of his or her official duties when done to prevent or retaliate for that performance;
The murder of any person (including but not limited to inmates, staff, and visitors) occurring at a correctional facility;
The murder of two or more persons regardless of whether the deaths occurred as the result of the same act or of several related or unrelated acts, as long as either (a) the deaths were the result of an intent to kill more than one person, or (b) the defendant knew the act or acts would

⁸⁴ Testimony of Gerald Kogan, at p. 30.

⁸⁵ See Liebman & Marshall, *Less Is Better: Justice Stevens and the Narrowed Death Penalty*, 74 Fordham L. Rev. 1607 (2006).

cause death or create a strong probability of death or great bodily harm to the murdered individuals or others;

The intentional murder of a person involving the infliction of torture. In this context, torture means the intentional and depraved infliction of extreme physical pain for a prolonged period of time before the victim's death; and depraved means that the defendant relished the infliction of extreme physical pain upon the victim, evidencing debasement or perversion, or that the defendant evidenced a sense of pleasure in the infliction of extreme physical pain;

The murder by a person who is under investigation for, or who has been charged with or has been convicted of, a crime that would be a felony, or the murder of anyone involved in the investigation, prosecution, or defense of that crime, including, but not limited to, witnesses, jurors, judges, prosecutors, and investigators.

6. Felony Murder Should Be Excluded as the Basis for Death Penalty Eligibility.

The five eligibility factors in Recommendation 5, which are intended to be an exhaustive list of the only factors that may render a murderer eligible for capital punishment, do not include felony murder as a basis for imposing the death penalty. To ensure that the death penalty is reserved for the most culpable offenders and to make the imposition of the death penalty more proportional, jurisdictions that nevertheless choose to go beyond these five eligibility factors should still exclude from death eligibility those cases in which eligibility is based solely upon felony murder. Any jurisdiction that chooses to retain felony murder as a death penalty eligibility criterion should not permit using felony murder as an aggravating circumstance. (2005 Update).⁸⁶

Similarly, the Illinois Governor's Commission on Capital Punishment, a bipartisan group of seventeen current or former prosecutors, defense lawyers, judges and civic leaders established to determine what reforms would ensure that the Illinois capital punishment system is fair, just and

⁸⁶ The Constitution Project, *Mandatory Justice: The Death Penalty Revisited*, p. xxiv-xxv (2001; 2005 Update).

accurate, unanimously concluded that the Illinois death penalty law be narrowed to the functional equivalent of the Constitution Project recommendation:

The Commission unanimously concluded that the current list of 20 factual circumstances under which a defendant is eligible for a death sentence should be eliminated in favor of a simpler and narrower group of eligibility criteria. A majority of the Commission agreed that the death penalty should be applied only in cases where the defendant has murdered two or more persons, or where the victim was either a police officer or a firefighter; or an officer or inmate of a correctional institution; or was murdered to obstruct the justice system; or was tortured in the course of murder.⁸⁷

Hon. Alex Kozinski, now presiding judge of the U.S. Court of Appeals for the Ninth Circuit, suggested thirteen years ago that narrowing of the death penalty laws was the most appropriate way to address the “illusory” nature of the death penalty. Noting the growing gap between the numbers of people sentenced to death and the numbers we were actually willing to execute, he suggested decreasing the number of crimes punishable by death and the circumstances under which death may be imposed so that we only sentence to death “the number of people we truly have the means and the will to execute.”⁸⁸ The goal of narrowing, then, is to limit the numbers of

⁸⁷ State of Illinois, Report of the Governor’s Commission on Capital Punishment (April 2002).

⁸⁸ Hon. Alex Kozinski & Sean Gallagher: *Death: The Ultimate Run-on Sentence*, 46 Case W. Res. L. Rev. 1,3 (1995).

death row inmates to those whom we truly have the means and the will to execute.

Our Commission undertook a comprehensive review to determine which special circumstances were found in all cases in which the death penalty was imposed in California from 1978 through 2007. Despite the difficulties in gathering data because of the lack of a systematic data reporting requirement in California, the researchers, led by Professor Ellen Kreitzberg of Santa Clara University School of Law, were able to locate 822 death penalty judgments, and identify the special circumstances utilized in all but 26 of these cases. They concluded that since 1978, one of the five special circumstances identified by the Constitution Project was found in 55% of California death cases, or a total of 451 of the cases examined. This means that if the California death penalty law had limited itself to the “worst of the worst” as identified by the Constitution Project and the Illinois Commission, we would have approximately 368 on death row, rather than 670. The researchers also analyzed trends in the use of California’s special circumstances over time. They found that there is a growing trend to narrow the use of special circumstances to the five which were identified in the *Mandatory Justice* report of the Constitution Project:

Our analysis of the special circumstances found by juries in California death penalty cases shows a growing trend in the percentage of cases

where at least one *Mandatory Justice* factor is found. Compare 1980, where only 37% of the cases that year had at least one *Mandatory Justice* factor, with 2007, where 79% of the cases had at least one factor. Since 1998, a *Mandatory Justice* factor has been found in at least 59% of the cases each year – most years over 65% of the total cases. However, there is significant disparity from county to county with several counties falling far below the state average. California needs to determine how to eliminate these geographic disparities in the imposition of the death penalty.⁸⁹

Thus, a narrowing of the California special circumstances to the five factors recommended by *Mandatory Justice* and the Illinois Commission could largely eliminate the geographic variation in use of the death penalty which the Commission notes below.⁹⁰ The following chart illustrates the percentage of death penalty cases which included at least one *Mandatory Justice* factor for 1978 through 2007 from each of the fourteen counties which most frequently utilize the death penalty:

⁸⁹ Kreitzberg, et al., *A Review of Special Circumstances in California Death Penalty Cases*, p. 8 (2008).

⁹⁰ See Section C-2 of this Report, *infra*

**PERCENTAGE OF CALIFORNIA DEATH CASES WITH AT LEAST
ONE MANDATORY JUSTICE FACTOR BY COUNTY⁹¹**

County	Total Death Sentences	Percentage With At Least One Factor
Alameda	55	51%
Contra Costa	20	65%
Fresno	18	50%
Kern	29	55%
Los Angeles	247	64%
Orange	60	38%
Riverside	65	48%
Sacramento	43	37%
San Bernardino	46	52%
San Diego	43	63%
San Mateo	18	78%
Santa Clara	30	57%
Tulare	17	41%
Ventura	17	41%

The Kreitzberg study was also critical of the use of felony murder as a special circumstance:

The use of felony murder as a special circumstance should be reviewed. Over the years felony murder (robbery) was either the first or second most frequently used special circumstance. While many felony murders are among the most intentional and aggravated killings, the felony murder circumstance fails to differentiate between these aggravated murders and a minimally culpable defendant who would still qualify under this factor.⁹²

Some of the gravest concerns about the fairness of the death penalty might be alleviated or eliminated if its use were limited to the most aggravated cases. The current list of 21 factual circumstances under which a defendant

⁹¹ *Id.* at pp. 45-46.

⁹² *Id.* at p. 8.

is eligible for a death sentence could be eliminated in favor of a simpler and narrower group of eligibility criteria.

The use of the *Mandatory Justice* factors is not the only option available to narrow the use of California's death penalty. Other alternatives could be considered as well. Commissioner Jon Streeeter suggests adding to the *Mandatory Justice* factors the further limitation that the crime in question must be found to have "legally affected all citizens of the State of California." According to this approach, any killing of a peace officer, a correctional officer, or a participant in the justice system would be presumed to have the requisite "citizen impact," since those crimes are, in effect, attacks on the State itself and on the State's ability to mete out justice on behalf of all of its citizens. For multiple murder and murder involving torture, there would be no such presumption; it would take more than a simple allegation of "murder of more than two persons" or "infliction of torture" to justify a capital charge. In those cases, "citizen impact" would have to be proved by the prosecution.⁹³ Unquestionably, some case-by-case line-drawing would be required, but the courts already do that kind of line-

⁹³ By way of illustration, mass murderers (e.g. the Oklahoma City bomber, the September 11 assassins) and serial murderers whose crimes are notorious for their depravity and the widespread fear they create (e.g. the Zebra killings, the D.C. sniper killings) are examples of cases in which a state-wide "citizen impact" seems readily apparent and readily provable.

drawing in interpreting and applying our current death penalty special circumstances. As Commissioner Streeter puts it:

The overall idea behind this approach would be to impose a limitation that distinguishes between purely local crimes (where the costs of prosecution will be borne largely by county taxpayers) from crimes of state-wide import (where the costs of prosecution will be borne largely by all taxpayers of the state). Not only does this approach directly address the issue of geographical disparity, but, by introducing the principle that no crime may qualify for the death penalty unless it is a matter of some state-wide consequence, it also minimizes the need to draw potentially arbitrary distinctions between different types of heinous crimes. Most importantly, because the number of capital-eligible crimes would shrink dramatically – yet leave open the option of using capital punishment in cases that are often used as examples for why we should have the death penalty – this approach accomplishes a substantial narrowing of death-eligibility, yet does so in a way that acknowledges and respects the strongly-felt views of many citizens that the ultimate punishment is appropriate in some cases. In effect, we would propose to 'right size' the death penalty in the State so that the citizens end up with a workable, yet fair, system that we can afford.

The Commission is not suggesting any particular formula or list to narrow California's death penalty law. This judgment is best left to the legislative process. Other criteria, such as the murder of children, could be included on the list. But the list must be carefully measured to actually achieve the benefits of narrowing that have been identified. However the list of special circumstances is narrowed, this narrowed list would only be applied in death penalty cases. The current list of special circumstances

could still be utilized to impose sentences of life without possibility of parole.

If California's death penalty law were narrowed, it would be unwise to proceed with the execution of defendants whose death judgment was not based upon one of the identified special circumstances. With respect to the thirteen executions conducted by California since 1978, ten of them would have met the recommended special circumstance for multiple murders. Only the executions of Thomas M. Thompson, Manuel Babbitt and Stephen Wayne Anderson would not have resulted in a death sentence using the *Mandatory Justice* factors. The death sentence of any death row inmate whose conviction did not include a finding of one or more of the enumerated special circumstances could be commuted to a sentence of life without possibility of parole. Taking this step would actually have little impact for the death row inmates involved. Most of them will never be executed, but will die in prison. Changing their sentence to one of lifetime incarceration would only change the location in which they will serve their sentence. But just that change could save the State of California \$27 million dollars each year over the current cost of confining these prisoners on death row.

The additional cost of confining an inmate to death row, as compared to the maximum security prisons where those sentenced to life without

possibility of parole ordinarily serve their sentences, is \$90,000 per year per inmate.⁹⁴ With California's current death row population of 670, that accounts for \$63.3 million annually. Reducing the death row population to those whose death judgment is based upon one or more of the five special circumstances recommended by the Constitution Project would immediately reduce the size of California's death row to 368, who could be confined on death row at an annual cost of \$35 million. With respect to those no longer subject to the death penalty, millions more would be saved by eliminating the need to litigate their appeals and habeas petitions.

In terms of the future growth of California's death row, the Kreitzberg study suggests that for the past four years, 70% of the new death judgments in California have included at least one of the recommended circumstances. Thus, an average of 11 or 12 new death judgments could be anticipated, if prosecutors seek the death penalty at the same rate. The numbers, both in terms of backlog and new judgments, could be managed with substantially less resources than we currently devote to our death penalty system. The cost of implementing many of the reforms recommended by this Commission to fix the current system would be reduced by 30 to 40%.

⁹⁴ Tempest, *Death Row Often Means a Long Life*, Los Angeles Times, Mar. 6, 2005, quoting Corrections Department Spokeswoman Margot Bloch.

A 45% reduction in the size of death row would also reduce the otherwise necessary expansion of the State Public Defender, the Habeas Corpus Resource Center, and the Court staffing needed.

2. The Alternative of Establishing the Maximum Penalty at Lifetime Incarceration.

After a comprehensive review of the costs and benefits of the death penalty, the New Jersey Death Penalty Commission reached the following conclusions:⁹⁵

1. There is no compelling evidence that the death penalty rationally serves a legitimate penological purpose;
2. The costs of the death penalty are greater than the costs of life in prison without parole;
3. There is increasing evidence that the death penalty is inconsistent with evolving standards of decency;
4. The penological interest in executing a small number of persons is not sufficiently compelling to justify the risk of making an irreversible mistake;
5. The alternative of life imprisonment in a maximum security institution without the possibility of parole would sufficiently ensure public safety and address other legitimate social and penological interests, including the interests of the families of murder victims;

⁹⁵ Final Report, New Jersey Death Penalty Study Commission Report, p. 1 (January, 2007).

6. Abolition would make sufficient funds available to ensure adequate services and advocacy for the families of murder victims.

These considerations led the State of New Jersey to abolish the death penalty this year, in favor of the alternative of life imprisonment without parole.

(LWOP). We have the same alternative available in California.

California has had a sentence of life imprisonment without possibility of parole available since 1978. According to the California Department of Corrections, as of January 1, 2008, 3,622 defendants are serving LWOP sentences, including some who were initially charged in death penalty cases. Thus, throughout the past thirty years, we have increased our LWOP population at an average rate of 120 defendants per year. It is appropriate to label these as cases of lifetime incarceration. The term of imprisonment is the defendant's life. He is being sentenced to die in prison. Not only are the costs of confinement significantly reduced, compared to the cost of confinement on death row, many of the costs of trial and appellate review for death cases are eliminated.

At the trial level, substantial savings would result from the elimination of the necessity for death-qualified juries. Among the increased costs necessitated by death penalty trials are the heavier burdens imposed upon potential jurors than non-death cases. In Los Angeles County, 800 potential

jurors may be summoned for a death penalty case. California jury commissioners rely solely upon voter registration and DMV lists to summon jurors, although state law permits expansion of source lists.⁹⁶ Seventy-five percent of potential jurors will be excused for financial hardship because of the length of the trial. California courts pay jurors at a rate of \$15 per day.⁹⁷ Many employers do not pay employees for jury service, and those who do frequently limit the payment to no more than two weeks. The remaining jurors must undergo individual questioning to determine whether they have opinions about the death penalty that would preclude their serving in a death case. This process of "death qualification" has resulted in larger numbers of potential jurors being excused as public opinion against the death penalty has grown.

While a jury is normally selected in one or two days in most felony cases, the selection of a death-qualified jury normally takes 8-10 days of court time. The use of limited source lists, the exclusion of a higher proportion of potential jurors for economic hardship, together with the exclusion of those who disapprove of the death penalty, results in juries that

⁹⁶ California Code of Civil Procedure, Section 197(a). In contrast, New York uses five source lists, including state income taxpayers, state unemployment, and welfare rolls. Testimony of Lois Heaney, March 28, 2008.

⁹⁷ At least 31 states and the Federal Courts pay jurors more than California. In Federal Courts, jurors receive \$50 per day. Testimony of Lois Heaney, March 28, 2008.

do not reflect a cross-section of the community to the extent that non-death juries do.

Upon conviction of first-degree murder and a finding of at least one special circumstance, the same jury is required to return for a second trial, the penalty phase in which the jury decides between a sentence of death or a sentence of life imprisonment without possibility of parole. This is a full trial, with opening statements, presentation of evidence by both sides, closing arguments and jury instructions. The jury is asked to weigh aggravating and mitigating circumstances, and impose a sentence of death if aggravating circumstances outweigh mitigating circumstances, or a sentence of life imprisonment without possibility of parole if mitigating circumstances outweigh aggravating circumstances. The jury must unanimously agree as to the penalty; if they are unable to achieve unanimity, another jury must be impaneled to decide the penalty.⁹⁸

The expenses for trial and appellate counsel would also be substantially reduced if lifetime incarceration became the maximum penalty in California. Only one defense lawyer would have to be appointed for the trial. There would be no automatic appeal to the California Supreme Court, so appeals would be handled much more expeditiously by the Courts of

⁹⁸ California Penal Code Section 190.4 (b).

Appeal. Between June 2005 and June 2006 the California Courts of Appeal decided 100 LWOP appeals after an average delay of 18.6 months.⁹⁹ While habeas corpus petitions are available, there is no right to appointed counsel, as there is for appeals and for habeas petitions in death cases. And since there is no discretion in the exercise of the sentencing function, there is no issue regarding the adequacy of investigation of mitigating evidence or the effective assistance of counsel at a sentencing trial. Finally, although the risks of wrongful convictions remain, there would be no wrongful executions. New trials could be ordered if necessary, and the exonerated would be released.

If the New Jersey approach were used in California, the death penalty backlog would immediately disappear. The issues being litigated in direct appeals and habeas petitions would no longer have to be decided by the California Supreme Court. Penalty issues would not have to be decided at all. The forty death penalty trials each year would simply be added to the existing schedule of LWOP cases; instead of 120 LWOP cases per year, we would have 160. With a dysfunctional death penalty law, the reality is that most California death sentences are actually sentences of lifetime incarceration. The defendant will die in prison before he or she is ever

⁹⁹ Alarcon, *supra* n. 2 at p. 731.

executed. The same result can be achieved at a savings of well over one hundred million dollars by sentencing the defendant to lifetime incarceration without possibility of parole.

A significant one-time savings is also available to California under this option. According to the California State Auditor Report for 2006, the current condemned-inmate facilities at San Quentin do not meet many of the Department of Corrections standards for maximum security facilities. The Department received spending authority of \$220 million to build a new condemned-inmate complex, but the audit found the analysis of alternative locations and costs was incomplete.¹⁰⁰ Governor Schwarzenegger has set aside \$136 million to proceed with construction of a new death row at San Quentin. The Department of Corrections estimate for completion of the project is \$356 million, up \$19 million from the year before.¹⁰¹ The California State Auditor reported in June, 2008 that this estimate is too low:

Analyses by our consultant suggest that the cost to construct the CIC will exceed Corrections' recent estimate. Although Corrections reasonably estimated construction costs, it was precluded from applying realistic escalation rates, and delays from the anticipated

¹⁰⁰ California State Auditor Report 2006-406, p.281.

¹⁰¹ Halstead, *\$136 Million Requested for New Death Row at San Quentin*, Marin Independent Journal, April 30, 2008.

start date will add to project costs. Additionally, Corrections did not include the costs to activate and operate the CIC in its estimated costs. Our consultant estimates the cost to construct the CIC will exceed Corrections' estimate of \$356 million by \$39.3 million and that the cost to activate the new CIC will reach \$7.3 million. Furthermore, our consultant estimates that the average new staffing costs to operate the new CIC will average \$58.8 million per year, for a total of approximately \$1.2 billion over the next 20 years.¹⁰²

3. Estimating and Comparing the Annual Costs of Available Alternatives.

As we have previously noted, it is impossible to ascertain the precise costs of the administration of California's death penalty law at this time. But the choices that California faces require some comparison of projected costs; for this purpose, rough estimates will have to do.

In recent years, a number of states have attempted to compare the costs imposed by a death penalty trial to a murder trial where the death penalty is not sought, with quite consistent results. A performance audit report prepared for the State of Kansas in 2003 compared the average cost of cases in which a death sentence was imposed (\$1.2 million) with the average

¹⁰² California State Auditor, *California Department of Corrections and Rehabilitation: Building a Condemned Inmate Complex at San Quentin May Cost More Than Expected*, June 2008 Letter Report 2007-120.1.

cost of murder cases in which the death penalty was not sought (\$.7 million) and concluded that seeking the death penalty adds 70% to the cost of a murder case.¹⁰³ A report by the Comptroller of the Treasury for the State of Tennessee concluded that seeking the death penalty in murder trials adds an average of 48% to the cost of the trial.¹⁰⁴ A study of Indiana death penalty trials concluded that the cost of a death penalty trial and direct appeal alone is more than five times the cost of a life without parole trial and direct appeal. Including the relative costs of incarceration, the study concluded that obtaining the death penalty increases the cost by 38%.¹⁰⁵ Michael Ebert of the George Mason University School of Public Policy evaluated these studies, and concluded that “the Indiana analysis may well be the new ‘gold standard’ in this unique area of capital vs. non-capital cost assessments. The American Bar Association (ABA) examined the Indiana study and has commented very favorably on its techniques.”¹⁰⁶

¹⁰³ Performance Audit Report: Costs Incurred for Death Penalty Cases, A Report to the Legislative Post Audit Committee, State of Kansas, December 2003.

¹⁰⁴ Wilson, Doss & Phillips, Tennessee’s Death Penalty: Costs and Consequences, State of Tennessee, July 2004.

¹⁰⁵ Janeway, *The Application of Indiana’s Capital Sentencing Law: Findings of the Indiana Criminal Law Study Commission* (2002).

¹⁰⁶ Ebert, *Weighing the Costs of Capital Punishment v. Life in Prison Without Parole: An Evaluation of Three States’ Studies and Methodologies*, Volume I, New Voices in Public Policy (Spring 2007).

A recent report for the Washington State Bar Association elicited estimates from prosecutors and public defenders of the costs added to trials when the death penalty was sought. The report concluded “that the prosecutor’s average estimate of \$217,000 and the public defenders average estimate of \$246,000 were realistic estimates of the cost difference for death penalty cases at the trial level.”¹⁰⁷

Not surprisingly, California estimates for trial costs have been somewhat higher. A U.C. Berkeley School of Public Policy researcher in 1993 reported that a capital murder trial cost \$1.9 million, compared to \$630,000 for a non-capital murder case, a difference of \$1.27 million.¹⁰⁸

The ACLU comparison of death penalty cases and non-death penalty cases in which counties were reimbursed by the state found the difference between the least expensive death penalty trial with the most expensive non-death penalty trial was \$1.1 million.¹⁰⁹

For comparative purposes, the Commission adopted a very conservative estimate that seeking the death penalty adds \$500,000 to the

¹⁰⁷ Washington State Bar Association, Final Report of the Death Penalty Subcommittee on the Committee on Public Defense, December 2006, at p. 18.

¹⁰⁸ Tempest, Death Row Often Means a Long Life, Los Angeles Times, March 6, 2005 at p. B1. Based on Erickson, Capital Punishment at What Price?, available at <http://death.live.radicaldesigns.org/downloads/Erickson1993COSTSTUDY.pdf>

¹⁰⁹ Minsker, The Hidden Death Tax: The Secret Costs of Seeking Execution in California, March 2008, at p. 32.

cost of a murder trial in California. The costs of a second defense lawyer, the background investigation for the penalty phase, and the added duration and expense of the trial for jury selection and penalty trial alone would easily add up to \$500,000 in most cases. The current rate of 20 death sentences per year would require 40 death penalty trials per year, for a total added cost of \$20 million. The Commission's recommendations for adequate funding of defense costs for death penalty trials, especially the necessary investigation of mitigation, will easily increase this cost differential by 50%. If the same pace of 40 death penalty trials were maintained, the needed reforms would then require an annual expenditure of \$30 million, rather than \$20 million. This expenditure would be at the county level, but \$13.5 million of it would be reimbursed by the State pursuant to Penal Code Section 987.9.

If California's death penalty law were narrowed to a more selective list of special circumstances, the number of death penalty trials would be reduced to 24, requiring the expenditure of \$18 million including the recommended reforms. If California opted in favor of terminal confinement [LWOP] as the maximum penalty, there would no longer be the enhanced costs of death penalty trials, but the number of LWOP trials would probably increase. In some cases, the risk of facing the death penalty provides an

incentive to plead guilty and accept an LWOP sentence. If the incentive is removed, more LWOP cases may have to be tried. And if more LWOP cases are tried, more will be appealed. California currently processes approximately 120 LWOP cases each year, but fewer than 5% of them are disposed of by a plea of guilty.¹¹⁰ Even if all cases formerly charged as death cases become LWOP cases and all of those cases go to trial, that would add approximately \$5 million to the cost of LWOP trials and \$3 million to the cost of LWOP appeals. Both the trials and appeals would be considerably less expensive than death cases, because there would be no penalty phase, and no right to counsel for a habeas petition.

The costs of appellate and habeas corpus review for death cases can be estimated with somewhat more precision. The current budgets of the California Supreme Court for the appointment of private lawyers (\$15.4 million), of the State Public Defender for death penalty appeals (\$12.1 million) and the California Habeas Corpus Resource Center for habeas representation (\$14.9 million) total \$42.4 million. Former Attorney General Bill Lockyer estimated that 15% of his criminal division budget is devoted to capital cases. That currently amounts to \$12 million per year. Thus, at least \$54.4 million is currently devoted to post-trial review of death cases in

¹¹⁰ This estimate is based upon a 2008 survey of the California Appellate Projects.

California. The recommended budget increases proposed by the Commission in Part A would increase this figure by \$85 million. The added charges to the State general fund would include \$6 million for the State Public Defender, \$70 million for the California Habeas Corpus Resource Center, \$6 million to the Attorney General, and \$3 million to the State Supreme Court for appointed counsel. The reduction of the backlog by adopting the narrowing proposal would reduce these enhanced budgets by 45%, to a total of \$68 million.

The costs of confinement can also be estimated with some precision, based upon the Department of Corrections estimate that confinement on death row adds \$90,000 per year to the cost of confinement beyond the normal cost of \$34,150. Thus, just the enhanced confinement costs for the 670 currently on California's death row totals \$63.3 million. This figure increases each year as the population of California's death row grows. The needed reforms recommended by the Commission would reduce the delays and eventually lead to reductions in the death row population. The alternative of narrowing the death penalty law could result in a 45% reduction in the size of death row, and a corresponding 45% reduction in the costs of confinement to \$35 million per year. This number would also decline as the backlog was reduced. The alternative of terminal confinement

would not reduce confinement costs to zero, since current death row inmates who might have been executed will be confined for their full life expectancy, although at the lower confinement rate of \$34,150 per year. Assuming 100 inmates might otherwise have been executed, the cost of their continued confinement would amount to \$3.5 million per year.

Thus, using conservative, rough estimates, the total cost of the available alternatives would be (1) to continue spending at least \$137.7 million per year to maintain our dysfunctional system; (2) to spend \$216.8 million to reduce delays in resolving cases from 20-25 years down to the national average of 12 years; (3) to spend \$121 million per year for a narrowed death penalty producing 10-12 new death sentences per year; (4) or to adopt a policy of terminal confinement at an annual cost of \$11.5 million.

These estimates make no effort to measure opportunity costs or savings. For example, the California Supreme Court currently devotes 20-25% of its time and resources to processing death penalty appeals and habeas petitions. If California's death penalty law were significantly narrowed, the Supreme Court caseload would be correspondingly lighter. The reduction would be even more dramatic with the alternative of lifetime incarceration as the maximum penalty.

The following chart summarizes the additional annual charges to the California state budget which each of four alternatives would impose: the present system, the present system with the reforms recommended in Part A of this Report, a significantly narrowed death penalty law, and a maximum punishment of lifetime incarceration without possibility of parole.

ESTIMATING THE ANNUAL COSTS OF FOUR ALTERNATIVES

	CURRENT SYSTEM	CURRENT SYSTEM WITH PART A ADDITIONS	NARROWED DEATH PENALTY LAW WITH PART A ADDITIONS	MAXIMUM OF LIFETIME INCARCERATION [LWOP]
ADDITIONAL COST OF TRIALS	\$20 Million	\$30 Million	\$18 Million	\$5 Million
ADDITIONAL COST OF APPEAL AND HABEAS PROCEEDINGS	\$54.4 Million	\$139.4 Million	\$77 Million	\$3 Million
ADDITIONAL COST OF CONFINEMENT	\$63.3 Million [Increasing]	\$63.3 Million [Declining]	\$35 Million [Declining]	\$3.5 Million
TOTAL	\$137.7 Million [Increasing]	\$232.7 Million [Declining]	\$130 Million [Declining]	\$11.5 Million

PART C: ADMINISTRATIVE REFORMS.

1. Reducing the California Supreme Court Backlog.

Despite extraordinary efforts and the investment of substantial resources, the California Supreme Court has been unable to stay abreast of the rising tide of death cases arriving at its door. As already noted, the delays in appointment of counsel for both direct appeals and state habeas proceedings are attributable to lack of adequate funding rather than any failure on the part of the Court. The Court has no control over the number of death verdicts returned each year, and the numbers have far surpassed the capacity of the court to promptly process and decide the cases. The Court has added attorneys to the staff of each Justice's chambers, and created a central staff of ten attorneys dedicated to death penalty motions, appeals and habeas proceedings. These cases arrive with lengthy records, and the opinions issued by the Court addressing the issues raised on appeal are lengthy and complex. Ordinarily, the Court will issue published opinions deciding 20 to 25 death appeals each year, and an additional 30 memorandum opinions deciding habeas petitions. There is now a delay of as much as two or three years from the time a death case is fully briefed until it is set for oral argument. The Court has 80 direct appeals fully briefed and

awaiting oral argument. Another 100 fully briefed habeas petitions are before the Court.

According to Chief Justice Ronald M. George, the Court now faces a crisis, in which the death penalty backlog is threatening the Court's ability to resolve other statewide issues of law and settle conflicts at the appellate level, which is its primary duty and responsibility. The California Supreme Court has formulated a proposal to address the delay in deciding fully briefed death penalty appeals by amending the California constitution to give the Supreme Court discretion to transfer fully briefed cases to the intermediate Courts of Appeal for decision.¹¹¹ The Supreme Court would review the Court of Appeals judgment and could summarily affirm it, or hold oral argument and issue its own decision with reasons stated, addressing all or part of the Court of Appeal's decision.¹¹² On March 25, 2008, the Chief Justice announced that in view of the budget situation, the Court is not asking that the proposal be advanced at this time. The Commission recommends that this proposal be advanced only in conjunction with implementation of recommendations it is presenting in this report to

¹¹¹ A constitutional amendment would be required because the California constitution gives the Supreme Court exclusive jurisdiction over appeals involving judgments of death. Cal. Const., art. VI, Section 12.

¹¹² News Release, Supreme Court Proposes Amendments to Constitution in Death Penalty Appeals, Nov. 19, 2007.

adequately fund the appointment of both appellate and habeas counsel in death cases, and the provision of adequate staffing for the Courts of Appeal.

Witnesses before the Commission have addressed a number of other concerns regarding the implementation of this proposal. Concern has been expressed that transferring as many as thirty death appeals each year to the nineteen different divisions and districts of the Court of Appeal will result in inconsistent rulings, especially in resolving issues such as harmless error. The lack of formal proportionality review in California, coupled with the patterns of geographic disparity, give added weight to concerns regarding the consistency of death penalty review.

The assurance of the Supreme Court that Court of Appeal rulings would be carefully scrutinized should be accepted. An annual evaluation of the effects of this proposal could be assured by the implementation of the Commission's recommendation to establish a California Death Penalty Review Panel (*infra*, pp. 102-103). The Commission majority recommends adoption of the proposed constitutional amendment if the recommendations contained in Part A of this Report are implemented.

While the California Supreme Court is also considering proposals to address the backlog of state habeas cases, Senior Judge Arthur Alarcon of the U.S. Court of Appeals for the Ninth Circuit has suggested that California

law be changed to permit original habeas petitions in death cases to be filed in the Superior Courts, with right of appeal to the Courts of Appeal and discretionary review by the Supreme Court.¹¹³ He suggests:

The potential for reducing the delay of finally adjudicating a sentence of death by having the original habeas corpus petition filed in the superior court is tremendous. There are 1499 superior court judges in California. An average of thirty-eight state habeas corpus petitions in death penalty cases are filed each year in the California Supreme Court. Spreading these state habeas corpus petitions among the trial courts would dramatically reduce the Supreme Court's caseload while having a minimal impact on the superior courts. Trial court judges are uniquely qualified to hear original habeas corpus claims because they are already familiar with the evidence presented at trial. And in order to facilitate appellate review, the superior court judge hearing the petition should be required to issue a written order explaining the reasons for granting or denying habeas corpus relief.¹¹⁴

The Alarcon proposal may not require amendment of the California constitution. The Supreme Court, the Courts of Appeal and Superior Courts share original jurisdiction over habeas corpus proceedings.¹¹⁵ The reason habeas cases are filed directly in the Supreme Court is because only the Supreme Court is authorized to pay counsel. The California Supreme Court has adopted a policy which declares:

Absent prior authorization by this court, this court will not compensate counsel for the filing of any other motion, petition or pleading in any other California or federal court or court of another

¹¹³ Alarcon, *supra* n. 2, at 743-49.

¹¹⁴ *Id.* at p. 743.

¹¹⁵ Cal. Const., art. VI, Section 10.

state. Counsel who seek compensation for representation in another court should secure appointment by, and compensation from, that court.¹¹⁶

Adoption of the Alarcon proposal could also expedite the consideration of a subsequent habeas corpus petition in federal court. Under the existing system, federal courts do not have the benefit, in most cases, of a prior evidentiary hearing or a written order from the Supreme Court explaining the reasons for its decision. After the California Supreme Court rejected requests from the judges of the Ninth Circuit Court of Appeals that the Court spell out its reasons for denying petitions for habeas corpus, due to lack of time and resources, Senator Dianne Feinstein wrote to Governor Arnold Schwarzenegger requesting assistance in addressing this problem. She concluded that “[t]he absence of a thorough explanation of the [California Supreme] Court’s reasons for its habeas corpus decisions often requires federal courts to essentially start each federal habeas death penalty appeal from scratch, wasting enormous time and resources.”¹¹⁷

The Commission majority recommends that changes to California statutes, rules and policies be seriously considered to encourage more hearings and formal findings in considering state habeas corpus petitions in

¹¹⁶ Supreme Court Policies Arising From Judgments of Death, at Policy 3, 2-1 (1989).

¹¹⁷ Alarcon, *supra* n. 2, at 742-43.

death penalty cases. The California Supreme Court's summary denial of habeas petitions without evidentiary hearings and without any explanation of the reasons¹¹⁸ does not save time, since it adds to the delay in resolution of the inevitable subsequent federal habeas corpus claim. Simply adopting the Alarcon proposal to shift the initial consideration of habeas petitions to the Superior Courts, however, would only add to the delays if the Superior Courts summarily deny the petitions at the same rate, competency standards for the appointment of counsel are not ensured, or additional resources are not provided for full development of the facts necessary to resolve claims for relief. Among the statutory changes to be considered should be a reexamination of the standards for requiring the Attorney General to file a return, and the standards for requiring an evidentiary hearing. Written findings should also be required.

2. Explaining Racial and Geographic Disparities.

The decision to pursue the death penalty for a death eligible defendant is the responsibility of the elected District Attorney in each California county.

Although there is no current data to show what proportion of California homicides are *charged* as first degree murder and/or death penalty cases,

¹¹⁸ The California Supreme Court issues an order to show cause requiring the Attorney General to respond in only 8% of death penalty habeas corpus petitions, and orders an evidentiary hearing before a referee in only 4.5% of the cases.

there has been research focused upon the cases that actually result in a sentence of death. Professors Glen Pierce and Michael Radelet examined the racial, ethnic and geographical variation in the imposition of the death penalty based on an analysis of homicides that occurred in California between January 1, 1990 and December 31, 1999.¹¹⁹ They found that for the 33,914 homicides occurring in California during this period, 302 defendants were sentenced to death. The statewide ratio for this ten-year period was .89 death sentences for every 100 homicide victims. The authors then examined variations in this ratio based upon the race of the victim and the geographical location of the homicide. They found the ratio varied substantially among California counties. Excluding counties in which fewer than five death sentences were imposed,¹²⁰ death sentencing ratios varied from .58 for each 100 homicides to rates nearly ten times higher.

These ratios do not take into consideration variations in arrest rates across counties. Larger urban counties may have higher proportions of stranger-to-stranger homicides, which often remain unsolved and produce correspondingly lower arrest rates. Pierce and Radelet adjusted for variance

¹¹⁹ Pierce & Radelet, *The Impact of Legally Inappropriate Factors on Death Sentencing for California Homicides, 1990-1999*, 46 Santa Clara L. Rev. 1 (2005).

¹²⁰ In almost half the counties, 28 of the 58, no death sentences were imposed during the 1990's, although 1,160 homicides took place in these counties. The current District Attorney for San Francisco, Kamala Harris, and her predecessor, Terrence Hallinan, pledged never to seek the death penalty. Since 1979, only two defendants have been sentenced to death for murders in San Francisco. *Id.* at 26, n.128.

in arrest rates by counting homicides in which an offender was identified (ordinarily by making an arrest), and then comparing the death sentencing rate to the urban character of the county as measured by population density, and the proportion of the county's population that were non-Hispanic whites. This comparison strongly suggested that those counties with the highest death sentencing rates tend to have the highest proportion of non-Hispanic whites in their population, and the lowest population density. The more white and more sparsely populated the county, the higher the death sentencing rate.

Pierce and Radelet also subjected their data to logistic regression analysis to ascertain whether the race and ethnicity of homicide victims is associated with imposition of the death penalty in California. Overall, controlling for all other predictor variables, they found all those who kill African Americans, regardless of the ethnicity or race of the perpetrator, are 59.3% less likely to be sentenced to death than those who kill non-Hispanic whites. This disparity increases to 67% when comparing the death sentencing rates of those who kill whites with those who kill Hispanics, again without regard to the ethnicity or race of the perpetrator.

It should be clearly understood that this data does not establish that prosecutorial discretion is affected by race and class bias, unconscious or

otherwise. There are many other plausible explanations for the consistent patterns based on race of victim that appear in every death penalty state. Similar patterns have been found in other states in recent studies, including Florida, Illinois, Nebraska, Arizona, Maryland, North Carolina and Pennsylvania, as well as in studies of death sentencing in federal cases.¹²¹ More detailed analysis of more data is necessary to identify the reasons for patterns of disparity based upon the race of the victims.¹²²

Professors Pierce and Radelet noted broad concerns about data quality and availability in California:

Such issues raise crucial questions about the interest, and, more fundamentally, the ability of the State to monitor its death sentencing process. A comprehensive and effective monitoring program needs to track all homicide cases from arrest through appeal. To accurately assess the full range of factors that may or may not affect criminal justice decisions, all links and actors in the decision-making process must be monitored. This necessitates collecting information from the very start of the process, including information on the character of police investigations and prosecutorial charging decisions.¹²³

¹²¹ Pierce and Radelet, *supra* n. 119, at 38-39.

¹²² Analysis of racial data should include all cases in which the death penalty was sought and those in which it was rejected as well as those in which it was imposed. Data from San Mateo County illustrates the difficulty of drawing any conclusions from a simple comparison of the race of the defendant and the race of the victim in cases where the death penalty was imposed. Since 1983, 26 capital cases were tried to penalty phase to a jury. 13 of the defendants were white, and 13 were persons of color. There were a total of 42 victims: 27 were white and 15 were persons of color. Death verdicts were returned in 14 of the cases, 8 against white defendants, and 6 against defendants of color. In those 14 cases, there were 27 victims, 16 white and 11 persons of color. In the twelve cases where the jury rejected a death verdict, 5 defendants were white and 7 were persons of color. There were 15 victims in those 12 cases: 11 were white, and 4 were persons of color.

¹²³ *Supra*, n. 119 at p. 37.

The systematic collection and monitoring of more comprehensive data about how homicide cases are selected for prosecution as death cases could yield valuable insights into the impact of the race of the victim. This data should be regularly collected and analyzed.

Prosecutors suggest that geographical variation in utilizing the death penalty is not a problem, because locally elected District Attorneys are responding to the demands of the electorate which they represent. The California Supreme Court has consistently rejected claims that the discretion conferred on the district attorney of each county to seek the death penalty results in a county-by-county disparity in capital prosecutions, causing arbitrariness forbidden by the federal Constitution.¹²⁴ Others suggest that since the death penalty is administered in the name of the State, there should be a uniform statewide standard applied to determine if the death penalty should be employed.¹²⁵ A local decision to seek the death penalty may impose tremendous costs that will be borne by the State as a whole, including the costs of subsequent appeal and habeas proceedings and the costs of confinement on death row.

¹²⁴ See, e.g., *People v. Ayala*, 23 Cal.4th 225 (2000); *People v. Holt*, 15 Cal.4th 629, 702 (1997); *People v. Ochoa*, 19 Cal.4th 353, 479 (1998).

¹²⁵ See, e.g., the suggestion of Commissioner Jon Streeter, pp. 67-68 *supra*.

Many states address the problem of geographical variation by imposing a requirement of comparative proportionality in death sentences. The United States Supreme Court has ruled that the Eighth Amendment of the U.S. Constitution does not *require* comparative proportionality review in death penalty cases, concluding that disparities in death sentences cannot be labeled as cruel and unusual punishment. The Court also held that death penalty statutes without proportionality review do not violate the Fourteenth Amendment's guarantee of equal protection. Indeed, these rulings came in a case challenging California's death penalty statute for failing to provide proportionality review.¹²⁶ Nevertheless, the majority of states which provide for the death penalty do require comparative proportionality review to achieve a consistent statewide standard.¹²⁷ Gerald Kogan, former Chief Justice of the Florida Supreme Court, told the Commission that Florida has one of the highest rates of state Supreme Court reversal of death penalties in the nation, because of its employment of proportionality review.¹²⁸

The Commission majority has concluded that geographical and racial variation should be subjected to further study and analysis in

¹²⁶ *Pulley v. Harris*, 465 U.S. 37 (1984).

¹²⁷ Kaufman-Osborn, *Capital Punishment, Proportionality Review, and Claims of Fairness (With Lessons From Washington State)*, 79 Wash. L. Rev. 775, 790-92 (2004) (21 of the 39 states with death penalty laws impose a requirement of comparative proportionality review).

¹²⁸ Testimony of Hon. Gerald Kogan, p. 34.

California. Evidence of disparities in the administration of the death penalty undermines public confidence in our criminal justice system generally.

California is the most diverse state in the country. It is our duty to ensure that every aspect of the criminal justice system is administered fairly and evenly, and that all residents of the state are accorded equal treatment under the law. This is especially true when the state chooses to take a life in the name of the people. The Commissioners are unwilling to recommend a requirement of comparative proportionality or approval of local death penalty decisions by a statewide body, however, without additional data and research.

3. Comprehensive Data Collection and Monitoring.

The Commission made a concerted effort to identify the process by which decisions are made by California District Attorneys to proceed with a homicide prosecution as a death penalty case. After completing preliminary research, Professors Harry Caldwell, Carol Chase and Chris Chambers of Pepperdine University School of Law prepared a survey form which was sent to the District Attorneys in each of California's 58 counties. The survey sought information concerning the process by which each office determines whether to file a homicide as a capital case, as well as information designed to reveal whether certain types of special circumstances are more likely than

others to be filed as capital cases, and whether certain characteristics of defendants, victims, or the crimes alleged were more likely to result in a capital charge. Despite extensive follow-up contacts, twenty counties never responded to the survey, and another fourteen responded by declining to participate in the survey. The non-cooperating counties included five of the top ten death-sentencing counties in California.¹²⁹

With respect to the counties that completed the survey, most indicated that a panel or committee of prosecutors was utilized to make a recommendation to the District Attorney whether the death penalty should be sought. Very few counties indicated they had written policies or guidelines, and only one was willing to provide a copy of their written policy. The responding offices differed as to their use of information from the defense in making their decisions. In most counties, the decision is not made until the information is filed, after the preliminary hearing.

The survey did not yield enough statistical information to draw any conclusions with regard to the decision-making process. The Pepperdine researchers concluded:

Of all the decisions that a government can make, the decision to seek to end the life of another human being must be the most important and

¹²⁹ The non-cooperating counties included Riverside, Orange, Alameda, San Diego and Kern. The top ten death-sentencing counties in California, measured by the number of inmates on death row in January, 2004, were: 1. Los Angeles (194), 2. Riverside (54), 3. Orange (49), 4. Alameda (43), 5. Sacramento (34); 6. San Bernardino (34); 7. San Diego (32), 8. Santa Clara (27), 9. Kern (23), 10. San Mateo (16).

sobering. These decisions should be made only after careful consideration of specified factors after a clearly defined process designed to ensure fairness and to avoid arbitrary results. As the ultimate decision for each county rests with an elected official, the District Attorney, one would hope that the District Attorney would value transparency in his/her decision-making process, both to insure that these important decisions are being made as evenhandedly as possible and to give the electorate the opportunity to voice its approval or disapproval of the process by which the District Attorney makes those decisions. Unfortunately, our experience has revealed a wariness about disclosing information about the death penalty decision-making process on the part of many district attorneys offices. While some offices – including the office of the most populous county (Los Angeles), have been very forthcoming – a record of 15 relatively complete responses out of 58 counties¹³⁰ paints a distressing picture of the willingness of those who tinker with the machinery of the death penalty to expose their decision-making process to the electorate.¹³¹

Regrettably, a similar experience of wariness was reported by the Rand Corporation, which was retained by the Commission to determine the feasibility of a major study of the administration and the administrative costs of the death penalty in California:

At the outset of our conversations with representatives of participating agencies, the relevance of the underlying political dynamic became undeniably apparent. Namely, that many (if not most) of the participants in the death penalty process have strongly held views about the death penalty, and that those views have implications for our ability to gather the necessary data for the proposed study. The representatives on the defense side with whom we spoke tended to see it as their responsibility to prevent or delay the application of capital punishment. Therefore, not surprisingly, they appear to fall largely

¹³⁰ In addition to Los Angeles County, relatively complete responses were received from Butte, Calaveras, Imperial, Inyo, Kings, Lake, Mendocino, Nevada, San Bernardino, San Mateo, Santa Clara, Shasta, Tehama and Tuolumne Counties.

¹³¹ Caldwell, Chase & Goodman, *Death Penalty Survey Report*, p. 7 (Nov. 7, 2007).

within the group of those opposed to the use of the death penalty. And the representatives on the prosecution side, especially at the local level, showed an interest in maintaining all possible sentencing options for any given crime, which allows for the widest discretion in determining how to handle their cases, as well as providing leverage for plea-bargaining. Thus, the two groups of key stakeholders not only play adversarial roles in individual cases, but they also largely disagree when it comes to the death penalty.

It is perhaps not surprising then, that many of the stakeholders in the current death penalty process are wary of the kind of independent study we have proposed, for fear that it could end up swaying opinion in a direction contrary to their own convictions. This wariness was expressed to us directly by some, as well as indirectly (e.g., difficulties we encountered getting connected in a timely fashion to the right people). In our experience, such ambivalence about a study can make data collection extremely difficult – if not effectively impossible.¹³²

Providing the public with reliable information about how the death penalty is being administered in California should not depend upon the discretion of those who are charged with its administration. The Commission majority recommends that reporting requirements be imposed to systematically collect and make public data regarding all decisions by prosecutors in murder cases whether or not to charge special circumstances and/or seek the death penalty, as well as the disposition of such cases by dismissal, plea or verdict in the trial courts. The Legislature should impose a requirement upon courts, prosecutors and defense counsel to collect and report all data needed to determine the extent to which race of the defendant, the race of the

¹³² Everingham, Ridgley, Reardon & Anderson, *Feasibility Study: Characterizing the Administration and Assessing the Administrative Costs of the Death Penalty in California*, p. 11 (Rand Corp., August 2007).

victim, geographic location and other factors affect decisions to implement the death penalty, to accurately determine the costs, and to track the progress of potential death penalty cases. This recommendation was among the most vigorously debated by the Commission, with some Commissioners believing that data collection is useless without a carefully defined purpose for the data. The Commission majority concluded that a newly created Death Penalty Review Panel would play a vital role in defining what data is necessary to carry out its monitoring and advising functions.

The Commission received a recommendation from Professors Ellen Kreitzberg, Michael Radelet and Steven Shatz describing a comprehensive system of data collection modeled on the system implemented by the Supreme Court of New York.¹³³ Some counties, such as Alameda County, already routinely collect much of the data that would be reported. The Commission recommends that reporting requirements be imposed to systematically collect and make public cumulative data regarding all decisions by prosecutors in murder cases whether or not to charge special circumstances and/or seek the death penalty, as well as the disposition of such cases by dismissal, plea or verdict in the trial courts.

¹³³ Kreitzberg, Radelet & Shatz, Response to Questions on Proportionality Review and Data Collection, March 12, 2008. (Available on Commission's Website).

The Legislature should impose a requirement upon courts, prosecutors and defense counsel to collect and report any data other than privileged material designated by the California Death Penalty Review Panel which may be necessary: (1) to determine whether demographics affect decisions to implement the death penalty, and if so, how; (2) to determine what impact decisions to seek the death penalty have upon the costs of trials and post-conviction review; and (3) to track the progress of potential and pending death penalty cases to predict the future impact upon the courts and correctional needs. The information should be reported to the California Department of Justice and the California Death Penalty Review Panel. The information reported should be fully accessible to the public and to researchers.

The experience of this Commission in undertaking a comprehensive review of the administration of California's death penalty law confirms the need for more comprehensive collection of data and the continual monitoring and analysis of that data, to identify and address the problems of delay, chronic under-funding, and the potential risk of wrongful convictions and executions, and to assure ourselves that racial and geographic variations do not reflect the inappropriate exercise of discretion.

The Commission majority recommends the establishment of a California Death Penalty Review Panel, to be composed of judges, prosecutors, defense lawyers, law enforcement representatives and victim advocates appointed by the Governor and the Legislature. It should be the duty of this Panel to issue an annual report to the Legislature, the Governor and the courts, gauging the progress of the courts in reducing delays in death penalty cases, analyzing the costs of and monitoring the implementation of the recommendations of this Commission, and examining ways of providing safeguards and making improvements in the way the California death penalty law functions.

4. The Need for Greater Transparency in the Exercise of Prosecutorial Discretion to Pursue the Death Penalty.

Although the Commission's attempt to survey prosecutors was largely unsuccessful, the ACLU of Northern California conducted a survey of defense attorneys to ascertain the death penalty charging procedures in their counties.¹³⁴ They received information regarding the practices in fifteen active death penalty counties,¹³⁵ in most cases from the Chief Public Defender or a deputy. The data obtained was entirely consistent with that

¹³⁴ Natasha L. Minsker, *Charging Practices of CA DA's in Death Penalty Cases, Survey Responses*, Letter to the Commission dated Feb. 15, 2008 (Available on Commission's Website).

¹³⁵ Responses were obtained for Alameda, Contra Costa, Fresno, Kern, Los Angeles, Orange, Riverside, Sacramento, San Bernardino, San Diego, San Mateo, Santa Clara, Solano, Tulare and Ventura Counties. Thus, all of the top ten death-sentencing counties were included. See n. 96, *supra*.

collected by the Pepperdine researchers. It demonstrated great variation in the practices for charging special circumstances, a lack of racial diversity among the individuals who made the decision, great variation in when the decision was made, and significant variation in the involvement of the defense in the process. In all but three of the responding counties (Kern, Sacramento and Solano) review panels or Committees of prosecutors were utilized to make a recommendation to the District Attorney. Only two responses indicated the review committees were racially diverse. In three of the counties, the defense is not regularly consulted before a decision is made.¹³⁶ Five of the counties permit written submissions by the defense.¹³⁷ Seven of the counties permit the defense to actually meet with the committee.¹³⁸

There was also significant variation in when the decision to seek the death penalty was made. Most counties made the decision after the preliminary hearing, but there was significant variation in how long after the preliminary hearing a decision was made. In one recent case, the

¹³⁶ Kern, Riverside and San Bernardino.

¹³⁷ Alameda, Contra Costa, Fresno, Los Angeles and Solano.

¹³⁸ Orange, San Diego, San Mateo, Sacramento, Santa Clara, Tulare and Ventura.

prosecution declared for the first time that it was seeking a sentence of death on the first day of trial.¹³⁹

The Commission recently recommended that all District Attorney Offices in California formulate and disseminate a written Office Policy to govern compliance with the constitutional obligation to disclose exculpatory evidence. *Report and Recommendations on Compliance With the Prosecutorial Duty to Disclose Exculpatory Evidence* (March 6, 2008). We believe it is equally important that the policy governing the decision to seek the death penalty be in writing and publicly available. The Commission therefore unanimously recommends that all District Attorney Offices in California formulate and disseminate a written Office Policy describing how decisions to seek the death penalty are made, who participates in the decisions, and what criteria are applied. Such policies should also provide for input from the defense before the decision is made.

5. The Governor's Clemency Power in Death Penalty Cases.

The California constitution vests the power to commute or pardon a person condemned to death in the Governor:

Art. V, Section 8(a). Subject to application procedures provided by statute, the Governor, on conditions the Governor deems proper, may grant a reprieve, pardon, and commutation, after sentence, except in case of impeachment. The Governor shall report to the legislature each reprieve, pardon, and commutation granted, stating the pertinent

¹³⁹ Dan Bernstein, *A Late Penalty*, Riverside Press-Enterprise, Oct. 9, 2007.

facts and the reasons for granting it. The Governor may not grant a pardon or commutation to a person twice convicted of a felony except on recommendation of the Supreme Court, 4 judges concurring.

At the request of the Commission, Professors Linda E. Carter and Mary-Beth Moylan of the University of the Pacific, McGeorge School of Law undertook a comprehensive study of the use of commutation in California death penalty cases.¹⁴⁰ Historically, they found substantial variation in the rates at which California Governors exercised clemency in death penalty cases. Governor Culbert Olson (1939-1942) commuted 16 death sentences while overseeing 29 executions.¹⁴¹ Governor Earl Warren (1943-1953) commuted 7 death sentences while overseeing 80 executions.¹⁴² Governor Edmund G. "Pat" Brown commuted 20 death sentences while presiding over 20 executions.¹⁴³ The last commutation of a death sentence in California was by Governor Ronald Reagan in 1967. Governor Reagan also presided over one execution. Since the enactment of the current California death penalty law in 1978, there have been 13 executions: Clemency was denied in all 13

¹⁴⁰ Carter and Moylan, *Clemency in Capital Cases* (2008) (Available on the Commission's Website).

¹⁴¹ Governor Olson's Clemency Secretary was Stanley Mosk, who later served as California Attorney General and as a Justice of the California Supreme Court for 37 years.

¹⁴² Governor Warren later served as Chief Justice of the United States Supreme Court for 15 years.

¹⁴³ One of Governor Brown's Clemency Secretaries was Arthur Alarcon, now a Senior Judge of the U.S. Court of Appeals for the Ninth Circuit. Governor Brown authored a book describing his experiences in considering death penalty commutations. Edmund (Pat) Brown with Dick Adler, *Public Justice, Private Mercy: A Governor's Education on Death Row* (1989).

cases: five by Governor Pete Wilson, five by Governor Gray Davis, and three by Governor Arnold Schwarzenegger.

Professors Carter and Moylan conclude that executive clemency cannot and should not function as a device to review procedural errors or legal challenges to execution. Its purpose is to provide a safety valve, and its unregulated nature furthers that purpose. They do make two recommendations to amend Article V, Section 8(a) of the California constitution, however, and the Commission unanimously supports these recommendations:

1. Decisions denying clemency in death cases should be preserved in the records of the Legislature as well as decisions granting clemency. All of the last thirteen denials of clemency resulted in the issuance of written decisions, but Professors Carter and Moylan encountered difficulty in locating all of those decisions. The second sentence of Section 8(a) should be amended to read: "The Governor shall report to the Legislature each reprieve, pardon, and commutation granted *or denied*."

2. The requirement of Supreme Court concurrence in the grant of executive clemency to a twice-convicted felon should be removed. Involving the Supreme Court in the clemency process intertwines the judicial branch in a power that is exclusively vested in the executive branch

by the California constitution. No other state has a process that gives the judicial branch this type of veto power over the executive's decision. The concept of granting mercy is an extra-judicial function that is not within the purview or function of a court.

The Commission is also in agreement with the suggestion of Professors Carter and Moylan that Penal Code Section 4813 be amended to make it discretionary rather than mandatory that requests for clemency by a twice convicted felon be referred to the Board of Prison Terms for a written recommendation. This proposed amendment will bring the statute into conformity with the actual practice of recent Governors and alleviate a possible conflict with the California constitution and its requirement of the separation of powers.

Finally, the Commission suggests that the Governor receive information from the attorneys for the accused, and should consider in each case meeting personally with the attorneys for each side before making a decision regarding commutation in a death penalty case. As the only decision maker, the Governor should hear evidence and arguments in person as much as possible.

CONCLUSION

If we are to achieve the goals of justice, fairness and accuracy in the administration of the death penalty in California, and reduce delays at least to the national average, there is urgent need to increase funding at every level: trials, direct appeals and habeas corpus review. Once increased funding has been achieved, serious consideration should be given to both a proposed constitutional amendment to permit the California Supreme Court to transfer fully briefed pending death penalty appeals from the Supreme Court to the Courts of Appeal, and changes to California statutes, rules and policies to encourage more factual hearings and findings in state habeas proceedings in death penalty cases.

Reporting requirements should be imposed to systematically collect and make public cumulative data regarding all decisions by prosecutors in murder cases whether or not to charge special circumstances and/or seek the death penalty, as well as the disposition of such cases by dismissal, plea or verdict in the trial courts.

A Death Penalty Review Panel should be established to issue an annual report to the Legislature, the Governor and the courts, gauging the progress of the courts in reducing delays, analyzing the costs of and monitoring the implementation of the recommendations of this Commission,

and examining ways of providing safeguards and making improvements in the way the California death penalty law functions.

Each District Attorney Office in California should formulate a written Office Policy describing when and how decisions to seek the death penalty are made.

The constitutional and statutory provisions governing Gubernatorial clemency should be modified to maintain consistent records and eliminate unnecessary procedural steps.

This report sets forth an ambitious and expensive agenda of reform. The failure to implement it, however will be even more costly. The death penalty will remain a hollow promise to the people of California.

Respectfully submitted,

California Commission on the Fair Administration of Justice:

John K. Van de Kamp, Chair

Jon Streeter, Vice Chair*

Diane Bellas, Alameda County Public Defender

Harold O. Boscovich, Jr., Danville

Chief William Bratton, Los Angeles Police Department (Represented by Gerald Chaleff)*

Jerry Brown, California Attorney General (Represented by Scott Thorpe, Janet Gaard, and Donald DeNicola)*

Ron Cottingham, Peace Officers Research Association of California

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*See separate statement attached to this report.

APPENDIX I:

DEATH PENALTY FOCUS QUESTIONS

1. Should reporting requirements be imposed to systematically collect and make public data regarding all decisions by prosecutors in murder cases whether or not to charge special circumstances and/or seek the death penalty, as well as the disposition of such cases by dismissal, plea or verdict in the trial courts?
2. Should the California constitution be amended to permit the transfer of jurisdiction over pending death penalty appeals from the Supreme Court to the Courts of Appeal?
3. Should California law be changed to require state habeas corpus petitions in death penalty cases be filed in the Superior Courts?
4. Should California law be changed to narrow the special circumstances that would make a defendant eligible for the death penalty?
 - A. Should death penalty eligibility be limited to cases in which the defendant was the actual killer?
 - B. Should death penalty eligibility be limited to cases in which the defendant formed the intent to kill?
 - C. Should felony murder special circumstances be retained?
 - D. Should special circumstances be limited to the "worst of the worst"? If so, which special circumstances define the "worst of the worst"?
5. What measures should be taken to assure the prompt appointment of qualified lawyers to provide competent representation for the defendant in death penalty cases at the trial stage, on direct appeal, and for habeas corpus challenges?
6. Should consistency of representation be provided for state and federal habeas corpus proceedings in death penalty cases?
7. Are funding and support services for the defense of capital cases adequate to assure competent representation by qualified lawyers?

8. Are there significant racial disparities associated with the race of the victim or the defendant in imposing the death penalty in California? If so, what remedies are available to minimize or eliminate the problem?

9. Are there significant geographical disparities from county to county in utilizing the death penalty in California? Is this a problem? If so, what remedies are available to minimize or eliminate the problem?

10. Is there a need for proportionality review of death penalty sentences in California? If so, how should such a review process be incorporated into California's death penalty law?

11. Are clemency procedures used by California governors consistent from one administration to the next? Are they consistent with the procedures utilized by other states? Are they adequate to assure a fair opportunity to be heard by all interested parties, and to assure a principled decision on the merits?

Appendix II



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FEDERAL GRANTS OF RELIEF IN CALIFORNIA CAPITAL CASES (JUDGMENTS ARE FINAL) (N=38)

	Inmate	Result	Relief Granted on Guilt or Penalty	Case Citation
1.	Acala, Rodney	Granted	Guilt	<i>Alcala v. Woodford</i> , 334 F.3d 862 (9th Cir. 2003)
2.	Ainsworth, Steven	Granted	Penalty	<i>Ainsworth v. Woodford</i> , 268 F.3d 868 (9th Cir. 2001)
3.	Bean, Anthony	Granted	Guilt	<i>Bean v. Calderon</i> , 163 F.3d 1073 (9th Cir. 1998), <i>cert. denied</i> , 528 U.S. 922 (1999)
4.	Bloom, Robert	Granted	Guilt	<i>Bloom v. Calderon</i> , 132 F.3d 1267 (9th Cir. 1997), <i>cert. denied</i> , 523 U.S. 1145 (1998)
5.	Caro, Fernando	Granted	Penalty	<i>Caro v. Woodford</i> , 280 F.3d 1247 (9th Cir.), <i>cert. denied</i> , 536 U.S. 951 (2002)
6.	Clark, William	Granted	Guilt (Special Circumstance)	<i>Clark v. Brown</i> , 442 F.3d 708 (9th Cir.), <i>cert. denied</i> , 127 S. Ct. 555 (2006)
7.	Coleman, Russell	Granted	Penalty	<i>Coleman v. Calderon</i> , 210 F.3d 1047 (9th Cir. 2000)
8.	Daniels, Jackson	Granted	Guilt	<i>Daniels v. Woodford</i> , 428 F.3d 1181 (9th Cir. 2005), <i>cert. denied</i> , 127 S. Ct. 2876 (2007)
9.	Douglas, Fred	Granted	Penalty	<i>Douglas v. Woodford</i> , 316 F.3d 1079 (9th Cir.), <i>cert. denied</i> , 540 U.S. 810 (2003)
10.	Dyer, Alfred	Granted	Guilt	<i>Dyer v. Calderon</i> , 151 F.3d 970 (9th Cir.), <i>cert. denied</i> , 525 U.S. 1033 (1998)
11.	Frierson, Lavell	Granted	Penalty	<i>Frierson v. Woodford</i> , 463 F.3d 982 (9th Cir. 2006), <i>cert. denied</i> , 127 S. Ct. 2976 (2007)
12.	Ghent, David	Granted	Guilt (Special Circumstance)	<i>Ghent v. Woodford</i> , 279 F.3d 1121 (9th Cir. 2002)
13.	Grant, Richard	Granted in District Court (Petitioner	Penalty	<i>Grant v. Brown</i> , Order, Civ. S-90-0779 (E.D. Cal. Jan. 12, 2006)

	Inmate	Result	Relief Granted on Guilt or Penalty	Case Citation
		appealed denial of guilt relief; Warden did not appeal grant of penalty relief)		
14.	Hamilton, Bernard	Granted	Penalty	<i>Hamilton v. Vasquez</i> , 17 F.3d 1149 (9th Cir.), <i>cert. denied</i> , 512 U.S. 1220 (2000)
15.	Hayes, Blufford	Granted	Guilt	<i>Hayes v. Brown</i> , 399 F.3d 972 (9th Cir. en banc 2002)
16.	Hendricks, Edgar	Granted	Penalty	<i>Hendricks v. Calderon</i> , 70 F.3d 1032 (9th Cir. 1995), <i>cert. denied</i> , 517 U.S. 1111 (1996)
17.	Hovey, Richard	Granted	Penalty	<i>Hovey v. Ayers</i> , 458 F.3d 892 (9th Cir. 2006)
18.	Howard, Gary	Granted in District Court (Parties stipulated to dismissal of appeal)	Penalty	<i>Howard v. Calderon</i> , Order, CV 88-7240 (C.D. Cal. Sept. 26, 1996)
19.	Hunter, Michael	Granted in District Court (Neither party appealed)		<i>Hunter v. Vasquez</i> , Order, C 90-3275 (N.D. Cal. Dec. 9, 1998)
20.	Jackson, Earl	Granted	Penalty	<i>Jackson v. Brown</i> , 513 F.3d 1057 (9th Cir. 2008)
21.	Jackson, Michael	Granted	Penalty	<i>Jackson v. Calderon</i> , 211 F.3d 1148 (9th Cir. 2000), <i>cert. denied</i> , 531 U.S. 1072 (2001)
22.	Jennings, Michael	Granted	Guilt	<i>Jennings v. Woodford</i> , 290 F.3d 1006 (9th Cir. 2002), <i>cert. denied</i> , 539 U.S. 958 (2003)
23.	Karis, James	Granted	Penalty	<i>Karis v. Calderon</i> , 283 F.3d 1117 (9th Cir. 2002), <i>cert. denied</i> , 539 U.S. 958 (2003)
24.	Keenan, Maurice	Granted in District Court (Petitioner appealed denial of guilt relief; Warden did not appeal grant of penalty relief)	Penalty	<i>Keenan v. Woodford</i> , 2001 WL 835856 (Dec. 21, 1999)
25.	Malone, Kelvin	Granted in District Court (Executed in Missouri)	Penalty	<i>Malone v. Vasquez</i> , Order, 96-4040-WJR, (C.D. Cal Jan. 11, 1999)
26.	Mayfield, Demetrie	Granted	Penalty	<i>Mayfield v. Woodford</i> , 270 F.3d 915 (9th Cir. 2001)

	Inmate	Result	Relief Granted on Guilt or Penalty	Case Citation
27.	McDowell, Charles	Granted	Penalty	<i>McDowell v. Calderon</i> , 130 F.3d 833 (9th Cir. en banc 1997), <i>cert. denied</i> , 523 U.S. 1103 (1998)
28.	McLain, Robert	Granted	Penalty	<i>McLain v. Calderon</i> , 134 F.3d 1383 (9th Cir.), <i>cert denied</i> , 525 U.S. 942 (1998)
29.	Melton, James	Granted in District Court (Neither party appealed)	Guilt	<i>Melton v. Vasquez</i> , Order, CV 89-4182 (C.D. Cal. Jan. 19, 2007)
30.	Moore, Charles	Granted	Guilt	<i>Moore v. Calderon</i> , 108 F.3d 261 (9th Cir.), <i>cert. denied</i> , 521 U.S. 1111 (1997)
31.	Morris, Bruce	Granted	Penalty	<i>Morris v. Woodford</i> , 273 F.3d 826 (9th Cir.), <i>cert. denied</i> , 537 U.S. 941 (2002)
32.	Murtishaw, David	Granted	Penalty	<i>Murtishaw v. Woodford</i> , 255 F.3d 926 (9th Cir. 2001), <i>cert. denied</i> , 535 U.S. 935 (2002)
33.	Odle, James	Granted	Guilt	<i>Odle v. Woodford</i> , 238 F.3d 1084 (9th Cir.), <i>cert. denied</i> , 534 U.S. 888 (2001)
34.	Ramirez, Richard	Granted in District Court (Warden did not appeal)	Guilt	<i>Ramirez v. Vasquez</i> , Order, 91-CV-03802 (C.D. Cal. Feb. 5, 2008)
35.	Sandoval, Alfred	Granted	Penalty	<i>Sandoval v. Calderon</i> , 241 F.3d 765 (9th Cir.), <i>cert. denied</i> , 534 U.S. 847 (2001)
36.	Silva, Benjamin	Granted	Guilt	<i>Silva v. Woodford</i> , 416 F.3d 980 (9th Cir. 2005)
37.	Wade, Melvin	Granted	Penalty	<i>Wade v. Calderon</i> , 29 F.3d 1312 (9th Cir. 1994), <i>cert. denied</i> , 513 U.S. 1120 (1995)
38.	Williams, Michael	Granted in District Court (Parties stipulated to dismissal of appeal)	Penalty	<i>Williams v. Vasquez</i> , Order, 90-1212R (S.D. Cal. Sept. 9, 1993)

**FEDERAL DENIALS OF RELIEF IN CALIFORNIA CAPITAL CASES
(JUDGMENTS ARE FINAL) (N=16)¹⁴⁴**

	Inmate	Result	US Supreme Court Action	Case Citation
1.	Allen, Clarence	Denied by Ninth Circuit	Certiorari Denied	<i>Allen v. Woodford</i> , 395 F.3d 979 (9th Cir.), <i>cert. denied</i> , 546 U.S. 858 (2005)
2.	Anderson, Stephen	Denied by Ninth Circuit	Certiorari Denied	<i>Anderson v. Calderon</i> , 232 F.3d 1053 (9th Cir. 2000), <i>cert. denied</i> 534 U.S. 1036 (2001)
3.	Babbitt, Manuel	Denied by Ninth Circuit	Certiorari Denied	<i>Babbitt v. Calderon</i> , 151 F.3d 1170 (9th Cir. 1998), <i>cert. denied</i> , 525 U.S. 1159 (1999)
4.	Beardslee, Donald	Denied by Ninth Circuit	Certiorari Denied	<i>Beardslee v. Woodford</i> , 358 F.3d 560 (9th Cir.), <i>cert. denied</i> , 543 U.S. 842 (2004)
5.	Bonin, William	Denied by Ninth Circuit	Certiorari Denied	<i>Bonin v. Calderon</i> , 59 F.3d 815 (9th Cir. 1995), <i>cert. denied</i> , 516 U.S. 1051 (1996)
6.	Davis, Larry	Denied by Ninth Circuit	Certiorari Dismissed	<i>Davis v. Woodford</i> , 384 F.3d 628 (9th Cir. 2004), <i>cert. dismissed</i> , 545 U.S. 1165 (2005)
7.	Fields, Stevie	Denied by Ninth Circuit	Certiorari Denied	<i>Fields v. Woodford</i> , 503 F.3d 755 (9th Cir. 2007), <i>cert. denied</i> 128 S.Ct. 1875 (2008)
8.	Harris, Robert	Grant by Ninth Circuit	Reversed	<i>Harris v. Pulley</i> , 692 F.2d 1189, (9th Cir.1982), <i>rev'd</i> , 465 U.S. 37 (1984)
9.	Morales, Michael	Denied by Ninth Circuit	Certiorari Denied	<i>Morales v. Calderon</i> , 388 F.3d 1159 (9th Cir. 2004), <i>cert. denied</i> , 546 U.S. 935 (2005)
10.	Raley, David	Denied by Ninth Circuit	Certiorari Denied	<i>Rayley v. Ylst</i> , 470 F.3d 792 (9th Cir. 2006), <i>cert. denied</i> , 128 S. Ct. 59 (2007)
11.	Rich, Darrell	Denied by Ninth Circuit	Certiorari Denied	<i>Rich v. Calderon</i> , 187 F.3d 1064 (9th Cir. 1999), <i>cert. denied</i> , 528 U.S. 1092 (2000)
12.	Sims, Mitchell	Denied by Ninth Circuit	Certiorari Denied	<i>Sims v. Brown</i> , 430 F.3d 1220 (9th Cir. 2005), <i>cert. denied</i> , 127 S. Ct. 62 (2006)
13.	Siripongs, Jaturun	Denied by Ninth Circuit	Certiorari Denied	<i>Siripongs v. Calderon</i> , 133 F.3d 732 (9th Cir.), <i>cert. denied</i> , 52 U.S. 839 (1998)
14.	Thompson, Thomas	Grant by Ninth Circuit	Reversed	<i>Thompson v. Calderon</i> , 120 F.3d 1045 (9th Cir. 1997), <i>rev'd</i> , 523 U.S. 538 (1998)
15.	Williams, Keith	Denied by Ninth Circuit	Certiorari Denied	<i>Williams v. Calderon</i> , 83 F.3d 281 (9th Cir.), <i>cert. denied</i> , 517 U.S. 1183 (1996)
16.	Williams, Stanley	Denied by Ninth Circuit	Certiorari Denied	<i>Williams v. Woodford</i> , 384 F.3d 567 (9th Cir. 2004), <i>cert. denied</i> , 546 U.S. 934 (2005)

¹⁴⁴ The table includes four cases of California inmates (Mr. Morales, Mr. Fields, Mr. Raley, and Mr. Sims) whose first federal petition is final, but for whom successor litigation may invalidate their convictions or sentences. Similarly, Mr. Davis died prior to a decision regarding his petition for certiorari and thus his case was not a final decision on the merits. Nonetheless, I have included the cases out of an abundance of caution.

**FEDERAL DENIALS OF RELIEF IN CALIFORNIA CAPITAL CASES
(JUDGMENTS ARE NOT FINAL) (N=3)**

	Inmate	Result	US Supreme Court Action	Case Citation
1.	Brown, Albert	Denied by Ninth Circuit	Certiorari Pending	<i>Brown v. Ornoski</i> , 503 F.3d 1006 (9th Cir. 2007), <i>cert. pending</i> (petition filed May 1, 2008)
2.	Cooper, Kevin	Denied by Ninth Circuit		<i>Cooper v. Brown</i> , 510 F.3d 870 (9th Cir. 2007), petition for rehearing pending
3.	Pinholster, Scott	Denied by Ninth Circuit		<i>Pinholster v. Ayers</i> , 525 F.3d 742 (9th Cir. 2008), petition for rehearing to be filed



STATE OF CALIFORNIA
OFFICE OF THE ATTORNEY GENERAL
EDMUND G. BROWN JR.

June 30, 2008

John Van de Kamp, Chairman
Members of the Commission
California Commission on the
Fair Administration of Justice
900 Lafayette Street, Suite 608
Santa Clara, CA 95050

Dear Chairman Van de Kamp and Commission Members:

I appreciate the hard work that went into this report. There are many issues involved in the application of the death penalty in California and I know commission members strove to achieve consensus on meaningful reforms. Regretfully, this goal still eludes us.

Capital litigation constitutes a substantial portion of my office's workload. Our lawyers work every day to defend death penalty judgments consistent with fairness, due process and constitutional requirements. Currently, we are handling some 343 capital cases at various stages of direct appeal to the California Supreme Court, 103 capital cases on habeas corpus in the state courts, 121 capital cases on habeas corpus in the federal district courts, and 16 capital cases in the United States Court of Appeals for the Ninth Circuit. Four condemned inmates have exhausted all challenges to their judgments and await the setting of their execution dates once the status of California's lethal-injection protocol is resolved by the state and federal courts. I know of no defendant facing execution who is innocent of the crime for which he was convicted and sentenced.

I share the Commission's concerns about the high costs associated with capital litigation and about the difficulty in finding and appointing qualified counsel to represent defendants in these cases. I am also concerned about needless delay in reviewing capital judgments, which has a number of causes. While death penalty proceedings warrant exceptionally careful review and cannot be rushed, multiple rounds of repetitive litigation can cause unnecessary delay, increase costs, and undermine respect for the criminal justice system.

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HCP-000780

John Van de Kamp, Chairman

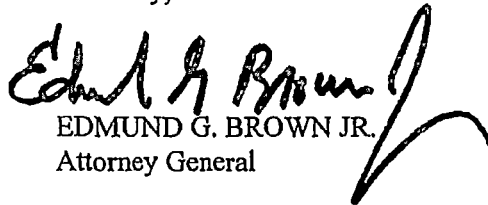
June 30, 2008

Page 2

I agree with the Commission that consideration should be given to seeking a constitutional amendment to permit transferring some death-penalty appeals from the California Supreme Court to the courts of appeal. I also agree that consideration should be given to seeking authorization to allow initiating state capital habeas corpus cases in the trial court, with appellate review in the courts of appeal. I believe that we should promptly begin to work on these proposals, even though their specific features need to be worked out.

I ask that this letter be included with the Commission's report.

Sincerely,



EDMUND G. BROWN JR.
Attorney General

HCP-000781

STATEMENT OF CHIEF WILLIAM J. BRATTON

I believe that the imposition of the Death Penalty is an appropriate remedy. I further believe that the imposition of the penalty should be imposed within a reasonable time and not unduly delayed. There must be an assurance that those convicted of murder and sentenced to death have received adequate representation, a full review of the legal issues involved and that they are in fact guilty of the crimes charged. The improvements in technology and its increased use in the determination of these cases has given me confidence that those who will be convicted and sentenced to death will be guilty of the crimes charged. I have supported the previous recommendations of the Commission regarding eyewitness identification, use of jailhouse informants, confessions, scientific evidence, the professional responsibility and accountability of prosecutors and defense lawyers to further ensure that this occurs.

I support the position that California has a dysfunctional system. A lapse of time of over two decades between sentence and imposition of sentence is unacceptable. To require the family of the victims to have to wait over to 20 years to have the promised punishment imposed only adds to their pain and suffering and renders it an illusory punishment. The legislature and the people of the State of California should undertake a meaningful debate to determine how to correct this problem. I realize correcting the problem will require a large expenditure of funds, at a time when we are facing a budget crisis, and may only result in the imposition of the penalty within ten years rather than 20 years. However, if we are to impose the penalty we should do it as expeditiously as possible, while ensuring that each defendant has received a fair trial and full review of all legal and factual issues.

I do not join in any proposal to limit the ultimate punishment to life without the possibility of parole or in narrowing the list of special circumstances.

**DISSENT TO CALIFORNIA
COMMISSION ON THE FAIR ADMINISTRATION OF JUSTICE
REPORT AND RECOMMENDATIONS ON THE ADMINISTRATION
OF THE DEATH PENALTY IN CALIFORNIA**

June 30, 2008

We respectfully dissent from the *Report and Recommendations on the Administration of the Death Penalty in California*, which was issued today by the California Commission on the Fair Administration of Justice. Regrettably, we believe the majority report indirectly assaults California's death penalty by seeking to undermine public confidence in our capital punishment law and procedure. While the majority refrains from making specific recommendations to weaken this voter approved law, the tone and unbalanced discussion of potential reform is anything but neutral. By doing so, the majority exceeds the scope of its original charge and unfortunately, diminishes the value of other worthwhile recommendations.

The duties of the Commission were to make recommendations as to the application and administration of the criminal justice system in California, not to advocate for or against the public policy issue of whether California should have a death penalty. Although the report purports to be neutral as to capital punishment, it unmistakably reveals a personal bias against the death penalty. The report does not reflect the views of those Commissioners joining this dissent, or those of the majority of Californians.

At the outset, it is important to note two themes in the report with which we wholeheartedly agree. First, delay on appeal and in habeas corpus in state and federal court is excessive and frustrates the effective administration of the death penalty. Second, additional resources should be expended to address a major source of that delay, the availability of sufficient competent appellate counsel, coupled with an increase in the number of attorney general deputies to respond to the appeals and writs. Additional funding for appellate counsel is a realistic measure that could significantly reduce the backlog and the delays that currently plague the administration of the death penalty in California. The Commission has performed an important service in quantifying how much these changes would cost, and the expected benefits from those expenditures. While the total figure of \$95 million is a significant amount of money, it is a small proportion of our state's \$140 billion annual budget, or of our state judicial branch's \$3.5 billion budget.

Unfortunately, the Commission did not limit itself to fact-based recommendations, but added discussion motivated by the personal philosophies of the Commissioners. For example, the majority repeatedly uses the statement that "California's Death Penalty system is dysfunctional."¹ This broad indictment of a criminal sanction that was overwhelmingly approved by voters and still enjoys the Californian's support by a 2 to 1 margin is not simply

¹ See majority report, pp. 3, 6 and 60.

improper – it is highly misleading.² The report quotes California Chief Justice Ronald M. George as stating that the death penalty system in California is “dysfunctional.” However, a careful reading of the Chief Justice’s comments and writings makes clear that he is referring only to the overburdened capital appellate process, and not to the entire death penalty system.³ By completely disregarding this context, the majority effectively bootstraps this comment into a broader indictment of entire death penalty system and law.

The report discusses two “available alternatives” to increased funding: narrowing the list of special circumstances that would make a murder case eligible for the death penalty, and eliminating the death penalty altogether. The Commission purports to “make[] no recommendation regarding these alternatives” and claims that it merely “presents information regarding them to assure a fully informed debate.” But the lengthy discussion of these proposals consists entirely of arguments in favor of these alternatives and excludes any discussion against them. A “fully informed debate” should include both sides of an issue, not just one side.

Reducing the number of special circumstances would exclude some of California’s most brutal murderers from death row. The report goes so far as to suggest that these changes be retroactive to killers already on death row, even though the death penalty was lawfully imposed in those cases at the time. A few examples will illustrate how reducing the number of special circumstances would exclude from the death penalty some of California’s most heinous murders:

- Gregory Scott Smith is on death row for the murder of an 8-year-old boy for whom he was a teacher’s aide.⁴ He had previously been mean to the victim, and on two occasions had tied him up with jump ropes. Angry that the victim had asked that Smith be fired, Smith gagged the victim with a cloth gag and duct tape, forcibly sodomized him, and strangled him. He poured fire accelerant on the body and set the body on fire, where it was discovered burning by firefighters. Smith was convicted of murder in the commission of a kidnapping, a lewd act upon a child, and an act of sodomy. None of these special circumstances would warrant the death penalty under the Commission’s proposal.
- The Commission’s proposal would also exclude Mitchell Sims, known as the Domino’s Pizza Killer, who is on death row with all state and federal review completed.⁵ After ordering pizza to be delivered to his motel room, Sims robbed the delivery driver, tied him up, strangled him with a rope, and fully submerged him in a bathtub with a gag tied into his mouth. After killing the driver, Sims went to Domino’s, robbed two other employees at gunpoint, and forced them into the cooler, suspended with nooses around

² The current death penalty law, Proposition 7, was an initiative approved at the General Election of November 7, 1978, by 72 percent of the voters. (*People v. Teron* (1979) 23 Cal.3d 103, 124-125.) A recent poll shows 63% of adults in favor of the death penalty, 32% opposed, and 5% with no opinion. (Field Poll, March 3, 2006.) For registered voters, the figures were 67% in favor, 29% opposed, and 4% no opinion. (*Ibid.*)

³ California Supreme Court Chief Justice Ronald M. George used the term “dysfunctional” in the narrow context of death penalty appeal delays. In a January 7, 2008 article he wrote: “The existing system for handling capital appeals in California is dysfunctional and needs reform. The state has more than 650 inmates on death row, and the backlog is growing.” (Ronald M. George, Reform Death Penalty Appeals, *Los Angeles Times*, January 7, 2008.)

⁴ *People v. Smith* (2005) 35 Cal.4th 334.

⁵ *People v. Sims* (1993) 5 Cal.4th 405; *Sims v. Brown* (9th Cir. 2005) 425 F.3d 560.

their necks. When one employee warned that the delivery driver was due back, Sims took off his sweater to reveal a Domino's shirt with the driver's name tag and chuckled, "No, I don't think so." Sims was found guilty of murder with special circumstances of murder while lying in wait and during the commission of a robbery, as well as attempted murder and robbery of the other employees. These special circumstances would not warrant the death penalty under the Commission's proposal.

- Stevie Lamar Fields is also on death row, with state and federal review completed.⁶ Shortly after being released from prison for a previous manslaughter, Fields became what the California Supreme Court described as "a one-man crime wave." Sitting in a car with a victim, he fired five shots and told the driver to keep on driving. He said that the victim was not dead and he needed to be sure she was, so he hit her in the head with a blunt object and dumped her body into an alley. He was convicted of robbery-murder with the special circumstance of murder during the commission of a robbery, as well as kidnapping for robbery and forced oral copulation of several other women. Under the Commission's proposal to limit special circumstances, Fields would escape the death penalty.
- The Commission advocates eliminating the death penalty in felony-murder cases. One such case this proposal would exclude is Vicente Benavides, who was sentenced to death for the murder of a 21-month-old girl he was babysitting.⁷ The victim died of an acute blunt force penetrating injury of the anus. The anus was expanded to seven or eight times its normal size, and multiple internal organs were injured. The victim's upper lip was torn, consistent with a hand being held over her mouth, and there was evidence of previous rib fractures. The special circumstances were felony-murder rape, felony-murder rape, and felony-murder sodomy, all of which the proposal would eliminate as bases for the death penalty.

These are but a few examples of special circumstances that voters, prosecutors, and juries have rightly determined to warrant death. The Commission's proposal to eliminate these and many other special circumstances is not a mere efficiency measure, but would seriously weaken California's death penalty law.

The credibility of the report is further damaged by giving serious consideration to a proposal that in order to obtain the death penalty, the prosecution be required to prove that the crime has "legally impacted all citizens of the State of California," an artificial concept that has no precedent in the law and is totally unworkable.

A significant portion of the report is devoted to promising various purported benefits of eliminating the death penalty altogether, including cost savings, shorter periods of jury service, and freeing the Supreme Court to hear more cases of other types. This section makes no attempt to even mention a single argument in favor of the death penalty such as deterrence that will save lives, the community's sense of justice, or upholding the will of the People who enacted the

⁶ *People v. Fields* (1983) 35 Cal.3d 329; *Fields v. Brown* (9th Cir. 2007) 503 F.3d 755.

⁷ *People v. Benevides* (2005) 35 Cal.4th 69.

death penalty.⁸ One of the most important reasons for maintaining the death penalty, its deterrent effect, is quickly dismissed in a footnote earlier in the report as a “contested issue.”⁹

Some of the commissioners came to the project with the unfounded assumption that the death penalty is being administered in a discriminatory manner against minorities, and that prosecutors must be considering some undisclosed improper factors to make decisions. The report engages in a circular logic that bemoans the lack of evidence to support these assumptions, and then proposes establishing another commission, the California Death Penalty Review Panel, to study whether there is any evidence to support these suspicions. In fact, during the 30-year history of California’s death penalty law, there is never been even a single finding of prosecutorial abuse in this decision making process. We oppose the creation of a California Death Penalty Review Panel as an unnecessary creation of another level of bureaucracy.

The report’s apprehension regarding the process utilized by district attorneys to make death penalty decisions is similarly without factual basis. The report begins with the assumption that 87% of first degree murders are eligible for the death penalty, a figure that we cannot accept as accurate. For example, in Ventura County, the District Attorney has sought death in only 4% of the murder cases filed, reserving this decision for the worst of the worst. Statewide, only 2% of “cleared” murder cases have resulted in death verdicts. The formulation of formal written policies as to how prosecutorial discretion will be exercised is not required by law and would serve primarily to create new grounds for condemned prisoners to challenge their convictions. The factors to be considered are already laid out in the statutory enumeration of factors in aggravation and factors in mitigation.

Most puzzling is the lengthy discussion and the call for further study on the issue of “geographic disparity” between the counties, even though the law is clear that uniformity between different jurisdictions is not required. This entire discussion is inappropriate in light of the Commission’s acknowledgement that the “data does not establish that prosecutorial discretion is affected by race and class bias, unconscious or otherwise.” The voters of each county select a District Attorney to enforce the law, including the death penalty, according to his or her exercise of discretion. Uniformity is not mandated and should not have been the subject of the Commission’s agenda.

The Commission discusses the proposal of Ninth Circuit Senior Judge Arthur Alarcon to encourage hearing habeas corpus petitions in Superior Court. The report also discusses the proposal of Chief Justice Ronald M. George to transfer capital appeals from the California Supreme Court to the Courts of Appeal. These are thoughtful proposals from distinguished jurists that merited additional discussion and study before an endorsement by the Commission should have been made. Additional ideas, such as establishing a court of criminal appeals similar to that used in Texas, also warrant discussion, and should have been addressed by the Commission.

⁸ See *Baze v. Rees* (2008) 128 S.Ct. 1520, 1547, 170 L.Ed.2d 420, 450, fn. 13 (Stevens, J., conc.), and 128 S.Ct. at 1553, 170 L.Ed.2d at 456 (Scalia, J., conc.).

⁹ Majority report, p. 4, n. 8.

The report's introduction correctly notes that the commissioners hold a diverse spectrum of divergent views on the death penalty. We respect the diversity of opinion on this issue in our democratic society and have never doubted the sincerity of any of the commissioners in their views. The problem is that the final report is entirely unbalanced. It gives weight only to those who seek to limit or eliminate the death penalty, and ignores views in favor.

We fear that the important accomplishments of the Commission addressing improvements in the administration in the death penalty will be overshadowed by the report's obvious bias against capital punishment. The Commission's report will rightly expose the Commission to extensive criticism where the horrific facts of hundreds of cases impacted by such a policy will be cited in detail. Such recommendations create the likelihood that the Commission will be marginalized and identified as an anti-death penalty body. Under no circumstances can we support or be a silent partner to such a fundamentally flawed effort to weaken our existing death penalty law.

Respectfully submitted,

GREGORY D. TOTTEN
District Attorney
County of Ventura

I join in the dissent:

HAROLD BOSCOVICH
Retired, Director Victim/Witness
County of Alameda

RON COTTINGHAM
President, Peace Officers Research Association of California

PETE DUNBAR
Chief of Police, Pleasant Hill
California Police Chiefs Association Representative

CURTIS HILL
Sheriff
County of San Benito

**STATEMENT OF COMMISSIONER ALEJANDRO MAYORKAS
IN RESPONSE TO REPORT AND RECOMMENDATIONS
ON THE ADMINISTRATION OF THE DEATH PENALTY IN CALIFORNIA**

June 30, 2008

The charge of our Commission has been to assess the administration of criminal justice in California and to recommend improvements. In the last phase of our work as a Commission, we have focused our attention on the administration of the death penalty in particular. I appreciate the strong feelings the death penalty engenders, and understand there are divergent views of the appropriateness of the death penalty itself. However, I do not believe it has been our Commission's charge to opine on whether or not the death penalty should be available as the ultimate sentence, or whether the crimes that qualify for its imposition should be limited in any fashion. To the extent our Commission's final report renders any such opinions, explicitly or implicitly, I respectfully dissent. The decision whether to have a death penalty in California, and to what extent, is within the province of the People of this State, and our charge as a Commission has been to make recommendations we believe will enhance the fair administration of it.

Respectfully submitted,

ALEJANDRO N. MAYORKAS
Commissioner
California Commission on the Fair Administration of Justice

HCP-000788

Supplemental Statement on Repealing the Death Penalty

by the following Commissioners:

Diane Bellas, Alameda County Public Defender
Rabbi Allen I. Freehling, Executive Director, City of Los Angeles Human
Relations Commission

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

June 30, 2008

Introduction

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

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

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

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

Summary of Reasons

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

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

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

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

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

¹ 408 U.S. 238 (1972).

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

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

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

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

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

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

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

Voices of Relatives of Victims

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

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

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

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

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

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

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

Closing

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

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

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

SEPARATE STATEMENT OF COMMISSIONERS JON STREETER,¹
KATHLEEN (COOKIE) RIDOLFI, MICHAEL HERSEK, AND MICHAEL
LAURENCE ACCOMPANYING REPORT AND RECOMMENDATIONS
ON THE ADMINISTRATION OF THE DEATH PENALTY IN CALIFORNIA

June 30, 2008

I. INTRODUCTION

We write separately to address alternatives to this Commission's recommendations for death penalty reform. Although the Commission's Report is complex and lengthy, it documents one simple reality. The death penalty as it is currently structured in California is vastly overbroad and cannot be sustained in its present form at a price that anyone would find even remotely reasonable. To any fair-minded reader, what follows is unavoidable: Our state's death penalty law must be either downsized or eliminated.

No member of the Commission disputed the death penalty's massive financial burden on taxpayers. Some, however, declined to address what should be done if the Commission's recommendations are not adopted. That is why the Report takes a neutral stance on the issue of alternatives. Commissioner Totten's dissent contends that the views of death penalty supporters were ignored in our deliberations, but our collective silence on the issue of alternatives evidences a respectful accommodation of those Commissioners who did not wish to appear to say anything that might somehow undermine the death penalty as it currently exists. Beyond that, we did not consider whether any Commissioner's views were "pro-death penalty" or "anti-death penalty." We looked solely to the fairness and function of our capital punishment system and what it will take to fix the many flaws that we found.

Given our charge, we feel duty bound to comment on what should be done if our reform recommendations are not adopted. Clearly, abolition of the death penalty is one option. The time may be right to put that issue to a statewide vote. Although current polls show continuing public support for the death penalty, whether those polls truly reflect what the voters would choose after being fully informed of the death penalty's costs is open to question. Every judge, every prosecutor, every witness who testified before the Commission gave the same answer to the question of cost; it will take tens of millions of *additional* taxpayer dollars to create a fair and functional capital punishment system. The harsh but incontrovertible reality that we must spend far more just to attain an acceptable level of fundamental fairness is bound to have a profound impact on voters. What we now know about these extraordinary costs fundamentally alters the terms of the public debate and may alone justify returning the death penalty to the ballot by legislative referendum for a *fully informed* up-or-down vote.

¹ Commissioner Streeter, the Vice Chairman of the Commission, is the principal author of this Statement.

The more modest alternative, and the more pragmatic approach, is a ballot referendum designed to narrow the scope of the death penalty. In describing various approaches to narrowing, the Commission's Report does not, in our view, sufficiently emphasize how much the death penalty needs to be cut back to address its mounting costs. To bring about meaningful reform, any narrowing proposal must be designed to reduce the universe of capital-eligible first-degree homicides from 87% to something less than 10%. Only by reducing the sheer volume of cases in the system can we address the root cause of the dysfunction that Chief Justice George described to us. Focusing on the front end by limiting the number of cases eligible for capital charging is crucial. We must be explicit about this goal. Anything less will amount to nothing more than rearranging the deck chairs on the Titanic.

If the recommendations of this Commission are not adopted and if the death penalty is not abolished or narrowed, another option, in theory, is to do nothing. We could just continue to muddle along with our current broken system. That is not a viable option, in our view. To continue spending massive amounts of money at current levels each year only to see the backlog of cases in the system continue to grow larger, rendering the death penalty system increasingly ineffective and increasing prone to the ultimate risk – the execution of innocent people – is impossible to justify. Given the many other critical budget priorities in this State, the fact that we spend well over a hundred million dollars a year to pay for a dysfunctional death penalty system will come as a surprise to voters; the notion of doubling that spend rate to repair it is likely to be taken as an outrage. *Something* must be done. Set forth are what we see as the only reasonable options.

II. ABOLITION OF THE DEATH PENALTY

In broad terms, we embrace the conclusions reached by Commissioner Hing in his Separate Statement calling for abolition of the death penalty. Most basically, we believe that the risk of wrongful conviction and punishment -- a problem that plagues our criminal justice system to a degree that is little known to most citizens -- simply cannot be tolerated when life is at stake.

Commissioner Hing justifies his call for abolition on broader grounds. He is in good company. Many of the reasons he cites may be found in the published opinions of six Justices of the United States Supreme Court who have opined on different occasions since 1970 that the death penalty is unconstitutional, either facially or as applied.² Commissioner Hing is not the first to cite the

² See *Baze v. Rees*, ___ U.S. ___, 2008 LEXIS 3476 (2008) (Stevens, J., concurring in the judgment) (death penalty unconstitutional in all circumstances); *Callins v. Collins*, 510 U.S. 1141 (1994) (Blackmun, J. dissenting from denial of certiorari) (death penalty unconstitutional in all circumstances); *Furman v. Georgia*, 408 U.S. 238 (1972) (separate opinions of Brennan, J. and Marshall, J.) (death penalty unconstitutional in all circumstances); *id.* (separate opinions of Douglas, J., White, J. and Stewart, J.) (death penalty statutes of Georgia and Texas unconstitutional as applied). One other Justice expressed this view following retirement. See John C. Jeffries, *Lewis Powell: A Biography*, at 451 (1994) (reporting Justice Powell's view that the one vote he regretted casting was his tie-breaking vote to sustain the death penalty in *McCleskey v. Kemp*, 481 U.S. 279 (1986)).

exorbitant costs of the death penalty,³ the statistics suggesting racial discrimination,⁴ the disproportionate impact of the death penalty on the poor and the disadvantaged,⁵ the biasing effect of death qualification,⁶ and most importantly, the heightened risk of error in capital cases coupled with the irrevocability of the penalty.⁷

The concerns that Commission Hing so eloquently articulates call into question whether our criminal justice system -- as fine as it is -- is *ever* capable of making life-or-death decisions with the fairness, objectivity, and reliability that we expect of it. The Supreme Court Justices who have cited these same concerns all served as the ultimate custodians of process integrity and fairness for court systems across the country; they sat atop our country's judicial apex, and for them to question whether the courts they oversaw are up to the task in death cases is *very* significant. Indeed, it is striking that several Justices changed their views with experience and after long reflection. At least three of the Justices who are now on record opposing the death penalty began as death penalty supporters on the Court, ultimately concluding, after decades of attempting to address its many flaws, that capital punishment is unworkable in practice.⁸

In California, we have reached a similar tipping point. Based on the extensive record compiled by this Commission, one can fairly conclude, as Justice Blackmun once put it explaining his own views, that the "death penalty experiment has failed."⁹ We find this to be true in California.

³ See *Baze v. Rees*, 2008 LEXIS at ***83 ("The time for a dispassionate, impartial comparison of the enormous costs that death penalty litigation imposes on society with the benefits that it produces has surely come.") (Stevens, J., concurring in the judgment).

⁴ See *Callins v. Collins*, 510 U.S. at 1153 ("Even under the most sophisticated death penalty statutes, race continues to play a major role in determining who shall live and who shall die.") (Blackmun, J. dissenting from the denial of certiorari); see also *McCleskey v. Kemp*, 481 U.S. 279 (1986) (Brennan, dissenting).

⁵ See *Furman v. Georgia*, 408 U.S. at 369 ("It is...evident that the burden of capital punishment falls upon the poor, the ignorant, and the underprivileged members of society. It is the poor, and the members of minority groups, who are least able to voice their complaints against capital punishment.") (separate op. of Marshall, J.).

⁶ See *Baze v. Rees*, 2008 LEXIS at ***88 ("Of special concern to me are rules that deprive a defendant of a trial by jurors representing a fair cross-section of the community.") (Stevens, concurring in the judgment).

⁷ See *Furman v. Georgia*, 408 U.S. at 288 ("The unusual severity of death is manifested most clearly in its finality and enormity.") (Douglas, J. concurring in the judgment); see also Brian Bakst, "O'Connor Questions Death Penalty," Associated Press (July 2, 2001) (quoting a speech by Justice O'Connor in which she stated "[i]f statistics are any indication, the system may well be allowing some innocent defendants to be executed").

⁸ See *Baze v. Rees*, 2008 LEXIS at ***63 (Stevens, J. concurring in the judgment); *Callins v. Collins*, 510 U.S. at 1153 (Blackmun, dissenting from the denial of certiorari); John C. Jeffries, *Lewis Powell: A Biography*, at 451 (1994).

⁹ See *Callins v. Collins*, 510 U.S. at 1130 (Blackmun, J. dissenting from the denial of certiorari).

III. NARROWING OF THE DEATH PENALTY

Although outright abolition would be the cleanest, most definitive approach to death penalty reform if our recommendations are not adopted, we recognize that, ultimately, a political judgment must be made about whether the time is right to seek a fresh electoral choice on whether California ought to have a death penalty. The new information generated by our Report about the dysfunctional state of the death penalty, the massive costs of maintaining it, and the even more massive costs of fixing it, will pave the way to a changed public debate on that topic. Whether the time is right to seek a statewide vote on abolition is debatable. A more modest and pragmatic approach would be to propose a modification of the death penalty that narrows its scope.

A. The Problem of Overbreadth

One of the most significant findings in our Report is that the death penalty encompasses 87% of all first degree murders committed in this state. Commissioner Totten's dissent takes issue with that finding, but the thrust of his criticism is that only a tiny percentage of capital-eligible crimes are charged in most counties. Whether that is the case or not, it begs the question. The gross numbers speak for themselves. There are now 670 condemned inmates on death row. On average, we had 20 new death judgments entering the appellate system annually in the last eight years. We have an accumulated backlog in the Supreme Court of 180 fully briefed appeals and habeas cases awaiting decision, and the Court cannot process more than 30 – 40 of these cases a year.

The sheer volume, statewide, is overwhelming the appellate system. Against this backdrop, local prosecutors may have the perception that they are charging death cases rarely and infrequently, but on a *combined basis* the rate at which they are charging these cases is clogging the Supreme Court's docket and creating delays that were unimaginable when the death penalty was adopted. To make matters worse, there is no statewide fiscal accountability to capital charging. District Attorneys often point out that they are accountable at the ballot box, and if their capital charging policies raise questions, they will be held accountable at election time. But the reality is that, with each capital charging decision, local prosecutors are forcing taxpayers *across the state* to subsidize their cases, often for many years into the future after the cases pass into the hands of the Attorney General at the appellate and collateral review stages. As a result, the vast majority of taxpayers who are actually footing the bill have no say in what these prosecutors are deciding when they make "local" decisions to initiate capital litigation.

B. Carrying Out Narrowing

To address the problem of overbreadth, two basic approaches can be taken: (1) We can add more lawyers and other resources in an effort to beef up the overall litigation capacity of the death penalty system (which is the approach reflected in most of our recommendations), or (2) we can narrow the scope of the death penalty and try to reduce the number of cases that may be charged capitally.

If the Commission's recommendations are not adopted, and if policymakers decline to spend the

amounts needed to repair the dysfunction in the system, there will remain only one possible way to address the problem of excessive capital case volume short of outright abolition -- and that is to narrow capital case eligibility.¹⁰ Suffice it to say that we support the idea of reducing the number of special circumstances to five in accordance with the Constitution Project's Mandatory Justice factors. We are concerned, however, that reducing the number of special circumstances in that fashion will be insufficient to effect a material decrease in the number of capital-eligible cases. To achieve meaningful reform, it is important to constrain *aggressively* the number of capital cases entering the system on the front end. The goal ought to be that less than 10% of first degree murders qualifies for the death penalty, rather than the current 87%. And whatever new guidelines are adopted, we should be explicit about our objective. The rules governing death penalty eligibility must be designed to reduce dramatically the number of capital cases entering the system. Tinkering around the edges will not do.

The proposal made by Commissioner Streeter to supplement the Mandatory Justice factors with a statewide "citizen impact" requirement may be one way to achieve the kind of dramatic reduction that we envision.¹¹ The dissent by Commission Totten expresses skepticism about this proposal on the grounds that it purportedly has "no precedent in law" and would be "totally unworkable." In fact, what has "no precedent in law" is our California death penalty system as it is currently administered. No other state has as many special circumstances as we do in California; no other state sentences to death as many people as we do in California; no other state and probably no other country in the world has anything close to the number of inmates we have on death row; no other state has the combined appellate and post-conviction delays that we do in California; and no other state spends the amounts of money that we do in California, to such little effect. To deal with this unusual state of affairs, unusual measures will be required.

The idea of imposing a statewide "citizen impact" requirement is, in any event, in accord with what courts do all the time in the context of change of venue motions, where the problem of media saturation is frequently litigated, without difficulty. The same or similar forensic techniques for marshalling proof in change of venue motions (e.g. use of demographic surveys) could certainly be used. In fact, in most cases where change of venue motions are granted, the level of media saturation that is proved would probably meet the kind of statewide "citizen impact" requirement that Commissioner Streeter has proposed, since those cases often involve the kinds of crimes that are notorious for the widespread fear and anxiety that they engender.

The bottom line is that some guidelines must be put in place to create statewide accountability, and the "citizen impact" concept is as good a way as any. It is understandable that a county prosecutor would view the proposed "citizen impact" requirement as "totally unworkable." This new hurdle would constrain his power to bring capital charges for crimes of great local concern. But that is the whole point of it. We must move away from a system in which local prosecutors are free to make capital charging decisions based on considerations of purely local concern. The grisly crimes such as those described by Commissioner Totten's dissent are unimaginably

¹⁰ We will not reiterate here the mechanics by which the death penalty law may be narrowed. That topic is covered thoroughly in the body of our Report.

¹¹ See Commission Report at 67 - 68.

horrible. But every first degree murder, by definition, involves some sort of heinous outrage. Hundreds of these cases are charged statewide every year. The combined effect of making 87% of them automatically eligible for the death penalty in all 58 counties without some mechanism to *force* consideration of broader statewide interests, naturally, is going to result in runaway costs. Which is exactly what has happened.

C. Geographic Disparity and Racial Discrimination

Although significantly reducing the sheer number of capital cases coming into the criminal justice system every year is, by itself, a compelling justification for narrowing death penalty eligibility, we find one other consideration significant. The overbreadth of the death penalty law is closely related to issues of geographic disparity and racial discrimination. Addressing overbreadth in an effective way will help put to rest concerns in these related areas as well.

The Commission's Report covers geographic variation thoroughly. We will make only brief additional comment. The scope of the current law permits broad variation in capital charging among the individual counties. Although some degree of unpredictability and randomness may be perfectly acceptable as a general matter in a criminal justice system that consists of 58 separate counties, it is deeply troubling in death penalty administration.¹² Direct oversight from the state level may not be feasible given the decentralized structure of state and county governments, but some indirect means of enforcing uniformity is desirable. We commented above on one possible mechanism. Adopting specific measures designed to ensure financial accountability -- through one of the many fiscal tools the state has at its disposal vis-à-vis county governments -- might be another approach. We do not suggest shifting the costs of these cases entirely to the counties. But some means can surely be devised by which the treasuries of counties who use the death penalty most frequently will feel the budgetary effects of their capital charging decisions.

The issue of racial discrimination is an entirely different matter, and as is so often the case, it is rife with misunderstanding. It may be, as Commissioner Totten suggests in his dissent, that only a small fraction of the 87% of first degree murders meeting the criteria for capital eligibility is actually charged capitally, but what that necessarily means is that broad discretion is being used to screen out hundreds of individuals from the death penalty each year. Each of those decisions is momentous for the people involved, perhaps more momentous than any other decision that prosecutors make. In any situation where there is such vast discretion and the stakes are so high for the affected individuals, special care must be taken to ensure that every aspect of the decision-making process is not only carried out in manner that is objective and even-handed, but that it carries the *appearance* of fair and even-handed treatment.

Commissioner Totten's dissent suggests that some members of the Commission came to their task with the pre-existing belief that capital charging is infected with racial discrimination. That

¹² Cf. *Furman v. Georgia*, 408 U.S. at 288 (death penalty imposed so "wantonishly and freakishly" is cruel and unusual for the same reason that "being hit by lightning" is cruel and unusual) (Stewart, J. concurring in the judgment).

is an inaccurate and unfortunate charge. For our part, we do not doubt in the least the good faith and integrity shown by the prosecutors on this Commission, as well as by those who testified before it; we believe that their views are generally reflective of views that are held widely by prosecutors in this state; and we accept that, save for rare situations in which misconduct surfaces and a prosecutor violates his or her oath, prosecutors take no account of race when they decide who merits the death penalty. But nevertheless, there are troubling indications in the aggregate statistics presented by professors Pierce and Radelet that this Commission reviewed. Those statistics clearly *suggest* that race plays a part in the selection of who must face the death penalty.

There may be many innocent explanations for any particular type of differential treatment, but it is critical not to be dismissive of the concerns raised here. In communities of color, confidence in prosecuting agencies can easily erode when members of those communities come to suspect improper racial motivations by law enforcement; that, in turn, can hinder the effectiveness of these very agencies in serving all of their constituents. We do not take the Pierce and Radelet study as proof of discrimination on the part of any individual decision maker, but the empirical methods used by these two expert statisticians are reliable enough to raise questions that require serious further attention.¹³ In fact, the study raises exactly the kind of questions, whether ultimately proved to be legitimate or not, that can destroy the trust and confidence that members of communities of color are entitled to have in prosecuting agencies. For this reason, we are disappointed that we did not see a greater receptiveness to the need for transparency in the capital charging process among the prosecution and law enforcement members of this Commission. In no way, however, does that disappointment amount to some kind of predisposition by any member of this Commission to assume improper racial motivations in capital charging.

IV. DOING NOTHING

Chief Justice George did not elaborate on what he meant when he testified that the continued growth in the capital case backlog, if unchecked, will at some point cause the system to "collapse[] of its own weight." But if the delays in our system continue to grow, it is not hard to envision, in legal terms, what could happen: The wholesale invalidation of capital punishment in California. It happened once before, following the United States Supreme Court's decision in *Furman v Georgia* in 1972 when the death penalty statutes of Georgia and Texas were declared

¹³ As explained by Justice Brennan's dissent in *McCleskey v. Kemp*, 481 U.S. at 327, where a study very similar to that done by Pierce and Radelet was presented:

[The] statistics have particular force because most of them are the product of sophisticated multiple-regression analysis. Such analysis is designed precisely to identify patterns in the aggregate, even though we may not be able to reconstitute with certainty any individual decision that goes to make up that pattern...[A] multiple-regression analysis need not include every conceivable variable to establish a party's case, as long as it includes those variables that account for the major factors that are likely to influence decisions.

unconstitutional in its application under the cruel and unusual punishment clause of the Eighth Amendment.

The key votes in *Furman* were by Justices William O. Douglas, Potter Stewart and Byron White, each of whom voted to strike down capital punishment in Georgia and Texas as applied. In effect, these Justices hit the constitutional equivalent of a computer "re-set" button, invalidating all convictions under the challenged statutes – and under similar statutes across the country, including California – but allowing state legislators to write new death penalty legislation designed to cure the defects that they found. The practical result was that death rows in all of these states were cleared out; formerly condemned inmates received life sentences; and whatever backlogs existed on the death rows of these states prior to *Furman* suddenly disappeared.

Justice White's rationale for finding the Georgia and Texas death penalty statutes unconstitutional has particular resonance in the context of the situation we face now in California. As he explained it,

[T]he [death] penalty has not been considered cruel and unusual punishment in the constitutional sense because it was thought justified by the social ends it was deemed to serve. *At the moment that it ceases realistically to further these purposes, however, the emerging question is whether its imposition in such circumstances would violate the Eighth Amendment.* It is my view that it would, for its imposition would then be the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes. A penalty with such negligible returns to the State would be patently excessive and cruel and unusual punishment violative of the Eighth Amendment.

It is also my judgment that this point has been reached with respect to capital punishment as it is presently administered under the statutes involved in these cases. Concededly, it is difficult to prove as a general proposition that capital punishment, however administered, more effectively serves the ends of the criminal law than does imprisonment. But however that may be, I cannot avoid the conclusion that as the statutes before us are now administered, the penalty is so infrequently imposed that the threat of execution is too attenuated to be of substantial service to criminal justice.

Furman v. Georgia, 408 U.S. at 312 (emphasis added) (White, J., concurring in the judgment).

Given the lengthy and growing delays documented by the Commission in its Report, the rationale applied by Justice White in his *Furman* opinion ought to be kept in mind. Even if we were to accept as true the theoretical arguments that capital punishment can deter crime and serve as a force for community retribution, our Report casts serious doubt on whether the death penalty in this State carries out either objective, effectively or at all. Whatever the academics say, no one can credibly suggest that the death penalty deters anything or expresses any clear sense of community outrage when the time from conviction to execution averages over two decades. Under these circumstances, the death penalty, as it is currently administered in California, is now at or near the point where it has effectively ceased to carry out the purposes for which it was

designed.¹⁴

A declaration that California's death penalty is unconstitutional as applied would render invalid the sentences of all of those who are currently on death row, resulting in the waste of what is now well over a billion dollars in taxpayer dollars that has so far been spent litigating these cases, and forcing either de facto abolition or adoption of a new, narrower death penalty law. In order to avoid this train-wreck scenario, something must be done to repair the death penalty system. Doing nothing is not a viable option. We do not predict a wholesale constitutional attack on California's death penalty system or comment on the correctness of any such attack, if it were ever made. We simply raise the question in order to illustrate that the consequences of leaving things as they are could conceivably lead to an unplanned result that may be as unwelcome in some quarters as it is avoidable. The flipside of this point is equally valid. For those who may view wholesale invalidation as a welcome result, the uncertainty that successful legal resort could eventually be had in the courts is reason enough to accept something less than might justifiably be demanded, purely in the interest of ensuring that something meaningful is done.

V. CONCLUSION

We believe that the alternative of narrowing the death penalty has great merit. This approach to death penalty reform is attractive to us because it is the most practical and perhaps the most achievable alternative.

The death penalty is obviously a controversial topic, bound to stir up strong views on both sides of any policy discussion. Certainly, in the course of our deliberations we had many spirited discussions about the best approach to death penalty reform. Forceful and respectful contentions were advanced from many perspectives. The discussions involved a degree of collective problem-solving among highly skilled and experienced professionals that was truly inspiring. If the Commission's recommendations are not adopted, we would like to see the spirit of accommodation and mutual respect that characterized our deliberations continued. That is a significant reason why we propose narrowing the death penalty. Even the most basic and fundamental policy choices to be made here need not involve a zero sum game in which one point of view "wins" and one point of view "loses."

For us, narrowing is a second-best policy solution, but it is one that the evidence before the Commission fully supports. The Commissioners who took a pro-death penalty stance on the Commission have genuine and strongly-held convictions about capital punishment. The same may be said for Commissioners who question the wisdom of the death penalty. Undoubtedly, both views are broadly reflective of the opinions of millions of California voters. We believe that narrowing the death penalty represents an effort to reconcile these contending points of view, at least at some level. Not everyone on either side would be satisfied fully with a substantially

¹⁴ See *Gomez v. Fierro*, 519 U.S. 918 (1996) (delays in implementation of the death penalty can be so substantial as to eviscerate the only justification under the Eighth Amendment for that kind of punishment) (Stevens, J., dissenting from the granting of certiorari) ; see also *Lackey v. Texas*, 514 U.S. 1045 (1995) (same) (Stevens, J., respecting the denial of certiorari).

narrowed death penalty. Far from it. For many on both sides, the issue is deeply infused with moral considerations and cannot be compromised. But the Commission as a whole decided early on that it would not attempt to weigh the morality of the death penalty. Rather, the Commission decided that it would seek practical solutions. In our view, the option of narrowing the death penalty is just such a solution.

EXHIBIT 43

Amnesty International's 2014 Death Sentences and Executions

DEATH SENTENCES AND EXECUTIONS

2014

AMNESTY
INTERNATIONAL



HCP-000806

Amnesty International is a global movement of more than 7 million people who campaign for a world where human rights are enjoyed by all.

Our vision is for every person to enjoy all the rights enshrined in the Universal Declaration of Human Rights and other international human rights standards.

We are independent of any government, political ideology, economic interest or religion and are funded mainly by our membership and public donations.

AMNESTY
INTERNATIONAL



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<i>Insert:</i> Death penalty in 2014 Exccuting countrics in 2014 Death penalty trends 1995-2014

Note on Amnesty International figures on the use of the death penalty

This report covers the judicial use of the death penalty for the period January to December 2014. As in previous years, information is collected from a variety of sources, including: official figures; information from individuals sentenced to death and their families and representatives; reporting by other civil society organizations; and media reports. Amnesty International reports only on executions, death sentences and other aspects of the use of the death penalty, such as commutations and exonerations, where there is reasonable confirmation. In many countries governments do not publish information on their use of the death penalty, making confirmation of the use challenging. In Belarus, China and Viet Nam, data on the use of the death penalty is classified as a state secret. During 2014 little or no information was available on some countries - in particular Eritrea, Malaysia, North Korea and Syria, due to restrictive state practice and/or political instability.

Therefore, with only a few exceptions, Amnesty International's figures on the use of the death penalty are minimum figures. Where we obtain fuller information on a specific country in a given year this is noted in the report.

In 2009 Amnesty International stopped publishing its estimated figures on the use of the death penalty in China; this decision reflected concerns about how the Chinese authorities misrepresented Amnesty International's estimated numbers. In stopping publishing estimates on China the organization challenged China to publish information on the use of the death penalty. China has yet to publish any figures on the death penalty. However, available information indicates that thousands of people are executed and sentenced to death in China each year.

Where Amnesty International receives and is able to verify new information after publication of this report, it updates its figures online at www.amnesty.org/deathpenalty.

Where "+" appears after a figure next to the name of a country – for instance, Yemen (22+) – it means that this is the minimum figure calculated by Amnesty International. Where "+" appears after a country name without a figure – for instance, death sentences in South Sudan (+) – it means that there were executions or death sentences (more than one) in that country but insufficient information to provide a credible minimum figure. When calculating global and regional totals, "+" has been counted as 2, including for China.

Amnesty International opposes the death penalty in all cases without exception regardless of the nature or circumstances of the crime; guilt, innocence or other characteristics of the individual; or the method used by the state to carry out the execution. The organization campaigns for total abolition of capital punishment.

SUMMARY

“There are too many flaws in the system. And when the ultimate decision is death there is too much at stake to accept an imperfect system”

Jay Inslee, Governor of Washington State, USA, 11 February 2014

Amnesty International recorded executions in 22 countries in 2014, the same number as in 2013.¹ At least 607 executions were carried out worldwide, a decrease of almost 22% compared with 2013. As in previous years, this figure does not include the number of people executed in China, where data on the death penalty is treated as a state secret. At least 2,466 people are known to have been sentenced to death in 2014, an increase of 28% compared with 2013. This increase was largely due to sharp spikes in death sentences in Egypt and Nigeria, where courts imposed mass sentences against scores of people in some cases.

An alarming number of countries that used the death penalty in 2014 did so in response to real or perceived threats to state security and public safety posed by terrorism, crime or internal instability. For example, Pakistan lifted a six-year-long moratorium on the execution of civilians in the wake of the horrific Peshawar school attack. The government also pledged to execute hundreds of people on death row who had been convicted on terrorism-related charges. China made use of the death penalty as a tool in the “Strike Hard” campaign, which the authorities characterized as a response to terrorism and violent crime in the Xinjiang Uighur Autonomous Region.

There is no evidence that the death penalty has a greater deterrent effect on crime than terms of imprisonment. Where governments present the death penalty as a solution to crime

¹ In 2013 and in 2014 Amnesty International was unable to confirm whether executions were carried out in Syria.

or insecurity they are not only misleading the public but – in many cases – failing to take steps to realize the goal of abolition recognized in international law.²

Many of those states that retain the death penalty continued to use it in contravention of international law and standards. Unfair trials, "confessions" extracted through torture or other ill-treatment, the use of the death penalty against juveniles and people with mental or intellectual disabilities, and for crimes other than "intentional killing" continued to be concerning features of the use of the death penalty in 2014.

Despite these concerns, the world continues to make progress towards abolition.

With the exception of Europe and Central Asia region, where Belarus – the only country in the region that executes – resumed executions after a 24-month hiatus, Amnesty International documented positive developments in all regions of the world. The Sub-Saharan Africa region saw particular progress, with 46 executions recorded in three countries, compared to 64 executions in five countries in 2013 – a 28% reduction. The number of executions recorded in the Middle East and North Africa region decreased by approximately 23% - from 638 in 2013 to 491 in 2014. In the Americas, the USA is the only country that executes, but executions dropped from 39 in 2013 to 35 in 2014, reflecting a steady decline in executions over recent years. The state of Washington imposed a moratorium on executions.

Fewer executions were recorded in the Asia-Pacific region, excluding China, and debates on abolition began in Fiji, South Korea and Thailand.

² Article 6(6) of the International Covenant on Civil and Political Rights states clearly that provisions in the same Article allowing for the use of the death penalty under certain circumstances "shall not be invoked to delay or to prevent the abolition of capital punishment". In its General Comment no.6, the UN Human Rights Committee has stated that Article 6 "refers generally to abolition in terms which strongly suggest [...] that abolition is desirable. The Committee concludes that all measures of abolition should be considered as progress in the enjoyment of the right to life". Human Rights Committee, General Comment No.6, Article 6 (Sixteenth session, 1982), Compilation of general comments and general recommendations adopted by human rights treaty bodies, UN doc. HRI/GEN/1/Rev.9, May 2008.

THE USE OF THE DEATH PENALTY IN 2014

“We must continue to argue strongly that the death penalty is unjust and incompatible with fundamental human rights”

UN Secretary-General Ban Ki-moon, 10 October 2014

GLOBAL FIGURES

EXECUTIONS

Amnesty International recorded executions in 22 countries in 2014, the same number of countries as in 2013. Although the number remained constant, there were some changes in the countries carrying out executions. Seven countries that executed in 2013 did not do so in 2014 (Bangladesh, Botswana, Indonesia, India, Kuwait, Nigeria and South Sudan) while seven others resumed executions (Belarus, Egypt, Equatorial Guinea, Jordan, Pakistan, Singapore and the United Arab Emirates [UAE]). Amnesty International was unable to confirm whether judicial executions took place in Syria.

At least 607 executions were carried out worldwide, a decrease of almost 22% compared to the figures recorded for 2013. This figure does not include the number of people who were believed to have been executed in China. In 2009 Amnesty International stopped publishing the organization's estimated figures on the use of the death penalty in China, where data on capital punishment is considered a state secret. Instead the organization has challenged the Chinese authorities to prove their claims that they are achieving their goal of reducing the application of the death penalty by publishing the figures themselves. (see page 26).

REPORTED EXECUTIONS IN 2014

Afghanistan (6), Belarus (3+), China (+), Egypt (15+), Equatorial Guinea (9), Iran (289+), Iraq (61+), Japan (3), Jordan (11), Malaysia (2+), North Korea (+), Pakistan (7), Palestine (State of) (2+, Hamas authorities, Gaza), Saudi Arabia (90+), Singapore (2), Somalia (14+), Sudan (23+), Taiwan (5), UAE (1), USA (35), Viet Nam (3+) and Yemen (22+)

Three countries – Iran, Iraq and Saudi Arabia – were responsible for 72% of the 607 recorded executions. In Iran the authorities officially announced 289 executions, but hundreds more were carried out which were not officially acknowledged.

DEATH SENTENCES

At least 2,466 people in 55 countries are known to have been sentenced to death in 2014. This represents an increase of 28% compared with 2013, when 1,925 death sentences were recorded in 57 countries. This increase was largely due to sharp spikes in death sentences in Egypt (from 109 in 2013 to 509 in 2014) and Nigeria (from 141 in 2013 to 659 in 2014), both countries in which courts imposed mass sentences in some cases.

REPORTED DEATH SENTENCES IN 2014

Afghanistan (12+), Algeria (16+), Bahrain (5), Bangladesh (142+), Barbados (2), Botswana (1), China (+), Congo (Républic of) (3+), Democratic Republic of Congo (DRC) (14+), Egypt (509+), Gambia (1+), Ghana (9), Guyana (1), India (64+), Indonesia (6), Iran (31+), Iraq (38+), Japan (2), Jordan (5), Kenya (26+), Kuwait (7), Lebanon (11+), Lesotho (1+), Libya (1+), Malaysia (38+), Maldives (2), Mali (6+), Mauritania (3), Morocco/Western Sahara (9), Myanmar (1+), Nigeria (659), North Korea (+), Pakistan (231), Palestine (State of) (4+ Hamas authorities, Gaza), Qatar (2+), Saudi Arabia (44+), Sierra Leone (3), Singapore (3), Somalia (52+), Somali Federal Government (1+), Puntland (10+), Somaliland, South Korea (1), South Sudan (+), Sri Lanka (61+), Sudan (14+), Taiwan (1), Tanzania (91), Thailand (55+), Trinidad and Tobago (2+), Tunisia (2+), Uganda (1), UAE (25), USA (72+), Viet Nam (72+), Yemen (26+), Zambia (13+) and Zimbabwe (10).

For some countries, such as Nigeria and Tanzania, the rise in the number of recorded death sentences is also partly due to the authorities providing more complete data to Amnesty International.

At least 19,094 people were believed to be under sentence of death worldwide at the end of 2014.

COMMUTATIONS, PARDONS AND EXONERATIONS

Commutations or pardons of death sentences were recorded in 28 countries: Antigua and Barbuda, Bahamas, Bahrain, Bangladesh, Egypt, Ghana, India, Iran, Iraq, Jamaica, Jordan, Kuwait, Malaysia, Mali, Myanmar, Nigeria, Saudi Arabia, Sierra Leone, Singapore, South Korea, Sri Lanka, Sudan, Tunisia, Trinidad and Tobago, UAE, USA, Viet Nam and Zimbabwe.

Amnesty International recorded 112 exonerations of death row prisoners in nine countries: Bangladesh (4), China (2), Jordan (1), Nigeria (32), Sudan (4), Tanzania (59), USA (7), Viet Nam (2) and Zimbabwe (1).³ The release of prisoners from death row on the grounds of

³ Exoneration is the process where, after sentencing and the conclusion of the appeals process, the convicted person is later freed from blame or acquitted of the criminal charge, and therefore is regarded as innocent in the eyes of the law. Iwao Hakamada was temporarily released in Japan pending retrial and therefore his case is not included in this list.

innocence exposes the fallibility of human justice and sparked debates on the death penalty in several countries, including countries where support for capital punishment has traditionally been strong, such as China, Japan, Viet Nam and the USA.

HOW THE DEATH PENALTY WAS USED IN 2014

The following methods of executions were used: beheading (Saudi Arabia), hanging (Afghanistan, Bangladesh, Egypt, Iran, Iraq, Japan, Jordan, Malaysia, Pakistan, Palestine, Singapore, Sudan), lethal injection (China, USA, Viet Nam) and shooting (Belarus, China, Equatorial Guinea, North Korea, Palestine, Saudi Arabia, Somalia, Taiwan, UAE, Yemen).

As in previous years, there were no reports of judicial executions carried out by stoning. In UAE one woman was sentenced to death by stoning for committing "adultery" while married. Public executions were carried out in Iran and Saudi Arabia.

Amnesty International has received reports indicating that at least 14 people were executed in Iran for crimes they allegedly committed when they were under 18 years of age. Egypt, Iran and Sri Lanka sentenced juvenile offenders to death in 2014. The imposition and execution of the death penalty against people aged under 18 when the crime was committed is a violation of international law. Often the actual age of the offender is in dispute because no clear proof of age, such as a certificate of registration at birth, exists.⁴ Amnesty International remained concerned that in Iran, Maldives, Nigeria, Pakistan, Saudi Arabia, Sri Lanka and Yemen, people who were juveniles at the time of their alleged crimes were under sentence of death during 2014.

People with mental or intellectual disabilities were under sentence of death in several countries including Indonesia, Japan, Malaysia, Pakistan, Trinidad and Tobago and the USA.

In the majority of countries where people were sentenced to death or executed, the death penalty was imposed after proceedings that did not meet international fair trial standards. In 2014 Amnesty International raised particular concerns in relation to court proceedings in Afghanistan, Bangladesh, China, Egypt, Iran, Iraq, North Korea, Pakistan, Saudi Arabia and Sri Lanka. In several countries – including Afghanistan, Bahrain, China, Iran, Iraq, North Korea and Saudi Arabia – sentences were based on "confessions" that may have been extracted through torture or other ill-treatment. In Iran some of these "confessions" were broadcast on television before the trial took place, further breaching the defendants' right to presumption of innocence.

⁴ Governments should apply a full range of appropriate criteria in cases where age is in dispute. Good practice in assessing age includes drawing on knowledge of physical, psychological and social development. Each of these criteria should be applied in a way that gives the benefit of doubt in disputed cases so that the individual is treated as a juvenile offender, and accordingly should ensure that the death penalty is not applied. Such an approach is consistent with the principle that the best interests of the child shall be a primary consideration in all actions concerning children, as required by Article 3(1) of the UN Convention on the Rights of the Child.

Mandatory death sentences continued to be imposed in Barbados, Iran, Malaysia, Pakistan, Singapore and Trinidad and Tobago. Mandatory death sentences are inconsistent with human rights protections because they do not allow any possibility of taking into account the defendant's personal circumstances or the circumstances of the particular offence.

People continued to be sentenced to death or executed for crimes that did not involve intentional killing, and therefore did not meet the threshold of "most serious crimes", as prescribed by Article 6 of the International Covenant on Civil and Political Rights (ICCPR). The death penalty was imposed or implemented for drug-related offences in a number of countries, including China, Indonesia, Iran, Malaysia, Saudi Arabia, Singapore, Sri Lanka, Thailand, UAE and Viet Nam.

Other capital crimes which did not meet the standard of "most serious crimes" but for which the death penalty was imposed in 2014 included: economic crimes such as corruption (China, North Korea and Viet Nam); armed robbery (DRC); committing "adultery" while married (UAE); rape that resulted in death (Afghanistan); rape committed by repeat rape offenders (India), rape (Saudi Arabia, UAE); kidnapping (Saudi Arabia); torture (Saudi Arabia); "insulting the prophet of Islam" (Iran); blasphemy (Pakistan); "witchcraft" and "sorcery" (Saudi Arabia).

Finally, different forms of "treason", "acts against national security", "collaboration" with a foreign entity, "espionage", participation in "insurrectional movement and terrorism" and other "crimes against the state", whether or not they led to a loss of life, were punished with death sentences in Lebanon, North Korea, Palestine (in the West Bank and in Gaza), Qatar and Saudi Arabia.

THE DEATH PENALTY AND INTERNATIONAL INTERGOVERNMENTAL ORGANIZATIONS IN 2014

- Of the 35 member states of the Organization of American States, only the USA carried out executions.
- Of the 57 member states of the Organization for Security and Co-operation in Europe, only Belarus and the USA carried out executions.
- Four of the 54 member states of the African Union were known to have carried out judicial executions: Egypt, Equatorial Guinea, Somalia and Sudan.
- Nine of the 21 member states of the League of Arab States are known to have carried out executions: Egypt, Iraq, Jordan, Palestine, Saudi Arabia, Somalia, Sudan, UAE and Yemen.⁵
- Three of the 10 member states of the Association of Southeast Asian Nations are known to have carried out executions: Malaysia, Singapore and Viet Nam.
- Three of the 53 member states of the Commonwealth were known to have carried out executions: Malaysia, Pakistan and Singapore.

⁵ Syria's membership was suspended because of the violence used to suppress uprisings. Due to the ongoing conflict, Amnesty International could not confirm any information on the use of the death penalty in Syria in 2014.

Three of the member and observer states of the Organisation internationale de la Francophonie are known to have carried out executions: Egypt, United Arab Emirates and Viet Nam.

Japan and the USA were the only countries in the G8 to carry out executions.

173 of the 193 member states of the UN were execution-free in 2014.

POSITIVE DEVELOPMENTS

The number of executions recorded in 2014 decreased by 22% compared with 2013. In Sub-Saharan Africa, 46 executions were recorded in three countries compared to 64 executions in five countries in 2013 – a 28% drop. Only Equatorial Guinea, Somalia and Sudan are known to have carried out executions. The number of executions recorded by Amnesty International in the Middle East and North Africa decreased by approximately 23%, from 638 in 2013 to 491 in 2014. In the Americas, the USA continued to be the only country to implement death sentences – but executions dropped from 39 in 2013 to 35 in 2014, reflecting a steady decline in executions.

A number of positive legislative developments were also recorded. In December the National Assembly of Madagascar adopted legislation to abolish the death penalty. Similar bills remained pending before legislative bodies in Benin, Chad, Fiji, Mongolia and Suriname.⁶ The Parliament of Barbados began considering draft legislation aimed at abolishing the mandatory death penalty. In February, the US state of Washington imposed a moratorium on executions.

El Salvador, Gabon and Poland became state parties to the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, on 8 April, 2 April and 24 April respectively. On 23 May, Poland also ratified Protocol No. 13 to the (European) Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the death penalty in all circumstances.

In December the UN General Assembly adopted its fifth resolution on a moratorium on the use of the death penalty. The number of votes in favour of resolution 69/186 increased by six, from 111 in 2012 to 117 in 2014, while 38 voted against and 34 abstained.⁷ Six more countries supported the resolution compared to last time a similar vote took place in 2012.⁸ New votes in favour of the 2014 resolution came from Equatorial Guinea, Eritrea, Fiji, Niger and Suriname. In a further positive sign, Bahrain, Myanmar, Tonga and Uganda moved from opposition to abstention. Regrettably, Papua New Guinea moved from abstention to a vote against the resolution.

⁶ The bills were adopted in Fiji and Suriname in February and March 2015 respectively.

⁷ The USA voted against the resolution but its vote was not captured in the official voting sheet.

⁸ On 20 December 2012, 111 states voted in favour, 41 against and 34 abstained in the vote on the UN General Assembly resolution 67/176. The full list of co-sponsors of and voting on the 2014 resolution can be found in Annex IV of this document.

New additions to the text of the 2014 resolution included calls on all states to comply with their obligations under the 1963 Vienna Convention on Consular Relations and respect the right of foreign nationals to receive information on consular assistance when legal proceedings are initiated against them; make available relevant information on the countries' use of the death penalty "disaggregated by sex, age and other criteria" as well as on the number of commutations, acquittals and pardon granted; and to not expand the scope of the death penalty.

CAMPAIGNING AGAINST THE DEATH PENALTY: AMNESTY INTERNATIONAL'S CONTRIBUTIONS

Throughout 2014, together with other members of civil society and stakeholders in all regions, Amnesty International activists helped to stop executions and secure positive action on the death penalty in a number of states. For example:

On 27 March Iwao Hakamada was temporarily released from death row in Japan pending a retrial. He had spent 45 years at the Tokyo Detention Centre under sentence of death, and developed a severe mental illness during his time on death row. Amnesty International's members had been campaigning on his behalf for nearly a decade.

Chandran s/o Paskaran was spared execution in Malaysia on 7 February after an outcry from human rights groups, including Amnesty International.

Osariakhi Ernest Obyangbon, a Nigerian national, was due to be executed in Malaysia on 14 March 2014. He had not received a fair trial and had been diagnosed as having schizophrenia, for which he had been receiving treatment before his appeal in 2007. Amnesty International was notified of the imminent execution 36 hours before it was due to be carried out and issued urgent appeals to the Malaysian authorities. After Osariakhi Ernest Obyangbon's execution was stayed, his brother wrote to Amnesty International, saying: "I am profoundly grateful to you and your entire team for saving my brother's life at the last minute. My brother was already moved from his room to the execution room and given different clothes to wear for the execution before you saved his life. We, the members of his family, will forever appreciate your magnanimity towards him." Both Chandran s/o Paskaran and Osariakhi Ernest Obyangbon remain on death row.

ThankGod Ebhos was sentenced to death in Nigeria in 1995. On 23 June 2013 he was taken to the gallows with four other men, all of whom were hanged in front of him. At the last minute, the prison authorities realized that ThankGod Ebhos's death sentence required a firing squad and he was returned to his cell. On 24 October, following campaigns against his execution, ThankGod Ebhos was released from death row.

Meriam Yehya Ibrahim was released from prison in Sudan, on 23 June. Her death sentence for apostasy, imposed by a Khartoum court on 15 May, was overturned by an appeals court. Meriam Yehya Ibrahim's case attracted widespread international attention with over one million people responding to Amnesty International's appeal for her release.

On 3 December the Court of Appeals for the Fifth Circuit stayed the execution of Scott Panetti in Texas, USA, less than eight hours before it was due to be carried out. His mental illness, which included schizophrenia, predated, and apparently contributed to, the murder for which he was sentenced to death. Amnesty International began campaigning on his behalf in 2004.

THE USE OF THE DEATH PENALTY TO COMBAT CRIME AND INSECURITY

Many countries that imposed or implemented death sentences in 2014 did so in response to real or perceived threats to state security and public safety posed by terrorism, crime or internal instability.

- **Pakistan** lifted a six-year long moratorium on the execution of civilians in the wake of the horrific Peshawar school attack. Seven people were executed in less than two weeks at the end of 2014. The government also pledged to execute hundreds of people on death row who had been convicted on terrorism-related charges.
- **China** made use of the death penalty as a tool in the “Strike Hard” campaign, which the authorities characterized as a response to terrorism and violent crime in the Xinjiang Uighur Autonomous Region. Three people were sentenced to death in a mass sentencing rally involving 55 people convicted of terrorism, separatism and murder. Between June and August, 21 people were executed in the Xinjiang Uighur Autonomous Region in relation to separate terrorist attacks.
- Both **Cameroon** and the **UAE** expanded the scope of the death penalty to include “terrorism”-related crimes.
- **Jordan** resumed executions in December after an eight-year hiatus, executing 11 men convicted on murder charges. The authorities clearly stated that the move was in response to increasing murder rates.
- In December, **Indonesia** announced the resumption of executions for drug-related offences to confront “a national emergency”.

The argument in support of use of the death penalty to combat crime ignores the fact that there is no convincing evidence that the death penalty works as a particular deterrent to crime, or that it is more effective than terms of imprisonment. This has been confirmed in many studies carried out by the UN and across different countries and regions.⁹

⁹ Amnesty International, Not making us safer: Crime, public safety and the death penalty (ACT 51/002/2013), 10 October 2013, available at www.amnesty.org/en/documents/act51/002/2013/en/

REGIONAL OVERVIEWS

AMERICAS

REGIONAL TRENDS

- The USA remained the only country to carry out executions in the Americas region. Fewer executions were recorded and fewer states executed.
- The use of the death penalty in the region continued to decline, with an overall decrease in the number of death sentences imposed (from at least 95 death sentences in 2013 to 77 in 2014).
- The US state of Washington imposed an official moratorium on executions on 11 February.
- The government of Suriname introduced draft legislation to remove the death penalty from the Criminal Code. El Salvador ratified an international treaty on the abolition of the death penalty.¹⁰
- Barbados began legislative processes to remove the mandatory death penalty.

THE DEATH PENALTY IN THE USA IN 2014¹¹

35 executions: Arizona (1), Florida (8), Georgia (2), Missouri (10), Ohio (1), Oklahoma (3) and Texas (10). All executions were carried out by lethal injection. Two women were among those executed in 2014.

At least 72 new death sentences: Alabama (4), Arizona (3), Arkansas (2), California (14), Connecticut (1), Florida (11), Georgia (1), Indiana (1), Kentucky (1), Louisiana (3), Mississippi (1), North Carolina (3), Ohio (3), Oklahoma (2), Oregon (1), Pennsylvania (4), South Carolina (1), South Dakota (1), Texas (11) and Federal (4).

3,035 people were under sentence of death as of October 2014, including 745 in California, 404 in Florida and 276 in Texas.

¹⁰ El Salvador ratified on 8 April the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty. The National Assembly of Suriname adopted changes to the Criminal Code abolishing the death penalty for all crimes in March 2015.

¹¹ For more information see Death Penalty Information Centre, "The Death Penalty in 2014: Year End Report", available at: www.deathpenaltyinfo.org/documents/2014YrEnd.pdf (accessed on 5 March 2015).

18 states have abolished the death penalty;¹² 32 retain it. Of these, Colorado, Kansas, Nebraska, New Hampshire, Oregon, Pennsylvania and Wyoming have not conducted any executions for at least 10 years. The governors of Oregon and Washington states have established official moratoriums on executions.¹³ The federal authorities have not carried out any executions since 2003 and the military authorities since 1961.

Seven people were exonerated of the crime for which they had been sentenced to death, bringing the total of such exonerations since 1973 to 150. At least two people had their death sentences commuted by the courts.

Four fewer people were executed in the USA than in 2013 and three states – Texas, Missouri and Florida – accounted for 80% of all executions. 65% of executions were carried out in southern states. Alabama and Virginia, states that executed in 2013, did not carry out executions in 2014. The number of executions in Texas declined from 16 in 2013 to 10 in 2014 and in Oklahoma from six to three. The number of executions in Missouri increased sharply, from two in 2013 to 10 in 2014.

The overall number of death sentences – at least 72 – decreased by eight compared to 2013.¹⁴ The total number of new death sentences recorded in 2014 was half the number recorded 10 years ago (140 in 2005).

Excluding the USA, five new death sentences were imposed in 2014 in three countries and 65 people were under sentence of death. Nearly half of those under sentence of death were in Trinidad and Tobago. Amnesty International did not record any new death sentences in the following countries: Antigua and Barbuda, the Bahamas, Belize, Cuba, Dominica, Grenada, Guatemala, Jamaica, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines and Suriname.

No one was under sentence of death in Cuba, Dominica, Guatemala, Saint Lucia and Suriname.

On 27 March, at the request of nine member states of the Organization of American States,¹⁵ the Inter-American Commission on Human Rights (IACHR) held a hearing on the death penalty in the Americas. States expressed an interest in working towards abolition and the

¹² In addition, the District of Columbia has also abolished the death penalty.

¹³ The governor of Pennsylvania established a moratorium on executions on 13 February 2015.

¹⁴ Death Penalty Information Centre, "The Death Penalty in 2014: Year End Report", available at: www.deathpenaltyinfo.org/documents/2014YrEnd.pdf (accessed on 5 March 2015). This is a projected figure.

¹⁵ Argentina, Brazil, Costa Rica, Dominican Republic, Honduras, Mexico, Panama, Paraguay and Uruguay.

Commissioners challenged the failure of states to highlight the need to identify strategies towards this end.¹⁶

The authorities in several Caribbean countries continued to present the death penalty as a solution to high crime rates and called for the resumption of executions. The number of recorded murders remained high, particularly in the Bahamas and Trinidad and Tobago. Detection and conviction rates remained extremely low. Trinidad and Tobago recorded 451 murders in 2014 and the police service classified only 63 as detected, representing just 14.19% of all cases.¹⁷ In Guyana the Director of Public Prosecutions announced in 2014 that in 2013 the courts had heard 83 cases of murder and 12 for other serious offences, out of a total of 109 cases. Of these, only 36 had resulted in actual convictions.¹⁸

COUNTRY DEVELOPMENTS

Five people remained on death row in **Antigua and Barbuda**, after the authorities pardoned two prisoners during the year.

One man, Kofhe Goodman, remained under sentence of death at the end of the year in the **Bahamas**, where no new death sentences were recorded. Mario Flowers and Anthony Clarke had their death sentences commuted by the Court of Appeal in May and November respectively.¹⁹ Of particular relevance was the judgment in Mario Flowers' case, in which the judges not only ordered that the case be remitted to the Supreme Court for resentencing, but also found that the murder of a police officer is not in itself a sufficient element to classify the act as the "worst of the worst" and attract the death penalty. By placing the emphasis on the circumstances of the murder rather than on the identity of the victim, this decision calls

¹⁶ For more information, visit Inter-American Commission on Human Rights, "Human Rights Situation and the Death Penalty in the Americas", 27 March 2014, available at <http://hrbrief.org/2014/03/human-rights-situation-and-the-death-penalty-in-the-americas/> (accessed on 5 March 2015).

¹⁷ Trinidad and Tobago Police Service, Police Service Serious Crime Statistics, available at www.ttps.gov.tt/Statistics.aspx (accessed on 5 March 2015).

¹⁸ *Guyana Times*, "DPP disposes of 109 cases in 2013", 17 January 2014, available at www.guyanatimesgy.com/2014/01/17/13/dpp-disposes-of-109-cases-in-2013/ (accessed on 5 March 2015).

¹⁹ Case no. 174 of 2010 and 178 of 2010 *Sylvester Aritis vs. Regina* and *Mario A. Flowers vs. Regina*, delivered on 30 April; and 287 of 2013 and 291 of 2013 *Anthony Clarke vs. Regina*, delivered on 26 November.

into question the categorization of murders adopted by the Parliament in 2011, which made the murder of a police officer or prison guard punishable by death.²⁰

On 9 January the Leader of the Opposition in the Bahamas, Hubert Minnis, published a draft Constitutional (Amendment) (Capital Offences) Bill. The draft Bill – which was not formally introduced in Parliament for procedural reasons – removed the possibility of appeals against death sentences upheld by the Bahamas Court of Appeal to any other court “anywhere else in the world”, on any grounds.²¹ This move appeared to aim at preventing appeals to the Judicial Committee of the Privy Council, a UK-based court which has jurisdiction as the final appellate court for the Bahamas and several other Caribbean countries, and to the Inter-American Commission on Human Rights.²² It would have also removed delays in the execution of a death sentence or detention conditions as grounds for commutations; and it would have set time limits for mercy petitions and appeals to international bodies, after which a death sentence could have been implemented even if these appeals were pending.

Two new death sentences were imposed in **Barbados**, bringing to 11 the number of people held under sentence of death at the end of the year. In November, the government introduced in Parliament a series of bills aimed at bringing national legislation in line with regional human rights law, including as established by the Inter-American Court of Human Rights.²³

The Penal System Reform (Amendment) Bill, 2014 aims at improving guidelines for courts on the factors and mitigating circumstances which judges should consider in sentencing.²⁴ The Prisons (Amendment) Bill, 2014 would abolish corporal punishment in prisons, establish a prisoners release board and allow for the early release of prisoners.²⁵ The Criminal Procedure (Amendment) Bill, 2014 seeks to amend the Criminal Procedure Act to include mandatory psychiatric evaluations for all those appearing before the High Court in murder

²⁰ Penal Code (Amendment) Act, 2011, Art.290. The Act also made the following offences punishable either by death or life without the possibility of parole: murder of a judicial officer, including judges, registrars and prosecutors; murder of a witness or juror; murder of more than one person; murder committed by a defendant who has a prior murder conviction; and murder in exchange for value. Any other type of murder is punishable by a term of imprisonment of 30 to 60 years.

²¹ Paragraph 4,2(a) of the Bill. The Bill is available from the government website: www.bahamas.gov.bs/

²² Other independent Commonwealth countries that recognize the Judicial Committee of the Privy Council as their final court of appeal are Antigua and Barbuda, Grenada, Jamaica, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines and Trinidad and Tobago.

²³ All bills were being considered by the Parliament as of 4 February 2015.

²⁴ Available at: www.barbadosparliament.com/bills/details/50 (accessed on 5 March 2015).

²⁵ Available at: www.barbadosparliament.com/bills/details/56 (accessed on 5 March 2015).

cases, in order to determine whether the defendant is fit to stand trial, as well as to allow judges to raise the defence of "insanity" and diminished responsibility should it be a concern.²⁶ The Constitution (Amendment) Bill, 2014 proposes amending the Constitution of Barbados to introduce discretion in the sentencing of people convicted of murder, which presently carries the mandatory death penalty.²⁷

While these bills include some positive steps, Amnesty International is concerned that the Constitution (Amendment) Bill, 2014 also seeks to prevent prisoners under sentence of death appealing against their sentences on the basis that the imposition or implementation of a death sentence violates their fundamental right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

No new death sentences were imposed in **Belize**, where one person remained under sentence of death.

The Parliament of **Dominica**, where no new death sentences were imposed and where no one was under sentence of death, adopted new legislation in July renouncing the authority of the Judicial Committee of the Privy Council and recognizing the Caribbean Court of Justice as its final appellate court. The human rights record of Dominica was reviewed at the Universal Periodic Review before the UN Human Rights Council on 1 May. The authorities of Dominica rejected recommendations to abolish the death penalty.²⁸

No new death sentences were imposed in **Grenada**. One man, Kyron McFarlane remained under sentence of death.²⁹

In October Robert Browne was sentenced to death for murder in **Guyana**. The Ministry of Foreign Affairs publically stated that, following the commutation of the death sentences of 15 prisoners in recent years, 13 men were on death row at the end of 2014.³⁰ However, information received by Amnesty International from the Office of the Director of Public Prosecutions indicated that 26 men were under sentence of death as of 31 December 2014.

²⁶ Available at: www.barbadosparliament.com/bills/details/51 (accessed on 5 March 2015).

²⁷ Available at: www.barbadosparliament.com/bills/details/52 (accessed on 5 March 2015).

²⁸ Amnesty International, *Dominica still falling down on the death penalty and the rights of LGBTI persons* (AMR 26/001/2014), 19 September 2014, available at www.amnesty.org/en/library/asset/AMR26/001/2014/en/639f9570-8be3-45c3-b1db-19904dfbe495/amr260012014en.pdf

²⁹ Information provided by the authorities to Amnesty International in 2014 indicated that no one was under sentence of death at the end of the year. Subsequent information received by the organization indicated that Kyron McFarlane is still under sentence of death but he is no longer held on death row.

³⁰ UN Human Rights Council, National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21-Guyana, UN doc. A/HRC/WG.6/21/GUY/1, 19 January 2015.

The national consultation on the abolition of the death penalty, which the government committed to put in place by 2015 through the Parliamentary Special Select Committee, had not begun by the end of 2014. The President suspended the Parliament on 10 November and elections are expected in May 2015.

No new death sentences were imposed in **Jamaica** during 2014, while one man, Leslie Moodie, had his death sentence commuted. Another man, Separus Lee, remained under sentence of death at the end of the year.

No new death sentences were recorded in **Saint Kitts and Nevis**, where one person, Everson Mitcham, remained under sentence of death at the end of the year.

Patrick Lovelace remained the only person under sentence of death in **Saint Vincent and the Grenadines**, where no new death sentences were imposed.

In June the government of **Suriname** introduced draft legislation to amend the Criminal Code and abolish the death penalty for all crimes, while increasing maximum terms for life sentences from 20 to 30 years.³¹ No new death sentences were recorded and no one was under sentence of death at the end of the year.

At least two new death sentences were imposed in **Trinidad and Tobago** in 2014. Ronald Bisnath was sentenced to death on 26 March and Shawn Marceline on 17 June, both having been convicted of murder. Richard Anthony Daniel and Julia Ramdeen, the only woman under sentence of death, had their death sentences commuted on appeal by the Judicial Committee of the Privy Council in February and March respectively.³²

Two prisoners, Garvin Sookram and Keron Lopez, had their death sentences confirmed by the Privy Council and appealed to the IACHR. On 19 May the IACHR asked the government of Trinidad and Tobago to refrain from executing the two men until it had ruled on the merits of their individual appeals.³³ With at least 30 people under sentence of death at the end of the year, Trinidad and Tobago holds the second largest death row population in the Americas region, after the USA. The consultation on the new Constitution initiated by the Ministry of Legal Affairs in 2013, including on the retention or abolition of the death penalty, continued in 2014.

³¹ The National Assembly adopted the Bill on 3 March 2015.

³² Judicial Committee of the Privy Council, *Richard Anthony Daniel v. The State*, Appeal No.48 of 2012, [2014] UKPC 3, delivered on 13 February 2014; and Judicial Committee of the Privy Council, *Ramdeen v. The State*, Appeal no. 77 of 2012, [2014] UKPC 7, delivered on 27 March 2014.

³³ See also: www.oas.org/en/iachr/decisions/precautionary.asp

The USA continued to use the death penalty in contravention of international law and standards. On 22 January Edgar Arias Tamayo was executed in Texas in violation of a binding judgment by a 2004 International Court of Justice (ICJ), which ordered the USA to provide judicial "review and reconsideration" of the convictions and sentences imposed against 51

Mexican nationals, including Edgar Tamayo.³⁴ Nine US states had denied the 51 individuals their right to seek consular assistance without delay after the arrest, as required by the Vienna Convention on Consular Relations. The Inter-American Commission on Human Rights stated that the USA had deprived Edgar Arias Tamayo of a criminal process that satisfied the minimum standards of due process and a fair trial as required under the American Declaration of the Rights and Duties of Man.³⁵ On 9 April the US authorities once again violated the ICJ judgment by executing Ramiro Hernandez Llanas, who was also part of the group of 51 Mexican nationals covered by the ICJ ruling. Ramiro Hernandez Llanas had an intellectual disability which, his lawyers argued, made his execution unconstitutional.³⁶

Amnesty International recorded several cases in which the death penalty was used against people with mental and intellectual disabilities in contravention of international law and standards. Askari Abdullah Muhammad was executed in Florida on 7 January for a murder committed in prison in 1980. He had a long history of serious mental illness, including a diagnosis of paranoid schizophrenia.³⁷ Paul Goodwin was executed in Missouri on 10 December. His lawyers had sought clemency on the grounds that his intellectual disability, combined with other mental deficits, rendered his execution unconstitutional.³⁸

³⁴ International Court of Justice, *Avena and Other Mexican Nationals (Mexico v. United States of America)*, Judgment, 31 March 2004, available at www.icj-cij.org/doCKET/index.php?doCKET/index.php?pr=605&p1=3&p2=3&case=128&code=mus&p3=4 (accessed on 5 March 2015). Among the 51 Mexican nationals, José Ernesto Medellín and Humberto Leal García were executed in 2008 and 2011 respectively.

³⁵ Inter-American Commission on Human Rights, "IACHR Concludes that the United States Violated Tamayo's Fundamental Rights and Requests that his Execution be Suspended", 17 January 2014, available at www.oas.org/en/iachr/media_center/PReleases/2014/002.asp

³⁶ Amnesty International, Texas execution set despite mental disability, Urgent Action 71/14 of 24 March 2014, available at: www.amnesty.org/en/library/info/AMR51/019/2014/en

³⁷ Amnesty International, Execution looms after decades on death row, Urgent Action 321/13 of 27 November 2013, www.amnesty.org/en/library/info/AMR51/080/2013/en

³⁸ Amnesty International, Missouri execution set for human rights day, Urgent Action 302/14 of 3 December 2014, www.amnesty.org/en/library/info/AMR51/057/2014/en

"INTELLECTUAL DISABILITY IS A CONDITION, NOT A NUMBER"³⁹

On 27 May 2014 the US Supreme Court struck down in *Hall v. Florida* a law of Florida requiring that a defendant claiming to have intellectual disability – and to be therefore exempt from execution under national law – show an IQ score of 70 or below.⁴⁰ The Supreme Court judgment of 2002, which established the prohibition on executing people with intellectual disabilities, had left to states the "task of developing appropriate ways to enforce the constitutional restriction", resulting in limited protection in some states and rigid assessments procedures.⁴¹

In its 2014 ruling the US Supreme Court found that Florida's exclusive reliance on the IQ test to make the assessment blocked the presentation of other evidence that would demonstrate limitations in the defendants' mental faculties. Other evidence could include medical histories, school tests and reports, and testimony on past behaviour and family circumstances. The Court also found that the assessment procedure as established in Florida failed to recognize that IQ scores are imprecise.⁴²

Robert Campbell had his execution stayed just two and a half hours before it was due to be carried out in Texas on 13 May. The stay was granted to allow his lawyers to pursue an appeal based on new evidence that he has an intellectual disability that would render his execution unconstitutional.⁴³

On 3 December the Court of Appeals for the Fifth Circuit issued a stay of execution for Scott Panetti, less than eight hours before it was due to be carried out. His mental illness, which includes schizophrenia, predates, and apparently contributed to, the murder for which he was sentenced to death. He was nonetheless found competent to stand trial and was allowed to represent himself in proceedings that were described by people who were present as a "mockery".⁴⁴

³⁹ *Hall v. Florida*, 572 U. S. (2014), delivered on 27 May 2014.

⁴⁰ *Hall v. Florida*, 572 U. S. (2014), delivered on 27 May 2014.

⁴¹ *Atkins v. Virginia*, 536 U.S. 304 (2002), delivered on 20 June 2002.

⁴² Amnesty International, *The Nation we aspire to be: Revisiting intellectual disability and the death penalty*, 29 May 2014, available at www.amnesty.org/en/library/info/AMR51/034/2014/en

⁴³ Amnesty International, *Mental disability claim as execution nears, further information on Urgent Action 90/14*, 6 May 2014, available at www.amnesty.org/en/library/info/AMR51/029/2014/en

⁴⁴ Amnesty International, USA: *Texas set to execute severely mentally ill man*, Urgent Action 292/14, 18 November 2014, available at www.amnesty.org/en/library/info/AMR51/053/2014/en

Frank Walls, who was 19 at the time of the murder of two people for which he was sentenced to death, was assessed as functioning at the level of a 12-year-old and as suffering from brain damage, brain dysfunction and major psychiatric disorders.⁴⁵

Michael Zack suffered severe physical, sexual and psychological abuse as a child and teenager. Mental health experts present at his trial testified that in their opinion he suffered from post-traumatic stress disorder, chronic depression and possible brain damage, that he had the mental and emotional age of a young child and that his ability to appreciate the criminality of his conduct had been substantially impaired.⁴⁶

Both Frank Walls and Michael Zack sought clemency from the Governor of Florida in 2014. No decision on their clemency applications had been made by the end of the year.

Concerns about racial discrimination continued to mark the use of the death penalty in the USA. Within a few weeks in 2014, Texas executed two individuals who were just above 18 at the time of the crimes for which they were convicted. Both were African American: Ray Jasper was tried for the murder of a white man in front of all-white juries. Earl Ringo was executed on 10 September in Missouri for the murder of two white people. He was tried in front of an all-white jury. In April the UN Human Rights Committee expressed concern "about the continuing use of the death penalty and, in particular, racial disparities in its imposition that disproportionately affects African Americans, exacerbated by the rule that discrimination has to be proven on a case-by-case basis." The Committee recommended that the USA take measures to effectively ensure that the death penalty is not imposed as a result of racial bias and "consider establishing a moratorium on the death penalty at the federal level and engage with retentionist states with a view to achieving a nationwide moratorium."⁴⁷

A similar recommendation was made by the UN Committee against Torture, which examined the period report of the USA in November. The Committee expressed "concern at the State party's admission that it is not currently considering abolishing the death penalty at the federal level." The Committee also expressed concern "at reported cases of excruciating pain;

⁴⁵ Amnesty International, "USA: Florida death row prisoner seeks clemency: Frank Walls", Urgent Action appeal 319/13, AMR 51/079/2013, available at: www.amnesty.org/en/library/info/AMR51/079/2013/en

⁴⁶ Amnesty International, "USA: Death row inmate seeks commutation to life", Urgent Action appeal 140/14, (AMR 51/033/2014), available at: www.amnesty.org/ar/library/asset/AMR51/033/2014/en/f6b9fd4c-b5de-40f7-899f-3298e9a69385/amr510332014en.pdf

⁴⁷ UN Human Rights Committee, Concluding observations on the fourth periodic report of the United States of America, UN doc. CCPR/C/USA/CO/4, 23 April 2014, para8.

and prolonged suffering that procedural irregularities have caused condemned prisoners in the course of their execution."⁴⁸

TRYING TO FIX THE UNFIXABLE: ABOLITION IS THE ONLY SOLUTION

In recent years, executing states in the USA have been confronted by limited availability of substances used in lethal injection protocols; this is due both to changes in the domestic production of these drugs as well as tighter regulations in the European Union on the export of substances which could be used in executions or torture.⁴⁹

Several states have taken steps to amend their legislation to either introduce alternative lethal injection protocols or to allow the use of substances produced by compounding pharmacies, which are not certified by the U.S. Food and Drug Administration.⁵⁰ Some states have also attempted to conceal the source of the drugs they use in lethal injection. Bills to enable this were introduced in Alabama, Georgia and Ohio.

In 2014, three more US executions were added to the list of those that have been described as "botched".⁵¹ In January, Dennis McGuire in Ohio appeared to gasp several times and snort loudly after the lethal injection with midazolam, one of the "new" drugs, began.⁵² It took more than 20 minutes before he was pronounced dead.⁵³ In April, Clayton Lockett died in Oklahoma approximately 40 minutes after the lethal injection began, during which period he gasped, writhed and mumbled.⁵⁴ An investigation by the Oklahoma Department of Public

⁴⁸ UN Committee against Torture, Concluding observations on the combined third to fifth periodic reports of the United States of America, UN doc. CAT/C/USA/CO/3-5, 19 December 2014, para25.

⁴⁹ Together with other NGOs, such as Reprieve and Omega, since 2010 Amnesty International has been advocating for tighter regulations in the trade from Europe, and in particular that Council of the European Union Regulation (EC) No 1236/2005 of 27 June 2005 concerning trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment is amended, including to add in its Annex III, substances such as hydromorphone, midazolam, pancuronium bromide, rocuronium bromide and vecuronium bromide.

⁵⁰ The U.S. Food and Drug Administration defines compounding pharmacies as practices "in which a licensed pharmacist, a licensed physician, or, in the case of an outsourcing facility, a person under the supervision of a licensed pharmacist, combines, mixes, or alters ingredients of a drug to create a medication tailored to the needs of an individual patient." For more information, visit: www.fda.gov/Drugs/GuidanceComplianceRegulatoryInformation/PharmacyCompounding/ucm339764.htm

⁵¹ Death Penalty Information Centre, "Examples of Post-Furman Botched Executions", available at www.deathpenaltyinfo.org/some-examples-post-furman-botched-executions?scid=8&did=478

⁵² Amnesty International, "USA: Another killing in a long-since failed experiment", 17 January 2014, available at www.amnesty.org/en/library/info/AMR51/005/2014/en

⁵³ He was executed with the "new" drugs midazolame and hydromorphone. No further executions have been carried out in Ohio since.

⁵⁴ Amnesty International, USA: Time to do something, Mr President: After Oklahoma's 'botched' execution, a call for human rights leadership, 2 May 2014, available at www.amnesty.org/en/library/info/AMR51/028/2014/en

Safety found that a paramedic and a physician had spent 50 minutes trying to place the needle to administer the lethal injection drugs in different parts of Clayton Lockett's body.⁵⁵ The investigation found an elevated concentration of midazolam in the tissue near his right groin indicated that the drug had not been administered into the vein. In July Arizona executed Joseph Wood using midazolam and hydromorphone. Witnesses to the execution described Joseph Wood as gasping and snorting for more than an hour.⁵⁶

While the federal authorities announced a review of the use of the death penalty in April, several states have taken steps to amend their execution methods.⁵⁷ In 2014 Oklahoma proposed to reintroduce executions by gas chambers; Tennessee and Virginia by electric chair; Utah and Wyoming by firing squad.⁵⁸

Amnesty International opposes the death penalty unconditionally, regardless of the method of execution used. The organization believes that there is no such thing as a humane execution and renews its call on the US authorities to take the opportunity of the present debate on execution procedures to abolish the death penalty for all crimes.

During 2014, Alabama, California, Kansas, Louisiana and Missouri considered draft legislation to expedite executions through the streamlining of appeals and/or scheduling of executions. In Colorado a bill was introduced to limit the power of the Governor to grant clemency. On 14 May the Governor of Louisiana signed into law a bill expanding the scope of the death penalty and making the murder of a prison worker a capital crime.

The states of Maryland, South Dakota and West Virginia considered bills to reinstate the death penalty, while Arizona, Delaware, Florida, Kansas, Nebraska, New Hampshire and Washington debated draft legislation for its abolition. In Washington, the Governor established a moratorium on all executions.

Charges were dropped in six cases where individuals had been sentenced to death and one man was acquitted of the crime for which a death sentence had been imposed. These seven cases in 2014 bring the number of former death row inmates exonerated since 1973 to 150.⁵⁹ Carl Dausch was acquitted in Florida, while Glenn Ford was exonerated in Louisiana;

⁵⁵ Oklahoma Department of Public Safety, The Execution of Clayton D. Lockett-Case Number 14-0189SI, available at <http://deathpenaltyinfo.org/documents/LockettInvestigationReport.pdf> (accessed on 5 March 2015). In January 2015 the US Supreme Court agreed to review the lethal injection procedure of Oklahoma and halted scheduled executions pending its review.

⁵⁶ Amnesty International, USA: 'He is still alive', 24 July 2014, AMR 51/042/2014, available at: www.amnesty.org/en/library/info/AMR51/042/2014/en.

⁵⁷ "Holder: DOJ needs Congress' support to reduce immigration backlog", PBS, 31 July 2014, available at www.pbs.org/newshour/bb/holder-doj-needs-congress-support-reduce-immigration-backlog/ (accessed on 5 March 2015).

⁵⁸ A good summary of legislation proposed and passed can be found at Death Penalty Information Centre, 2014 legislation, available at: www.deathpenaltyinfo.org/2014legislation, (accessed on 5 March 2014).

⁵⁹ For the full list, visit Death Penalty Information Centre at www.deathpenaltyinfo.org/innocence-list-those-freed-death-row?scid=6&did=110

Henry McCollum and Leon Brown in North Carolina; and Ricky Jackson, Wiley Bridgeman and Kwame Ajamu in Ohio.

Pre-trial military commission proceedings continued against six detainees at the US naval base in Guantánamo, Cuba. The US government intends to seek the death penalty in all cases if the individuals are convicted. The military commissions do not meet international fair trial standards. Any imposition of the death penalty after such a trial would violate international law.

ASIA-PACIFIC

REGIONAL TRENDS

- Pakistan and Singapore resumed executions in 2014.
- China, Democratic People's Republic of Korea (North Korea) and Viet Nam continued to classify data on the death penalty as a state secret.
- The number of executing countries decreased from 10 in 2013 to 9 in 2014.
- A bill to abolish the death penalty remained pending in Mongolia. Legislators in Fiji, Republic of Korea (South Korea) and Thailand began debates on abolition of the death penalty.⁶⁰
- China, Japan and Viet Nam exonerated people who had been sentenced to death.

EXECUTIONS AND DEATH SENTENCES IN ASIA-PACIFIC

At least 32 executions in nine countries: Afghanistan (6), China (+), Japan (3), Malaysia (2+), North Korea (+), Pakistan (7), Singapore (2), Taiwan (5), Viet Nam (3+). This figure does not include the number of executions believed to have taken place in China.

At least 695 new death sentences were known to have been imposed in 17 countries in the region: Afghanistan (12+), Bangladesh (142+), China (+), India (64+), Indonesia (6), Japan (2), Malaysia (38+), Maldives (2), Myanmar (1+), North Korea (+), Pakistan (231), Singapore (3), South Korea (1), Sri Lanka (61+), Taiwan (1), Thailand (55+), Viet Nam (72+).

Amnesty recorded 32 executions in the Asia-Pacific region – these figures do not include China, which executed thousands. While the number of recorded executions remained essentially the same as in 2013 (37), the number of death sentences recorded in 2014 decreased by 335 compared to 2013, excluding China.

In China, data on the number of executions and death sentences remained a state secret in 2014. Amnesty International stopped publishing figures on China in 2009 and instead

⁶⁰ Fiji abolished the death penalty for all crimes in February 2015.

challenged the Chinese government to release the numbers themselves in line with international standards and to prove their claims that they are achieving their goal of reducing the application of the death penalty.

The decrease in death sentences in the region is partly attributable to a decrease in the number of death sentences in Bangladesh, which in 2013 recorded the exceptionally high figure of 220 new death sentences because of the mass sentencing of 152 people for mutiny. It is also partly due to the difficulty of obtaining figures for countries such as Viet Nam.

In a landmark judgment in January the Supreme Court of India put executions in that country on hold. Doubts surrounding the safety of the conviction in several cases sparked debates on the death penalty in countries such as China, Japan and Viet Nam.

However, several other countries took action to resume executions. Following a terrorist attack that killed more than 140 people in December, Pakistan lifted its moratorium on executions of civilians. Papua New Guinea continued to take steps towards resuming executions.

Countries in the region continued to use the death penalty in contravention of international law and standards. The Trincomalee High Court of Sri Lanka sentenced a man to death for a crime committed when he was 12 years old. Juvenile offenders remained under sentence of death in Maldives, Pakistan and Sri Lanka. People with mental or intellectual disabilities remained on death row in several countries, including Indonesia, Japan, Malaysia and Pakistan.

The death penalty was imposed after unfair trials in Afghanistan, Bangladesh, China, North Korea, Pakistan and Sri Lanka. In China and North Korea, forced "confessions" extracted through torture or other ill-treatment were admitted as evidence at trials. Special courts imposed the death penalty in Bangladesh, India and Pakistan.

The courts of Malaysia, Singapore and Pakistan imposed the mandatory death penalty, and for crimes that do not meet the threshold of the "most serious crimes" under the International Covenant on Civil and Political Rights (ICCPR), such as blasphemy (Pakistan), economic crimes (China, North Korea, Viet Nam), and rape that resulted in death (Afghanistan) and rape committed by repeat rape offenders (India). China, Indonesia, Malaysia, Singapore, Sri Lanka, Thailand and Viet Nam continued to sentence people to death for drug trafficking. Executions for drug trafficking were recorded in China, Malaysia, Singapore and Viet Nam.

COUNTRY DEVELOPMENTS

At least 12 men were sentenced to death in **Afghanistan**, where six people were executed on 8 October. Five of them – Samimullah, Azizullah, Nazar Mohammad, Qaisullah and Habibullah – were sentenced to death after unfair trials for armed robbery, kidnapping and the rape of at least four women. One woman died as a result of her injuries.

In October officials at the Presidential Palace stated that the government would review the cases of 400 people who had been sentenced to death, approximately 100 of whom had their death sentence finalized by the Supreme Court.⁶¹

Afghanistan was reviewed under the UN Human Rights Council Universal Periodic Review (UPR) on 27 January. The Afghan authorities rejected recommendations to establish a moratorium on executions and abolish the death penalty.⁶²

In 2014 Amnesty International did not record any executions in **Bangladesh**, where at least 141 men and one woman were sentenced to death. The NGO Odhikar reported that a further 33 death sentences were imposed, for an overall total of at least 175. At least 1,235 people were under sentence of death at the end of the year.

The International Crimes Tribunal (ICT), a Bangladeshi court established to investigate the events of Bangladesh's 1971 independence war, sentenced six senior officials of the opposition party Jamaat-e-Islami to death – Ameer Motiur Nizami in October; Mir Qasim Ali, M.A. Zahid Hossain Khokon and Mobarak Hossein in November; Syed Mohammad Qaisar and Azharul Islam in December. The Supreme Court commuted the death sentence of Delwar Hossain Sayedee in September and upheld the sentence of Muhammad Kamaruzzaman in November.⁶³

The proceedings before the ICT did not meet international fair trial standards. The ICT is not an impartial court and all the sentences it imposed were against opposition party members, the majority of them against leaders of the Jamaat-e-Islami party.

No executions and no new death sentences were recorded in **Brunei Darussalam**. On 1 May a new Penal Code came into force in Brunei Darussalam, retaining the death penalty for a range of offences which do not meet the threshold of the "most serious crimes" under international law, including robbery. Defendants who were under 18 when crimes were committed can also be sentenced to death and acts that should not be considered crimes, such as consensual sex between unmarried adults or adults of the same gender, also attract the death penalty under the new Penal Code. Brunei Darussalam was reviewed under the

⁶¹ "Afghanistan to review cases of 400 convicts sentenced to death", Khaama Press, 14 October 2014, available at www.khaama.com/afghanistan-to-review-cases-of-400-convicts-sentenced-to-death-6837 (accessed on 4 March 2015).

⁶² UN Human Rights Council, Report of the Working Group on the Universal Periodic Review, Afghanistan, UN doc. A/HRC/26/4, 4 April 2014.

⁶³ The full verdict of the decision in the Muhammad Kamaruzzaman case was published in February 2015. Another review is still available to him before the Supreme Court. A new death sentence was imposed by the ICT on 18 February 2015 against Abdus Subhan.

UPR on 2 May. The state rejected recommendations to amend the Penal Code to bring it into line with international law and to abolish the death penalty.⁶⁴

Amnesty International monitors the use of the death penalty in China through available, but limited, sources, including media reports. On the basis of these sources, the organization estimates that in 2014 China continued to execute more than the rest of the world combined, and sentenced thousands to death.

Death sentences continued to be imposed after unfair trials and for non-lethal acts. Approximately 8% of all recorded executions in China, were carried out for drug-related crimes. Economic crimes, including embezzlement, counterfeiting and taking bribes accounted for approximately 15% of all executions. In some instances family members only found out about the executions of their relatives on the same day the death sentences were implemented.

Amnesty International was particularly concerned by the use of the death penalty as a tool in the "Strike Hard" campaign, which the authorities characterized as a response to terrorism and religious extremism in the north-western Xinjiang Uighur Autonomous Region. In one instance, three people were sentenced to death in a stadium in front of more than 7,000 people as part of a mass sentencing event involving 55 defendants. The death sentences were imposed for intentional homicide in connection with the murder of four people, including a three-year-old girl.⁶⁵

On 16 June, 13 people involved in seven separate cases were executed. They had been convicted of various offences including organizing, leading and participating in terrorist groups; murder; arson; theft; and illegal manufacture, storage and transportation of explosives.⁶⁶ Eight people of Uighur ethnicity were executed on 23 August in relation to separate terrorist attacks.⁶⁷

Several cases of wrongful convictions and executions emerged in 2014, sparking debate on the death penalty. Nian Bin was released in August after the Fujian Provincial Higher People's Court acquitted him of murder due to insufficient evidence. He had filed three appeals in six years and the Supreme People's Court had overturned his death sentence and

⁶⁴ Amnesty International, Brunei's revised Penal Code a dangerous step backwards for human rights (ASA 15/002/2014), 19 September 2014, available at www.amnesty.org/en/library/info/ASA15/002/2014/en.

⁶⁵ "Xinjiang's Yili hold Mass Sentencing Rally: 55 Terrorist are Charged", Xinhua, 27 May 2014, available at <http://news.qq.com/a/20140527/044951.htm> (accessed 5 March 2015).

⁶⁶ "13 executed over terror attacks, violent crimes in Xinjiang", Xinhua, 16 June 2014, available at http://news.xinhuanet.com/english/china/2014-06/16/c_133411946.htm (accessed 5 March 2015).

⁶⁷ "8 terrorists executed in Northwest China", Xinhua, 24 August 2014, available at http://news.xinhuanet.com/english/video/2014-08/24/c_133579992.htm (accessed 5 March 2015).

ordered a retrial in 2010. Nian Bin had maintained that he was forced to "confess" to the crime during police interrogation. Reports in November indicated that the police had begun a new investigation into the same crime for which Nian Bin was acquitted and listed him as one of the suspects.⁶⁸

In December, the Inner Mongolia Higher People's Court exonerated Hugjiltu (also known as Qoysiletu) of intentional homicide due to insufficient evidence.⁶⁹ Hugjiltu was executed in 1996; and he had maintained that he was ill-treated and forced to "confess" to the crime while in police custody. In 2005 another man confessed to the crime.

Also in December, the Shandong Provincial Higher People's Court announced a review of the case of Nie Shubin who was executed in 1995 at the age of 21 for an alleged rape and intentional homicide in Shijiazhuang city, Hebei province. Another man was arrested in 2005 for three other unconnected rape and murder cases and claimed that he was also responsible for the murder for which Nie Shubin was convicted.⁷⁰

Another case that provoked considerable debate was that of Li Yan. On 24 June the Supreme People's Court overturned her death sentence. She had been convicted of killing her husband. Prior to the murder, Li Yan had contacted the police on several occasions to seek protection from physical violence. On one occasion, following a physical assault by her husband she required hospital treatment. This information was not taken into account during her first trial. At the end of the year Li Yan was still awaiting a verdict.

Legal academics were among the concerned voices that called for reforms in the administration of justice, urging the Supreme People's Court to issue a notice to all courts to provide legal aid to defendants charged with offences that are punishable by death.⁷¹

The process of reforming the administration of justice continued in 2014. The Decision from the Fourth Plenum of the 18th Party Congress indicated that steps would be taken to ensure

⁶⁸ "Chinese police again probe acquitted death row prisoner: lawyer", Reuters, 25 November 2015, available at www.reuters.com/article/2014/11/25/us-china-rights-idUSKCN01916120141125 (accessed 5 March 2015). On 15 February 2015, Fuzhou City Intermediate People's Court ruled that Nian Bin should receive state compensation of more than 1.13 million yuan (US\$180,622).

⁶⁹ "Courts find executed Chinese teenager 'not guilty'", BBC News, 15 December 2014, available at www.bbc.com/news/world-asia-china-30474691 (accessed 5 March 2015).

⁷⁰ "China reviews another execution after miscarriage ruling", Reuters, 23 December 2014, available at www.reuters.com/article/2014/12/23/us-china-crime-idUSKBN0K109S20141223 (accessed 5 March 2015).

⁷¹ Liu Renwen, "Defendants Facing Death Penalty Review Should Have Right to Legal Aid", Legal Daily, 26 March 2014.

the independence of the judiciary by limiting the power of officials to interfere in legal cases.⁷²

In November the National People's Congress began consideration of the People's Republic of China Criminal Law Amendment (9) (Draft) which, if adopted, would remove the possibility of imposing the death penalty for nine crimes and reduce the overall number of capital offences from 55 to 46.⁷³ The authorities noted that since the last amendment to the list of capital offences in 2011, the abolition of the death penalty for the 13 crimes "has not had a negative impact on public order" and that society has "expressed positive opinion in favour of reducing the number of crimes for which the death penalty is used".⁷⁴ While a welcome step, Amnesty International remained concerned that these proposed amendments will have a limited effect in reducing its use in practice. The authorities have themselves acknowledged that the death penalty is "seldom used" for the nine crimes for which its abolition is proposed. Furthermore, several of the remaining 46 capital offences, which include economic crimes such as embezzlement and taking bribes, as well as non-lethal crimes such as rape, trafficking of women and children, sabotaging communications or communication equipment, and drug-related crimes, do not meet the threshold of the "most serious crimes" for which the death penalty can be imposed under international law.

The practice of harvesting organs from executed prisoners for transplants continued throughout 2014, despite the 2013 announcement by former Vice-Minister of Health Huang Jiefu that organs would only be sourced from voluntary donation schemes as of mid-2014.⁷⁵ Huang then later announced that using organs from prisoners will be phased out starting from 1 January 2015.⁷⁶

⁷² Chinese Communist Party, "CCP Central Committee Decision concerning Some Major Questions in Comprehensively Moving Governing the Country According to the Law Forward", available at <https://chinacopyrightandmedia.wordpress.com/2014/10/28/ccp-central-committee-decision-concerning-some-major-questions-in-comprehensively-moving-governing-the-country-according-to-the-law-forward/> (accessed 5 March 2015).

⁷³ The nine crimes were smuggling weapons or ammunition, smuggling nuclear materials, smuggling counterfeit currency; counterfeiting currency; fraudulent fundraising, organizing prostitution, forcing others into prostitution; obstructing the performance of military duties; and spreading rumours during a state of war.

⁷⁴ National People's Congress, "Xingfa Xiuzheng'an (9) (Caoan) Tiaowen" (Criminal Law Amendment (9) Provisions), 13 November 2014, available at www.npc.gov.cn/npc/xinwen/lfgz/flca/2014-11/03/content_1885029.htm (accessed 5 March 2015).

⁷⁵ Amnesty International, Death sentences and executions in 2013 (ACT 50/001/2014), p.21.

⁷⁶ For example, "China to stop harvesting executed prisoners' organs", BBC News, 4 December 2014, www.bbc.com/news/world-asia-china-30324440 (accessed 5 March 2015).

On 29 October the government of **Fiji**, where the last execution was carried out in 1964, announced during its UPR that, at the following session of Parliament, the Military Code would be amended to remove any references to the death penalty.⁷⁷ Fiji supported UPR recommendations to ratify the Second Optional Protocol to ICCPR and abolish the death penalty for all crimes.

While the government of **India** scheduled several executions in 2014, none were carried out. Amnesty International recorded that at least 64 new death sentences were imposed for murder and, for the first time since the Criminal Law (Amendment Act) of 2013 came into force, rape by repeat offenders. Information reported by the Death Penalty Research Project of the National Law University in Delhi indicated that 270 people were under the sentence of death and that eight people had their mercy petitions rejected in 2014.⁷⁸

In a landmark judgment on 21 January the Supreme Court commuted the death sentences of 15 people.⁷⁹ Thirteen of them (Suresh, Ramji, Bilavendran, Simon, Gnanprakasham, Meesekar Madaiah, Praveen Kumar, Gurmeet Singh, Sanjeev Chaudhury, Jafar Ali, Shivu, Jadeswamy and one woman, Sonia Chaudhury), on the grounds that there was a delay in the disposal of their mercy petitions by the President. The delays in question ranged from five to 12 years. The Court also commuted the death sentences of Sundar Singh and Magan Lal Barela on the ground that they suffer from mental illness.

In its judgment, the Supreme Court ruled that "undue, inordinate and unreasonable delay in execution of death sentence [amounted to] torture" and was a ground for commutation of sentence. Importantly, the Court also ruled as "bad law" a previous decision in the case of Devender Pal Singh Bhullar, which stated that prisoners convicted of terrorism-related offences cannot appeal for commutation on grounds of inordinate delay.

Quoting extensively from international treaties and standards, the Supreme Court stated that the execution of people suffering from mental illness was unconstitutional and ruled that mental disability would be a factor that warranted commutation of a death sentence. The Court also reiterated that solitary confinement of a prisoner on death row was unconstitutional and set guidelines on the treatment of people under sentence of death. According to the guidelines, prisoners on death row should receive legal aid; be informed in writing about the rejection of their mercy petitions; have their mental and physical conditions regularly checked; and be allowed to meet their family members before execution.

⁷⁷ The Bill to this aim was adopted and signed into law in February 2015.

⁷⁸ For more information visit Death Penalty Research Project at www.deathpenaltyindia.com/

⁷⁹ Supreme Court of India, *Shatrughan Chauhan & Anr Vs. Union of India & Ors*, Writ Petition (Criminal) No. 55 of 2013, delivered on 21 January 2014.

Among those whose death sentences were commuted in 2014 following this judgment was Devender Pal Singh Bhullar.⁸⁰ Devender Pal Singh Bhullar was sentenced to death in August 2001 for his involvement in a bomb attack in New Delhi in 1993 that killed nine people. He was arrested in January 1995 under the Terrorist and Disruptive Activities (Prevention) Act, a law that subsequently lapsed and contained provisions incompatible with international human rights law, including the right to a fair trial.

In 2014 the President rejected the mercy petitions of Holiram Bordoloi, Jagdish, Surendra Koli, Yakum Memon, Sonu Sardar, Rajendra Wasnik, and two women, Renukabei and Seema, putting them at risk of imminent execution.⁸¹

On 2 September the Supreme Court established that it should continue to hear appeals for reviews (review petitions) of death sentences imposed by High Courts with benches of three judges, but with the new possibility of oral hearings of 30 minutes to allow lawyers to present arguments in person, as opposed to written documentation alone, which had been the previous procedure.⁸² People on death row who had been denied this in previous review petitions could have the oral hearing in a new review petition. The judgment allowed C. Muniappan and Others, B.A. Umesh, Sundar @ Sundarajan, Yakub Abdul Razak Memon and Sonu Sardar and other prisoners whose review petitions were pending, to benefit from a further review of their cases. However, this benefit did not extend to cases – like Arif and other cases – where appeals issued after the ordinary review petitions (curative petitions) had already been dismissed by the Supreme Court. All these executions were stayed by the Supreme Court or High Courts to allow for the consideration of further appeals.⁸³

In March the government replaced the mandatory death penalty in the Narcotic Drugs and Psychotropic Substances Act with an optional death sentence.⁸⁴

In May the Law Commission of India began a study on the death penalty “to make the public debate on this much contested theme more informed, robust and reasonable”.⁸⁵ On 5 August

⁸⁰ Santhan, Murugan and Perarivalan had their death sentences commuted on 18 February, while Ajay Kumar Pal on 12 December.

⁸¹ Santhan, Murugan and Perarivalan’s mercy petitions were also rejected, but their death sentences were commuted on 18 February by the Supreme Court.

⁸² Supreme Court of India, *Mohd. Arif @ Ashfaq vs. The Registrar, Supreme Court of India*, Writ Petition (Criminal) No.77 of 2014, delivered on 2 September 2014. Mohd.Arif@Ashfaq had already had his curative petition rejected and therefore could not benefit from this new review.

⁸³ The death sentence of Surendra Koli was stayed by the Allahabad High Court and commuted in 2015.

⁸⁴ The Gazette of India, 10 March 2014, available at www.indiacode.nic.in/acts2014/16%20of%202014.pdf (accessed on 5 March 2015).

⁸⁵ Law Commission of India, “Consultation paper on capital punishment”, May 2014.

the Union Minister of State for Home Affairs Shri Kiren Rijiju clarified in response to a parliamentary question that there was no proposal from the government to abolish the death penalty.

Six new death sentences were imposed in **Indonesia** in 2014. At least 130 people remained under sentence of death at the end of the year, 64 of whom had been convicted of drug trafficking.

On 28 November the Deputy Attorney General for General Crimes, Basyuni Masyarif, announced that the government was planning to execute five people before the end of the year. He also stated that another 20 executions had been scheduled for 2015. On 3 December Vice-President Jusuf Kalla stated that the President would not grant clemency to at least 64 individuals who had been sentenced to death for drug-related offences and that their executions would be carried out.⁸⁶

The Ministry of Foreign Affairs continued to proactively seek the commutation of death sentences imposed against Indonesians abroad. Figures released in February 2015 indicated that between 2011 and 2014, when a special task force was established within the Ministry, 240 Indonesians who faced executions abroad had their death sentences commuted and that 46 of these were commuted in 2014 alone.⁸⁷ Some 229 other Indonesian nationals were still facing execution abroad, including 15 in China for drug trafficking, 168 in Malaysia (112 for drug trafficking and 56 for murder), 38 in Saudi Arabia, four in Singapore (including one for drug trafficking), one in Laos and one in Viet Nam, both for drug trafficking.⁸⁸

Iwao Hakamada who, at 78, was the longest serving death row prisoner in the world, was temporarily released on 27 March pending retrial in **Japan**. He had spent 45 years and six months at the Tokyo Detention Centre under sentence of death. While on death row he developed a severe mental illness. The prosecution unsuccessfully opposed his release and on 31 March filed a second appeal against the decision to grant him a retrial.⁸⁹

⁸⁶ The executions of six prisoners went ahead in January 2015. See also Amnesty International, "Indonesia: First executions under new president retrograde step for rights", 17 January 2015.

⁸⁷ Antara News, "Government save 190 Indonesians from death sentence: President", 16 August 2014, available at www.antaranews.com/en/news/95328/government-saves-190-indonesians-from-death-sentence-yudhoyono (accessed on 5 March 2015)

⁸⁸ "229 citizen threatened with the death penalty", Harian Nasional, 12 February 2015, available at www.harnas.co/2015/02/12/229-wni-terancam-hukuman-mati (accessed on 5 March 2015).

See also "Death penalty is a form of sovereignty", Media Indonesia, 22 June 2014, available at www.mediaindonesia.com/mipagi/read/7481/Hukuman-Mati-Bentuk-Kedaulatan/2015/01/22 (accessed 5 March 2015).

⁸⁹ The court has still to decide on this matter.

The release of Iwao Hakamada sparked debate on fair trial safeguards and flaws in the administration of justice. Despite this, three executions were carried out during the year. Masanori Kawasaki was hanged on 26 June at Osaka detention centre. Mitsuhiro Kobayashi and Tsutomu Takamizawa were hanged on 29 August at Sendai detention centre and Tokyo detention centre respectively. All three had been convicted of murder. Executions continued to be shrouded in secrecy and were carried out without prior announcements to the prisoners' relatives and lawyers. In February 2014, a group of former lay judges had urged the Minister of Justice to halt executions until there is greater transparency in the use of capital punishment in Japan.⁹⁰

Two new death sentences were imposed in Japan, both for murder. At the end of the year, 128 people including six foreign nationals, were on death row.⁹¹ Ninety-three of them were appealing for retrials.⁹² Prisoners continued to be detained in solitary confinement and were prohibited from talking to other prisoners. Contact with the outside world was limited to infrequent and supervised visits from family, lawyers or other approved visitors.

DEATH ROW AND MENTAL ILLNESS

Several prisoners under sentence of death in Japan have developed mental illness. Within months of the Supreme Court's 1980 judgment confirming his death sentence, Iwao Hakamada began to show signs of seriously disturbed thinking and behaviour. His communication with his lawyers became ineffective and his letters and verbal communications with his older sister were incoherent. Although Iwao Hakamada was temporarily released in March 2014 pending retrial, his mental illness continues to impair his ability to communicate and demonstrates the lasting damage caused by death row conditions in Japan.

Kenji Matsumoto has been on death row for murder since 1993 and could face execution any moment. He has a longstanding mental disability which originated from mercury poisoning (Minamata disease) and is reportedly paranoid and incoherent as a result of his detention on death row. His lawyers are seeking a retrial.

In May the Nagoya High Court rejected the eighth request for retrial submitted by Masaru Okunishi, who was sentenced to death in 1969. He remained detained in the medical prison

⁹⁰ "Lay judges' moral dilemma", *The Japan Times*, 21 May 2014, available at www.japantimes.co.jp/opinion/2014/03/21/editorials/lay-judges-moral-dilemma/#.U5f39nJ_uZc (accessed on 5 March 2015).

⁹¹ This figure does not include Iwao Hakamada.

⁹² Asahi Shimbun, "Decrease of execution to three, possible effect of Hakamada's retrial", 31 December 2014, available at <http://digital.asahi.com/articles/ASGDS5CHYGDSUTIL02D.html> (accessed on 5 March 2015).

in Hachioji, unable to speak, but fully conscious. On 2 June his lawyers submitted an objection to the High Court following the latest decision not to grant a retrial.⁹³

The UN Human Rights Committee reviewed Japan's compliance with the ICCPR in 2014 and expressed concern that "several of the 19 capital offences do not comply with the [ICCPR]'s requirement of limiting capital punishment to the 'most serious crimes', that death row inmates are still kept in solitary confinement for periods of up to 40 years before execution, and that neither the inmates nor their families are given prior notice of the day of execution."⁹⁴

Following the murder of five women in what appeared to be cases of domestic violence, on 2 September the Parliament of **Kiribati** adopted at its first reading a Bill to amend the Penal Code and introduce the death penalty for murder. In October the President established a Commission of Inquiry tasked with carrying out a national consultation on the proposed amendments.⁹⁵ On 1 December the Commission reported to the Parliament that 99.5% of the population was against the introduction of the death penalty and the second reading of the Bill was postponed.⁹⁶

No executions were recorded in **Laos** in 2014 and no information was available on the number of death sentences imposed.

Amnesty International received credible information that at least two executions were carried out in **Malaysia**. One of the two, Alaggandiran A/L Vellu (also known as Chellah), was executed in March 2014 for murder. The name of the other prisoner is unknown.

At least 38 new death sentences were imposed in 2014, 16 of which were for drug trafficking. In November, Home Minister Datuk Seri Dr Ahmad Zahid Hamidi informed the Lower House of Malaysia that 975 prisoners were under sentence of death in the country

⁹³ Masaru Okunishi's objection against the latest decision not to grant him a retrial was rejected by the high court on 9 January 2015. His lawyers have appealed against the decision to the Supreme Court on 14 January 2015.

⁹⁴ UN Human Rights Committee, Concluding observations on the sixth periodic report of Japan, UN doc. CCPR/C/JPN/CO/6, 20 August 2014, para13.

⁹⁵ Republic of Kiribati-Presidential Web Portal, "Public consultation gets underway on the Amendment to the Penal Code Bill advocating the Death Penalty", 23 October 2014, available at www.president.gov.ki/2014/11/13/public-consultation-gets-underway-on-the-amendment-to-the-penal-code-bill-advocating-the-death-penalty/ (accessed on 5 March 2015).

⁹⁶ Radio New Zealand International, "Public against introduction of death penalty in Kiribati", 1 December 2014, available at www.radionz.co.nz/international/programmes/datelinepacific/audio/20159137/public-against-introduction-of-death-penalty-in-kiribati (accessed on 5 March).

appealing against their sentences. During the same Parliamentary interrogation, the Minister also stated that "only two Malaysians and a foreigner have been sentenced to death in 2012 and 2013" (the information refers to executions).⁹⁷ Amnesty International recorded no executions in 2012 and two in 2013.

TWO EXECUTIONS STAYED

Chandran s/o Paskaran was spared execution in Malaysia on 7 February after an outcry from human rights groups, including Amnesty International. He had been convicted of murder and sentenced to death on 16 April 2008. On 5 February Chandran s/o Paskaran's family were notified of his imminent execution and were allowed to visit him on 6 February. He received a temporary stay on the same evening.⁹⁸

Osariakhi Ernest Obyangbon, also known to Malaysian courts as the British national Philip Michael based on a passport found in his possession upon his arrest, was due to be executed on 14 March 2014. He had not received a fair trial and had been diagnosed as having schizophrenia, for which he had been receiving treatment, before his appeal in 2007. His execution was temporarily stayed, after interventions from human rights groups including Amnesty International, only hours before its scheduled time.

Both men remained detained on death row in Kajang Prison in Selangor state at risk of execution since they had exhausted all their legal remedies.

Despite the announcement by the authorities in 2012 of a review of mandatory death penalty laws for drug trafficking, the government did not introduce amendments to national legislation during 2014. During the UN Human Rights Council UPR in March Malaysia rejected recommendations to take steps towards abolition, as recommended during the UPR in October 2013.⁹⁹ The Attorney-General's Chambers informed Amnesty International that the study of the death penalty laws and practices was still ongoing at the end of 2014.

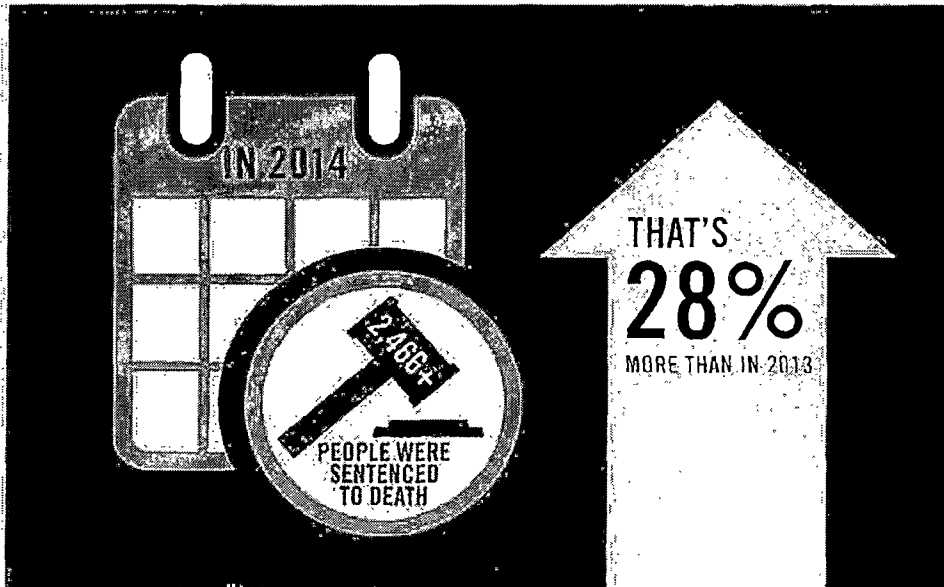
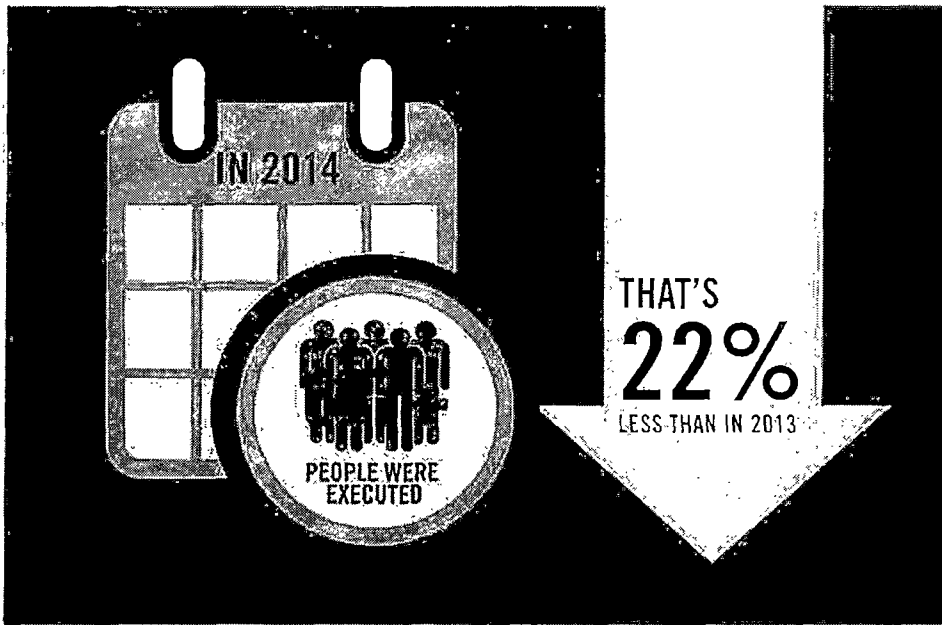
Two new death sentences were imposed in **Maldives**, where the last execution was carried out in 1954. Twelve people remained under sentence of death at the end of the year. On 23 January Minister of Home Affairs Umār Nāseer ordered the prisons officials in the country to start making "all necessary arrangements" for the implementation of all death sentences through lethal injection.

⁹⁷ "975 prisoners on death row awaiting appeals", *New Straits Times*, 13 November 2014, available at www.nst.com.my/node/52491?d=1 (accessed on 5 March 2015)

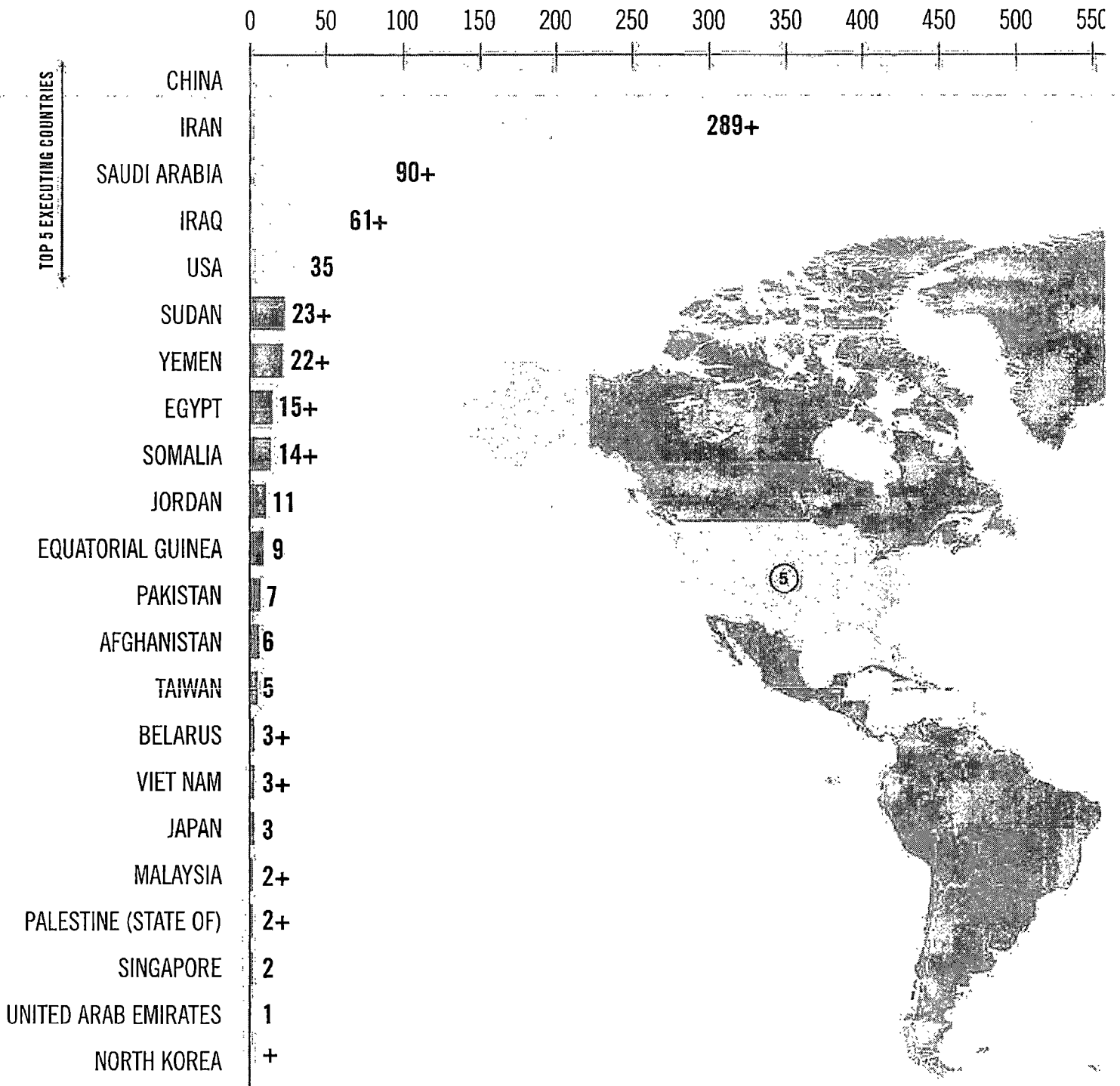
⁹⁸ Amnesty International, Update to Urgent Action 22/14 (ASA 28/002/2014), 9 February 2014, available at www.amnesty.org/en/library/asset/ASA28/002/2014/en/c8560edb-be2c-4e43-ba53-230f652e8ae1/asa280022014en.pdf

⁹⁹ UN Human Rights Council, Report of the Working Group on the Universal Periodic Review, Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review, Malaysia, UN doc. A/HRC/25/10/Add.1, 4 March 2014.

DEATH PENALTY IN 2014



EXECUTING COUNTRIES IN 2014



11 PERSISTENT EXECUTIONERS 2010-2014

①

CHINA
Carried out more executions than the rest of the world combined but figures remain a state secret.

②

IRAN
In addition to the 289 executions officially announced, Amnesty International believes at least 454 more executions were carried out.

③

SAUDI ARABIA
More than half of executions were carried out for non-lethal crimes.

④

IRAQ
Death sentences often handed down after grossly unfair trials.

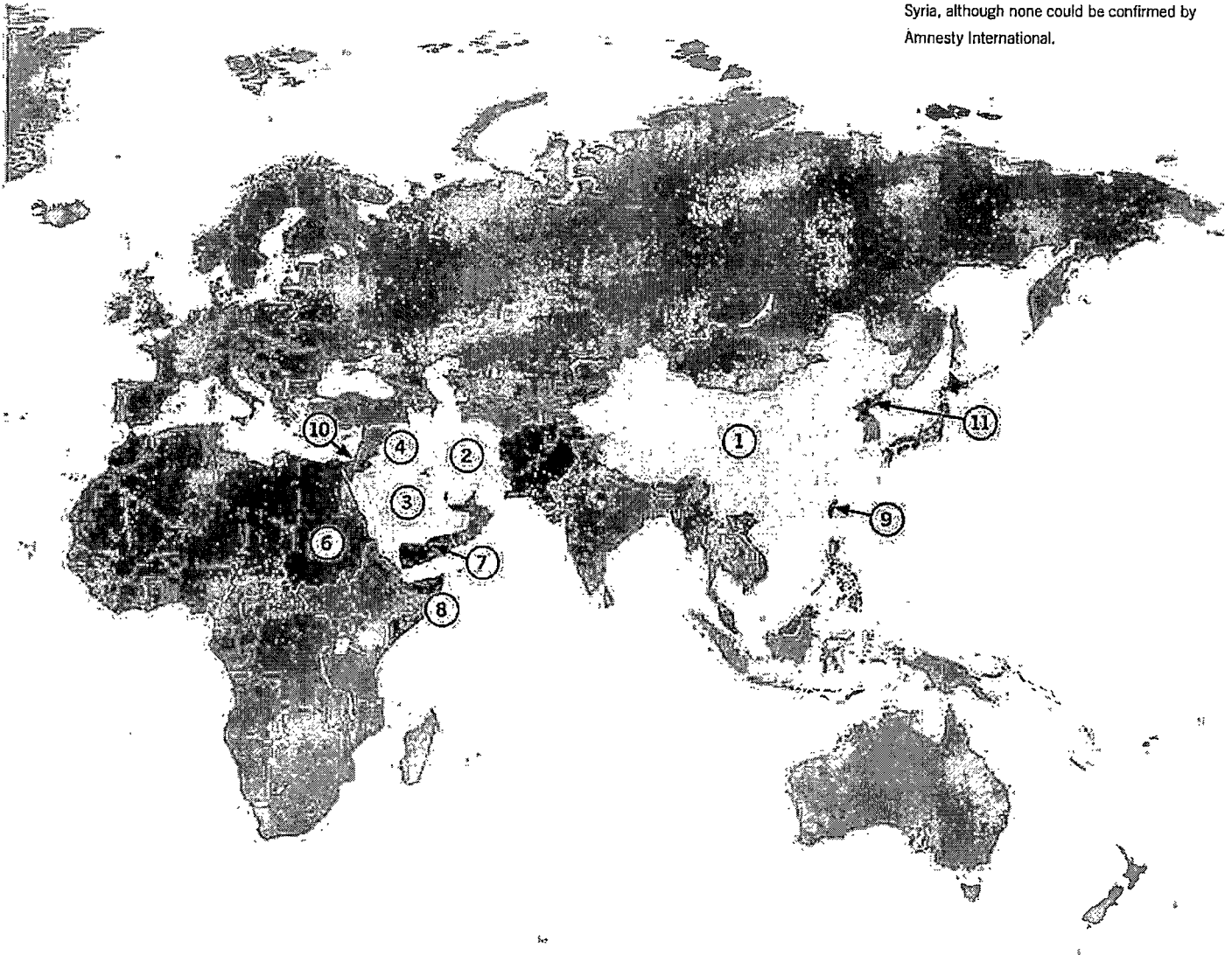
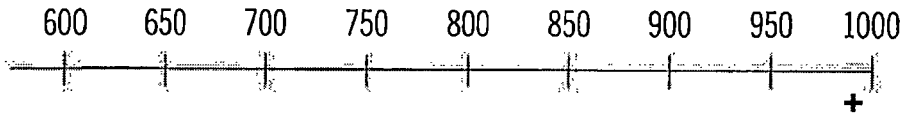
⑤

USA
Fewer executions and a decrease in death sentences imposed.

This map indicates the general locations of boundaries and jurisdictions and should not be interpreted as Amnesty International's view on disputed territories.

+ indicates that the figure that Amnesty International has calculated is a minimum figure. Where + is not preceded by a number this means Amnesty International is confident that there was at least one execution but it was not possible to establish a figure.

Executions may have taken place in Libya and Syria, although none could be confirmed by Amnesty International.



SUDAN
 Civilians prosecuted in military courts for crimes that carry the death penalty.



YEMEN
 Increase in the number of executions.



SOMALIA
 Fewer executions recorded.



TAIWAN
 Five executions; one crime removed from list of capital offences.



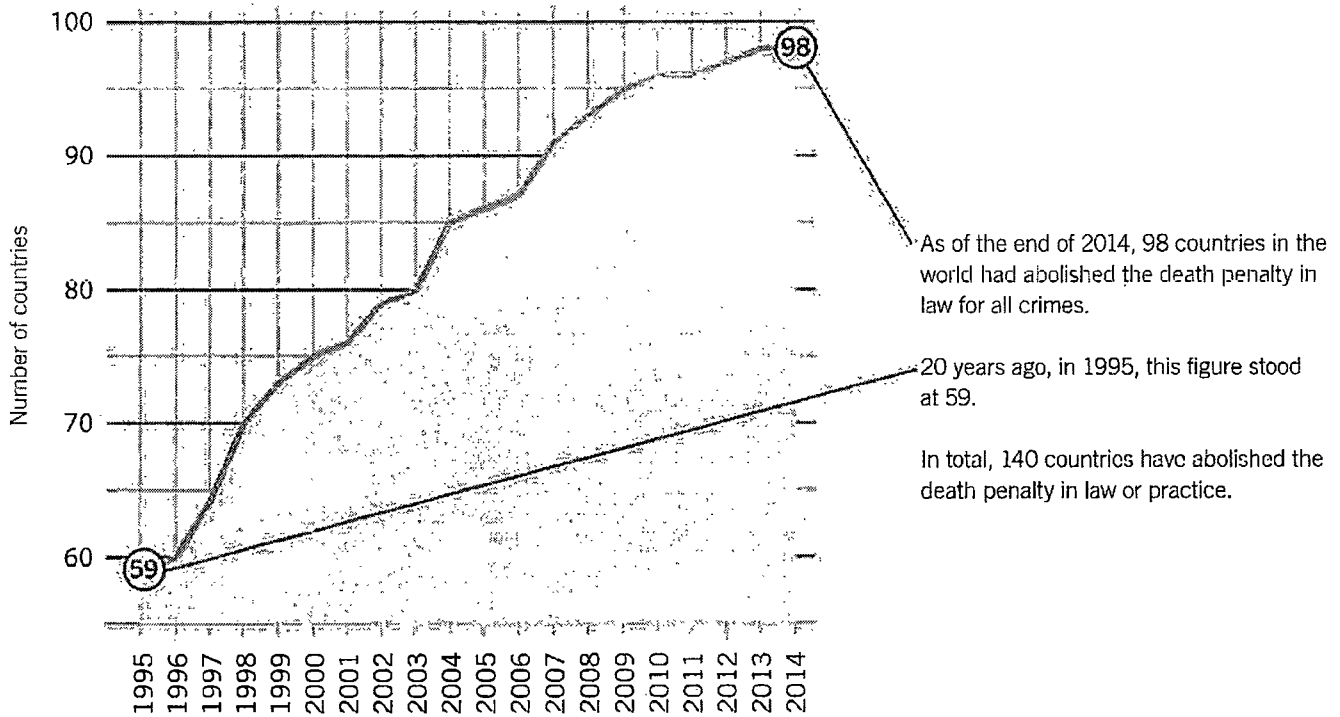
PALESTINE (STATE OF)
 Executions and death sentences in Hamas-controlled Gaza, Occupied Palestinian Territories.



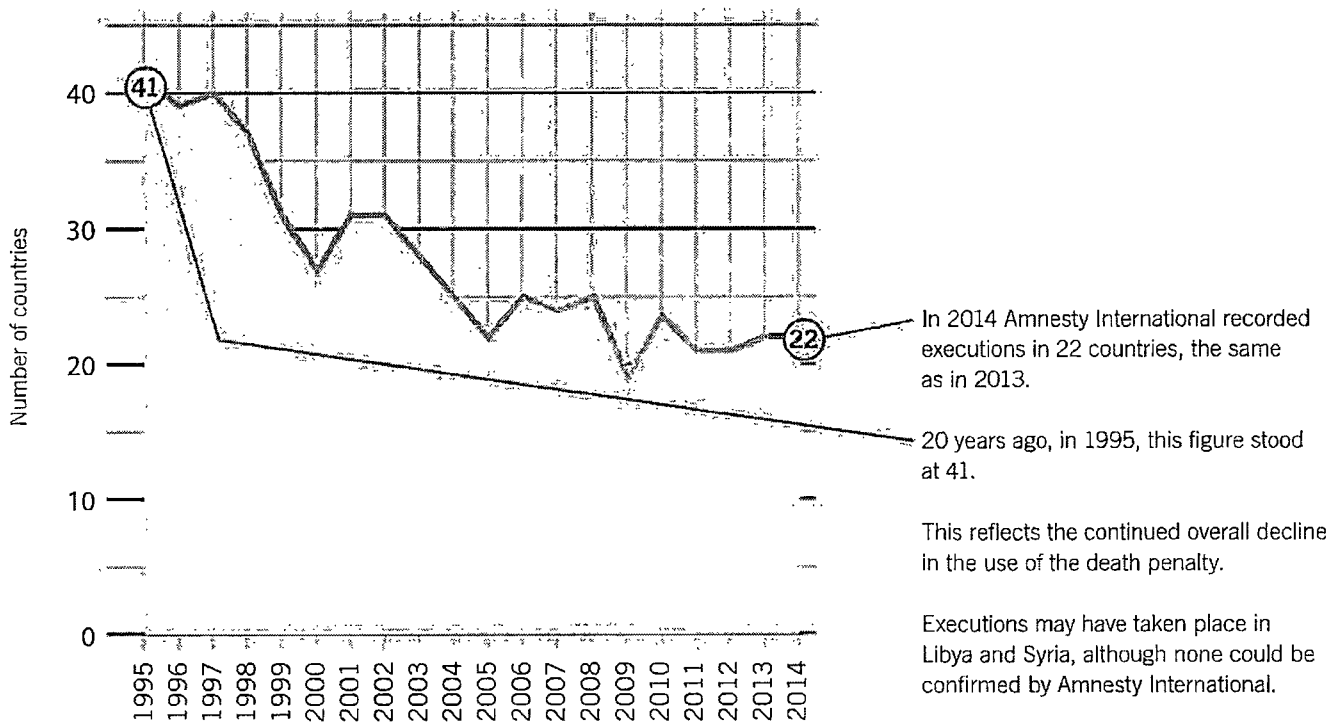
NORTH KOREA
 Executions after unfair trials, if any, and often for non-lethal crimes such as corruption.

DEATH PENALTY TRENDS 1995-2014

Increase in countries abolishing the death penalty



Decrease in countries carrying out executions



In April, the government introduced "Procedural Regulations on Investigating and Penalising the Crime of Murder" under the Police Act and Clemency Act, clearing the way for executions to be carried out. The new regulations contained new procedures relating to the execution of individuals who were below 18 when the crime was committed, allowing for them to be executed once they turned 18. Two people were sentenced to death by the Juvenile Court for crimes committed when they were under 18. The new Penal Code, adopted in April, retained the death penalty.¹⁰⁰

The authorities of **Mongolia** confirmed that no executions were carried out nor new death sentences imposed in 2014. The Bill to reform the Criminal Code, including to abolish the death penalty, remained pending before a committee of the Parliament during the year.

On 2 January President Thein Sein of **Myanmar** commuted all death sentences to life imprisonment. At least one new death sentence was imposed in Myanmar in 2014, where the last execution was carried out in 1988.

The extremely limited information available on **North Korea** did not allow for an adequate assessment of the country's use of the death penalty. While reports could not be independently verified, on the basis of the analysis of the more credible sources, Amnesty International believes that at least 50 executions were carried out in 2014. This figure likely represents a gross underestimate and the true number is believed to be much higher.

According to these reports, those executed were likely convicted of offences ranging from watching banned foreign shows and films, to corruption and sexual relations deemed inappropriate ("womanizing"). They included senior officials of the Central Administrative Department of the Workers' Party of Korea.

Death sentences continued to be handed down after unfair trials, including for offences that do not meet the threshold of the "most serious crimes" for which the death penalty can be imposed under international law and for crimes that do not carry the death penalty under the law of North Korea. In 2014 the authorities were reported to have amended the Criminal Code to expand the scope of the death penalty and make acts such as illegal phone contact with foreigners, drug use or drug dealings, and transnational human trafficking punishable by death.¹⁰¹

The UN commission of inquiry on human rights in the Democratic People's Republic of Korea released a report in February 2014. It stated: "[A]s a matter of State policy, the authorities carry out executions, with or without trial, publicly or secretly, in response to political and other crimes that are often not among the most serious crimes. The policy of regularly

¹⁰⁰ The new Penal Code will come into force in April 2015.

¹⁰¹ "Criminal Code Inciting Border Fears", Daily NK, 21 May 2014, available at: <http://www.dailynk.com/english/read.php?cataId=nk01500&num=11885> (accessed 5 March 2015).

carrying out public executions serves to instil fear in the general population. Public executions [...] continue to be carried out today."¹⁰² North Korea was reviewed under the UPR at the Human Rights Council on 1 May. In September the authorities rejected recommendations to ratify the Second Optional Protocol to the ICCPR or establish a moratorium on executions with a view to its abolition.¹⁰³

Prime Minister of **Pakistan** Nawaz Sharif lifted a six-year moratorium on civilian executions for terrorism-related offences on 17 December.¹⁰⁴ The decision was in response to an attack the day before on a school in Peshawar that left more than 149 people dead, including 132 children. Seven people were executed in less than two weeks: Aqeel and Arshad Meherban were executed on 19 December; Ikhlaq Ahmed, Ghulam Sarwar, Rashid Mehmood and Zubair Ahmed were executed on 21 December; Nias Mohammad was executed on 31 December. All had been convicted under the Anti-Terrorism Act.

The government had previously attempted to lift the moratorium on executions by scheduling the execution of Shoaib Sarwar, who had been convicted of murder in 1998, for 18 September 2014. The execution was stayed two days before it was due to be carried out.¹⁰⁵

DEATH FOR BLASPHEMY

"Defiling the name of the Prophet Mohammed" is a capital offence under Section 295-C of the Pakistan Penal Code. Blasphemy laws are inconsistent with Pakistan's international human rights obligations to guarantee the rights to freedom of expression and freedom of thought, conscience and religion. Furthermore, international law allows for the imposition of the death penalty only for the "most serious crimes", which has been interpreted to refer to intentional killing only.

On 25 September a prison guard shot and wounded Mohammad Asghar at the Adiala prison in the city of Rawalpindi, Punjab province. A British national of Pakistani origin, Mohammad Asghar was diagnosed with paranoid schizophrenia in the UK in 2010, before he moved to Pakistan. He was convicted of blasphemy in 2014 and sentenced to death. Despite his diagnosis in the UK, the Pakistan Court ruled that Mohammad Asghar was "sane". His appeal was pending before the Lahore High Court at the end of the year.¹⁰⁶ Mohammad Asghar remained in hospital at the end of the year. The provincial authorities charged the prison guard with

¹⁰² UN Human Rights Council, Report of the detailed findings of the commission of inquiry on human rights in the Democratic People's Republic of Korea, UN doc. A/HRC/25/CRP.1, 7 February 2014, para845.

¹⁰³ UN Human Rights Council, Report of the Working Group on the Universal Periodic Review-Democratic People's Republic of Korea, Addendum 1, UN doc. A/HRC/27/10/Add.1, 12 September 2014.

¹⁰⁴ The military authorities executed a soldier in 2012.

¹⁰⁵ Shoaib Sarwar's execution was scheduled for 3 February 2015 but was not carried out.

¹⁰⁶ Amnesty International, Pakistan: Further information: Guard shoots mentally ill prisoner, update to Urgent Action appeal 23/14 (ASA 33/014/2014), available at www.amnesty.org/en/library/info/ASA33/014/2014/en

attempted murder and suspended eight other prison guards. Mohammad Asghar's lawyer believes that his client is at risk of being killed if returned to prison because of the blasphemy charge.

On 16 October the Lahore High Court rejected an appeal against the death sentence of Asia Bibi, a Christian woman convicted on blasphemy charges. She was initially found guilty of blasphemy on 8 November 2010 and sentenced to death for allegedly insulting the Prophet Muhammad during an argument with a Muslim woman. Asia Bibi claimed that the evidence of her alleged blasphemy, which had been accepted by successive courts, was fabricated, and that she did not have access to a lawyer during her detention or on the final day of her trial in 2010. Asia Bibi was held in almost total isolation for her own protection since her arrest in 2009. Her mental and physical health reportedly deteriorated during her detention; her family and lawyers continued to fear for her safety.¹⁰⁷

According to the Human Rights Commission of Pakistan, 231 people were sentenced to death in 2014 and at least 8,200 people remained under sentence of death at the end of the year.¹⁰⁸ Approximately 500 prisoners had exhausted all legal appeals with mercy petitions pending before the President.

At least six men were under sentence of death for crimes committed when they were below 18 years of age, but the number is likely to be higher. Figures released by the National Assembly in March indicated that of those under sentence to death at least 444 people had been convicted of drug-related offences.¹⁰⁹

No new death sentences were recorded in **Papua New Guinea**, where 13 people remained on death row at the end of the year. In January members of the Constitutional Law Reform Commission returned from visits to Malaysia, Singapore, Thailand and the USA to study how to implement the death penalty.¹¹⁰ Following amendments to the Criminal Code in 2013 that expanded the scope of the death penalty to include "wilful murder of a person on account of accusation of sorcery" and for "aggravated rape" and introduced changes to the list of possible methods of execution.¹¹¹ In a seriously regressive move, in April the National Executive Council confirmed that lethal injection was the chosen method of execution and

¹⁰⁷ Amnesty International, Pakistan: Woman sentenced to death for blasphemy: Asia Bibi, Urgent Action appeal 266/14 (ASA 33/015/2014), available at www.amnesty.org/en/library/info/ASA33/015/2014/en

¹⁰⁸ "8,261 prisoners: Hanging in the balance", *Express Tribune*, 18 December 2014, available at <http://tribune.com.pk/story/808727/6261-prisoners-hanging-in-the-balance/> (accessed on 5 March 2015)

¹⁰⁹ "Drug smuggling cases: 70% of death sentences quashed by higher courts", *Express Tribune*, 27 March 2014, available at <http://tribune.com.pk/story/687815/drug-smuggling-cases-70-of-death-sentences-quashed-by-higher-courts/> (accessed on 5 March 2015).

¹¹⁰ "PNG says executions will go ahead this year", Radio New Zealand, 28 January 2014, available at www.radionz.co.nz/international/programmes/datalinepacific/audio/2583779/png-says-executions-will-go-ahead-this-year (accessed on 5 March 2015)

¹¹¹ Under Section 299A and 347 C of the Criminal Code.

that a death chamber would be built at the maximum security prison.¹¹² The last execution was carried out in 1954.

Singapore carried out two executions on 18 July 2014, ending a moratorium established in 2012 to allow the Parliament to review the mandatory death penalty laws. Tang Hai Liang and Foong Chee Peng had been convicted and mandatorily sentenced to death under the Misuse of Drugs Act for the trafficking of 89.55g and 40.23g respectively of diamorphine. Three new death sentences were imposed during the year; all were mandatory sentences for drug trafficking: Devendran was sentenced to death on 14 July; Prabagarana on 3 November; and Mohd Jeefrey bin Jamil on 28 November.¹¹³

Amnesty International recorded five commutations of death sentences in 2014; among them was Dinesh Pillai Raja Retnam whose sentence was commuted on account of his mental disability.¹¹⁴ It was the first time since sentencing discretion was introduced in 2012 that a case was commuted after taking into consideration the mental disability of the convicted prisoner. Twenty-two people were believed to be on death row at the end of the year.

One new death sentence was imposed in **South Korea**, where at least 61 people remained under sentence of death at the end of the year. The last execution was carried out in 1997. In December an opposition MP, Yoo In-tae, announced a plan to introduce a bill to abolish the death penalty.

At least 61 people, including two women, were sentenced to death in **Sri Lanka**, mostly for murder. At least 10 sentences were imposed for drug trafficking. One man was sentenced to death in his absence. On 7 February the Trincomalee High Court sentenced Thangarajah Sivakantharajah to death for a 1990 murder. He was 14 years old when he was arrested in 1992 and 25 when he was released on bail in 2003, while still waiting for his trial to

¹¹² pngedge.com, "Death penalty by lethal injection given go-ahead", 9 April 2014, available from Death Penalty News: http://deathpenaltynews.blogspot.co.uk/2014/04/papua-new-guinea-death-penalty-by.html?sm_au=iVVZr2r5NqTf3JHq (accessed on 5 March)

¹¹³ *Public Prosecutor v Prabagarana/ Srivijayan* [2014] SGHC 222, Criminal Case No 20 of 2014, 3 November 2014.

Public Prosecutor v Devendran A/L Supramaniam [2014] SGHC 140, Criminal Case No 4 of 2014, 14 July 2014.

Public Prosecutor v Mohd Jeefrey bin Jamil [2014] SGHC 255, Criminal Case No 31 of 2014, 28 November 2014.

¹¹⁴ Attorney General's Chambers, "First Person to qualify for re-sentencing under the diminished responsibility limb", 3 March 2014, available at www.agc.gov.sg/DATA/0/Docs/NewsFiles/AGC%20MEDIA%20STATEMENT_FIRST%20PERSON%20TO%20QUALIFY%20FOR%20RE-SENTENCING%20UNDER%20DIMINISHED%20RESPONSIBILITY_3%20MARCH%202014.pdf (accessed on 5 March 2015).

begin.¹¹⁵ International law prohibits the imposition of the death penalty against people below the age of 18 when the crime was committed.

Five out of eight people sentenced to death for drug trafficking in the same case on 30 October were pardoned and returned to their country of origin, India. The other three, all Sri Lankan nationals, remained under sentence of death. The Human Rights Commission of Sri Lanka reported in July that 529 people were under sentence of death, 451 of whom still appealing against the sentence.¹¹⁶

Taiwan carried out five executions and imposed one new death sentence in 2014; all cases involved people convicted of murder. The five men executed by shooting on 29 April were: Deng Kuo-liang executed at the Taipei Prison; Liu Yan-kuo, Tu Ming-lang and his brother Tu Ming-hsiung at the Tainan Prison; and Dai Wen-ching at the Hualien Prison. At the end of the year, 48 people were held on death row with their sentences finalized.

On 30 May the Legislative Yuan, the legislative body of Taiwan, adopted legislation to amend Article 347 of the Criminal Code to remove the death penalty as a punishment for the offence of kidnapping for ransom, except in cases in which the kidnapping leads to death. The amendment became effective on 20 June.¹¹⁷ Several other offences for which the death penalty remained a possible punishment, such as drug trafficking or sexual offences, do not meet the threshold of the "most serious crimes".

Amnesty International calculated that at least 55 new death sentences were imposed in **Thailand** between June and December 2014, for drug-related offences and murder. The actual figure is believed to be much higher. The Department of Corrections indicated that 645 people, including 54 women, were under sentence of death as of 31 December. Approximately 47% (302 people) had been convicted of drug trafficking.

On 19 September the government introduced a Bill in the National Legislative Assembly to expand the scope of the death penalty to include destroying an aircraft in service; damaging an aircraft to make it no longer operational; placing any material in an aircraft to cause

¹¹⁵ "Tamil man from Trincomalee sentenced to death", Tamil Net, 12 February 2014, available at www.tamilnet.com/art.html?catid=13&artid=37045 (accessed on 5 March 2015).

¹¹⁶ "Lanka rights body recommends abolition of capital punishment", South Asian Media, 11 July 2014, available at www.southasianmedia.net/stories/south-asia/lanka-rights-body-recommends-abolition-of-capital-punishment-story (accessed on 5 March 2015).

¹¹⁷ Global Legal Information Network Legislative Yuan, available at: <http://glin.ly.gov.tw/web/nationalLegal.do?isChinese=false&method=legalSummary&id=5349&fromWhere=legalHistory> (accessed 4 March 2015)

See also:

<http://glin.ly.gov.tw/file/legal/tw1806201427.pdf?sessionId=133F705C7FE55A5289BBC3577830B6B>
B.

damage; forcing the closure of an airport; and damaging airport facilities.¹¹⁸ The Bill had not been adopted before the end of the year.

On 22 December the Deputy Permanent Secretary of the Ministry of Justice Chanchao Chaiyanukit announced that the abolition of the death penalty was part of the Third National Human Rights Action Plan adopted by the authorities on 12 November.¹¹⁹

Figures on the use of the death penalty continued to be classified as a state secret in **Viet Nam**, where media reported at least three executions. The real figure is believed to be much higher. Amnesty International recorded that the courts imposed at least 72 new death sentences, 80% of which were for drug trafficking, and that at least 700 people remained under sentence of death at the end of the year. The death penalty continued to be imposed and implemented for drug-related offences and economic crimes such as embezzlement. Trials fell short of international standards of fairness, including in cases where the death penalty was imposed. Three cases in particular sparked debate in the country regarding the risk of executions on the basis of wrongful convictions: in December the Supreme Court authorized the stay of execution of Ho Duy Hai one day before it was due to go ahead and ordered a review of his case because of doubts surrounded his conviction.¹²⁰ In the same month, the National Assembly ordered the review of Nguyen Van Chuong's case. He was sentenced to death for murder in 2008 and his family had submitted numerous appeals to the courts. Earlier in the year, the Supreme People's Court declared Nguyen Thanh Chan innocent of a 2004 murder to which another man had confessed in October 2013.¹²¹

Viet Nam was considered under the UN UPR on 5 February. It stated that it was working to further reduce the number of crimes punishable by death as part of reforms to the Penal Code scheduled to be enacted by 2016.¹²² Viet Nam accepted recommendations to consider

¹¹⁸ "Thai parliament proposes death penalty for causing airport closure", Asia One, 19 September 2014, available at <http://news.asiaone.com/news/asia/thai-parliament-proposes-death-penalty-causing-airport-closure#sthash.33R1iCvY.dpuf> (accessed on 5 March)

¹¹⁹ "Thai Govt 'willing' to abolish death penalty: official", *Khaosod*, 22 December 2014, available at www.khaosodenglish.com/detail.php?newsid=1419229703 (accessed on 5 March).

¹²⁰ "Vietnam court halts execution of murder convict amid allegation of miscarriage of justice", *Thanh Nien News*, 4 December 2013, available at www.thanhniennews.com/society/vietnam-court-halts-execution-of-murder-convict-amid-allegation-of-miscarriage-of-justice-34885.html, (accessed 5 March 2015).

¹²¹ "Vietnam court halts execution of murder convict amid allegation of miscarriage of justice", *Thanh Nien News*, 4 December 2013, available at <http://www.thanhniennews.com/society/vietnam-court-halts-execution-of-murder-convict-amid-allegation-of-miscarriage-of-justice-34885.html> (accessed 5 March 2015)

¹²² UN Human Rights Council, Report of the Working Group on the Universal Periodic Review, Viet Nam, A/HRC/26/6, 2 April 2014.

ratifying the Second Optional Protocol to the ICCPR but rejected recommendations to establish a moratorium on the death penalty with a view to its eventual abolition.¹²³

EUROPE AND CENTRAL ASIA

REGIONAL TRENDS

- Belarus resumed executions in April, ending a 24-month hiatus that made the Europe and Central Asia region an execution-free zone.
- Poland ratified the Second Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR), aiming at the abolition of the death penalty, and Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights).
- Kazakhstan, Russia and Tajikistan continued to observe their formal moratoriums on the death penalty.
- Kazakhstan adopted a new Criminal Code reducing the scope of the death penalty.

In July the European Court of Human Rights of the Council of Europe heard the case of *Al Nashiri v. Poland* regarding Poland's alleged complicity in Abd al-Rahim al-Nashiri's secret detention and transfer to the US naval base at Guantánamo Bay, Cuba, despite the risk of him being subjected to the death penalty in a trial by military commission.¹²⁴ The Court found that "at the time of [Abd al-Rahim al-Nashiri's] transfer from Poland there was a substantial and foreseeable risk that he could be subjected to the death penalty following his trial before the military commission" and consequently found that Poland had violated Article 2 (right to life) of the European Convention on Human Rights and Article 1 of Protocol No. 6 (abolition of the death penalty) to the European Convention on Human Rights.¹²⁵ The Court required Poland to seek to remove the risk that Abd al-Rahim al-Nashiri could be subjected to the death penalty by seeking assurances that the US authorities would not impose such penalty on him.¹²⁶

¹²³ UN Human Rights Council, Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review, Viet Nam, UN Doc. A/HRC/26/6/Add.1, 20 June 2014.

¹²⁴ European Court of Human Rights, "Secret rendition and detention by the CIA in Poland of two men suspected of terrorist acts", 24 July 2014, available at <http://hudoc.echr.coe.int/webservices/content/pdf/003-4832205-5894802> (accessed on 5 March 2015).

¹²⁵ European Court of Human Rights, *Case of Al Nashiri v. Poland*, (Application no. 28761/11), 24 July 2014, para578, available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-146044> (accessed on 5 March 2015).

¹²⁶ European Court of Human Rights, *Case of Al Nashiri v. Poland*, (Application no. 28761/11), 24 July 2014, para589, available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-146044> (accessed on 5 March 2015).

COUNTRY DEVELOPMENTS

In April 2014 Belarus secretly executed Pavel Selyun, sentenced to death in June 2013 for a double murder committed in 2012.¹²⁷ The UN Human Rights Committee, the body overseeing the implementation of the ICCPR to which Belarus is a state party, was considering Pavel Selyun's case and had requested a stay of execution pending the conclusion of this process.¹²⁸ Such requests are binding on state parties to the First Optional Protocol to the ICCPR, which Belarus acceded to in 1992.

The UN Special Rapporteur on the situation of human rights in Belarus, Miklós Haraszti, condemned the execution and urged Belarus to establish a moratorium on the death penalty.¹²⁹ He further condemned the fact that the date of Pavel Selyun's execution was not made known, and that his mother only learned of the death of her son from his lawyer.

In May the Mogilev Regional Court confirmed that Rygor Yuzepchuk had been executed. He was sentenced to death in 2013 for a murder committed in 2012. The authorities have not made public the date of his execution or the location of his grave.¹³⁰

Alyaksandr Haryunou was executed in October. He had been sentenced to death in 2013 for a murder committed in 2012.¹³¹ After the Supreme Court confirmed his death sentence, Alyaksandr Haryunou appealed to the UN Human Rights Committee in April, arguing that his trial had been unfair.¹³² The Committee asked the Belarusian authorities to stay his execution until it had considered the case. Alyaksandr Haryunou's relatives and lawyer were not

¹²⁷ "Belarus executes convicted murderer: rights group", Death Penalty News, 18 April 2014, available at http://deathpenaltynews.blogspot.co.uk/2014/04/belarus-executes-convicted-murderer.html?sm_au=iVV6jTrtbrMLLS7N (accessed on 5 March 2015).

¹²⁸ Amnesty International, Belarus: Death row prisoner executed in secret, 23 April 2014, available at www.amnesty.org/en/documents/EUR49/003/2014/en/

¹²⁹ UN News Centre, "UN rights expert calls on Belarus to impose death penalty moratorium, halt executions", 25 April 2014, available at www.un.org/apps/news/story.asp?NewsID=47653&Kw1=Belarus&Kw2=executions&Kw3=moratorium#.VL.PDpCusXu0 (accessed on 5 March 2015).

¹³⁰ Amnesty International, Belarus executes second prisoner this year, 14 May 2014, available at www.amnesty.org/en/library/info/EUR49/005/2014/en.

¹³¹ Amnesty International, Belarus executes third prisoner this year, 6 November 2014, available at www.amnesty.org/en/documents/EUR49/009/2014/en/

¹³² UN High Commissioner for Human Rights "UN Human Rights Committee deplores Belarus execution", 14 November 2014, available at www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15301&LangID=E (accessed on 5 March 2015).

Viasna Human Rights Centre, "Death convict Aliaksandr Hrunou files supervisory appeal and petition for clemency", 17 April 2014, available at <http://spring96.org/en/news/70601> (accessed on 5 March 2015).

informed of the date of the execution, nor were they given the opportunity to have a final meeting with him.¹³³

In October the UN Human Rights Committee considered the case of Vasil Yuzepchuk, executed in 2010. The Committee found violations of a number of rights recognized in the ICCPR, including the right to life and the right to a fair trial. The Committee concluded that Vasil Yuzepchuk's trial did not meet the criteria of independence and impartiality and that he had been tortured to extract a confession.¹³⁴

Eduard Lykau remained on death row. He was sentenced to death on 26 November 2011 by the Minsk Regional Court after being convicted of five murders committed in 2002, 2004 and 2011.¹³⁵

In January 2014, four UN Special Rapporteurs – Special Rapporteur on the independence of judges and lawyers; Special Rapporteur on extrajudicial, summary or arbitrary executions; Special Rapporteur on torture and other cruel, inhuman and degrading treatment or punishment; and Special Rapporteur on the situation of human rights in Belarus – noted the lack of information regarding the trial and conviction of Eduard Lykau and the secrecy of the legal proceedings against him. They expressed concern that the death penalty may have been imposed after a trial that did not conform to the most stringent fair trial and due process guarantees.¹³⁶

In April 2014, following a Supreme Court ruling upholding the death sentence of Eduard Lykau, the Special Rapporteur on the situation of human rights in Belarus urged the Belarusian authorities to impose an immediate moratorium on death sentences and to refrain from carrying out further executions.¹³⁷ In June 2014 the Special Rapporteur on extrajudicial, summary or arbitrary executions expressed concern about the risk of Eduard Lykau's execution following proceedings marred by secrecy, and called on the authorities to commute his sentence.¹³⁸

¹³³ Amnesty International, Belarus executes third prisoner this year, 6 November 2014, available at www.amnesty.org/en/documents/EUR49/009/2014/en/

¹³⁴ UN Human Rights Committee, Communication No. 1906/2009, UN doc. CCPR/C/112/D/1906/2009, 17 November 2014 available at www.ccprcentre.org/doc/2014/11/1906-2009-Yuzepchuk-v-Belarus1.pdf (accessed on 5 March 2015).

¹³⁵ Amnesty International, Belarus must stop imminent execution: Eduard Lykau, 11 November 2014, available at www.amnesty.org/en/documents/EUR49/010/2014/en/

¹³⁶ UN High Commissioner for Human Rights, (2012) G/SO 214 (3-3-16) G/SO 214 (33-27) G/SO 214 (53-24) BLR 1/2014, 8 January 2014, available at [https://spdb.ohchr.org/hrdb/25th/public-UA_Belarus_08.01.14_\(1.2014\).pdf](https://spdb.ohchr.org/hrdb/25th/public-UA_Belarus_08.01.14_(1.2014).pdf) (accessed on 5 March 2015).

¹³⁷ UN High Commissioner for Human Rights, "Halt further executions – UN expert calls on Belarus for an immediate death sentence moratorium", 25 April 2014, available at www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14537&LangID=E (accessed on 5 March 2015).

¹³⁸ UN General Assembly, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns, UN doc. A/HRC/26/36/Add.2, 2 June 2014, available at www.ohchr.org/EN/Issues/Executions/Pages/AnnualReports.aspx (accessed on 5 March 2015).

Kazakhstan continued to observe the official moratorium on executions established in December 2003.¹³⁹ In 2014 the Parliament adopted a new Criminal Code; the Code's reform has introduced the death penalty for violation of the laws of war (Article 164.2) and removed it for abuse of authority in war time (Article 380.4) and exceeding authority and official powers in war time (Article 380-1.4). The new Criminal Code also reduced from 18 to 17 the number of articles providing for the death penalty. These amendments entered into force on 1 January 2015.¹⁴⁰

At the UN Universal Periodic Review in October the government of Kazakhstan accepted recommendations to maintain the moratorium on the death penalty and to proceed with the abolition of the death penalty. Nevertheless, it did not support recommendations to ratify the Second Optional Protocol to the ICCPR and to abolish the death penalty for all crimes.¹⁴¹

In **Russia**, throughout the year, various politicians and law enforcement officials called for the reintroduction of the death penalty. In January, four political parties introduced a draft law in the Duma (lower house of parliament) aimed at suspending Russia's moratorium on the death penalty in cases where the crimes involved terrorism and murder.¹⁴² In May, Aleksandr Bastykin, head of the Investigative Committee of Russia, asked members of parliament to vote to restore the death penalty as a way to deter potential criminals. Other influential politicians such as Sergey Naryshkin, speaker of the Duma, and Pavel Krashennikov, chairman of the State Duma's Legislation Committee, dismissed these calls. In May a spokesperson for President Vladimir Putin confirmed the President's opposition to the death penalty.¹⁴³

¹³⁹ Amnesty International, *Death sentences and Executions 2013* (ACT 50/001/2014).

¹⁴⁰ Criminal Code of the Republic of Kazakhstan, adopted on 16 June 1997 and entered into force on 1 January 1998, including amendments as of 10 June 2014, repealed on 1 January 2015; and Criminal Code of the Republic of Kazakhstan, adopted on 3 July 2014, with further amendments of 7 November 2014, and entered into force on 1 January 2015, available at <http://online.zakon.kz/> (accessed on 5 March 2015)

¹⁴¹ UN Human Rights Council, Report of the Working Group on the Universal Periodic Review, Kazakhstan, UN doc. A/HRC/28/10, 10 December 2014, available at www.upr-info.org/sites/default/files/document/Kazakhstan/session_20_-_october_2014/a_hrc_28_10_e.pdf (accessed on 5 March 2015).

¹⁴² "Russia's war on terror to remain within constitutional framework", *RT*, 30 December 2013, available at <http://rt.com/politics/russia-death-penalty-terrorism-982/> (accessed on 5 March 2015).

"Russian communists call for death penalty for terrorists", *Rapsi*, 4 February 2014, available at http://rapsinews.com/legislation_news/20140204/270633214.html (accessed on 5 March 2015).

¹⁴³ "Top investigator wants to restore death penalty 'as preventive measure'," *RT*, 30 May 2014, available at <http://rt.com/politics/162464-russia-death-penalty-return> (accessed on 5 March 2015).

MIDDLE EAST AND NORTH AFRICA

REGIONAL TRENDS

- In 2014, eight countries carried out executions, two more than in 2013.
- Egypt, Jordan and the United Arab Emirates (UAE) resumed executions in 2014.
- Sixteen countries handed down death sentences.
- The total number of death sentences imposed increased significantly in comparison to 2013.

EXECUTIONS AND DEATH SENTENCES IN THE MIDDLE EAST AND NORTH AFRICA

At least 491 executions in eight countries (out of 19 in the region) could be confirmed: Egypt (15+), Iran (289+), Iraq (61+), Jordan (11), Saudi Arabia (90+), Palestine (2+, Hamas authorities, Gaza), UAE (1) and Yemen (22+). It could not be confirmed if judicial executions took place in Oman and Syria.

At least 785 death sentences were imposed in 16 countries: Algeria (16+), Bahrain (5), Egypt (509+), Iran (81+), Iraq (38+), Jordan (5), Kuwait (7), Lebanon (11+), Libya (1+), Morocco/Western Sahara (9), Palestine (4+ Hamas authorities, Gaza), Qatar (2+), Saudi Arabia (44+), Tunisia (2+), UAE (25) and Yemen (26+).

As in previous years, the use of the death penalty in the Middle East and North Africa region continued to be of grave concern in 2014. The number of executions recorded by Amnesty International in the region in 2014 decreased by approximately 23% compared to 2013. In 2013 at least 638 executions were recorded while in 2014 the figure was at least 491. Iran, Iraq and Saudi Arabia continue to carry out the greatest number of executions in the region, accounting for 90% of all those confirmed in 2014. While the number of confirmed executions in Saudi Arabia increased by almost 14% compared with 2013, the numbers recorded for Iran and Iraq decreased sharply, by 22% and 64% respectively.¹⁴⁴ In contrast, executions recorded by Amnesty International in Yemen increased by 69%.

The number of confirmed death sentences imposed in 2014 – at least 785 – represented an increase of over 100%, compared to 2013 (when Amnesty International recorded 373 sentences). The mass death sentences imposed in Egypt contributed significantly to this increase, with the country accounting for 65% of all the death sentences imposed in the

¹⁴⁴ This assessment is based on a decrease in the number of executions that Amnesty International was able to confirm. The assessment for Iran is based on officially acknowledged figures although reliable sources reported that more executions were carried out. In Iraq, due to the internal armed conflict that escalated during the year, access to information on the use of the death penalty has been limited.

region in 2014. While the number of death sentences imposed in Algeria, Iran and Tunisia decreased, the number increased in Iraq, Saudi Arabia, UAE and Yemen:

Obtaining complete and reliable data on the use of the death penalty in the region is particularly difficult, especially on countries such as Iran, Iraq, Saudi Arabia and Yemen. The internal armed conflict in Syria meant that information on the use of the death penalty could not be confirmed.

Algeria, Bahrain, Kuwait, Lebanon, Libya, Morocco/Western Sahara, Qatar and Tunisia imposed death sentences; however, they did not carry out executions.

Across the region, executions continued to be carried out for crimes not involving intentional killings and therefore not meeting the threshold for the use of the death penalty under international human rights standards. Death sentences were imposed for crimes such as "insulting the prophet of Islam" (Iran) and "disobeying and breaking allegiance to the ruler" (Saudi Arabia), which are not recognizably criminal offences under international human rights law. In addition, death sentences were imposed in countries including Egypt, Iran, Iraq and Saudi Arabia after unfair trials.

Following the UN Human Rights Council Universal Periodic Review (UPR), Qatar and Saudi Arabia rejected recommendations on the use of the death penalty.

COUNTRY DEVELOPMENTS

In **Algeria** at least 16 death sentences were imposed; no executions were known to have been carried out in 2014.

No executions were carried out in **Bahrain**. Five death sentences were imposed on five men, four Bahraini nationals and one Yemeni national, while one commutation was granted. During the year the Court of Appeal upheld the death sentence of Maher Abbas Ahmad (also known as Maher al-Khabbaz). His lawyer had stated that the court accepted his "confession", which was obtained under torture, as evidence against him.¹⁴⁵ Bahrain took a positive step when it moved its vote from "opposition" to "abstention" during the UN General Assembly vote on a resolution on the use of the death penalty.

At least 15 executions were carried out in **Egypt** in 2014. At least 509 death sentences were imposed; this figure includes death sentences imposed after grossly unfair trials.

During the year Egyptian courts handed down mass death sentences after mass trials that were grossly unfair. The Minya criminal court imposed mass death sentences on 37 people in April and 183 people in June. The death sentences followed referrals made by the court to

¹⁴⁵ Amnesty International, Death Sentence for Flare Fatality, 7 October 2014, available at www.amnesty.org/en/documents/MDE11/034/2014/en/

the Grand Mufti, Egypt's highest religious official.¹⁴⁶ Egyptian criminal courts must refer a case to the Grand Mufti for review, before handing down a death sentence; however, the opinion of the Grand Mufti is only advisory and not binding on the courts. In December, the Giza criminal court recommended death sentences against 188 people for involvement in the killing of 11 police officers in Giza in August 2013. The court referred the 188 people to the Grand Mufti, but final verdicts had not been handed down at the end of 2014.¹⁴⁷

Two commutations were granted in September when a court sentenced two men to life imprisonment after re-trying them on charges of inciting violence and blocking access to a public highway in 2013. A court in July had sentenced them to death in their absence on the same charges. Under Egyptian law, defendants tried in their absence have the right to a re-trial in person.

During the year Egypt's highest court overturned at least two death sentences passed by the lower courts, ordering that the defendants be re-tried.

Iran carried out the most executions in the region in 2014. Iranian authorities or state-controlled or state-sanctioned media officially announced 289 executions (278 men and 11 women). However, reliable sources reported at least 454 more executions in addition to those officially announced, bringing the total number of executions in 2014 to at least 743. Of those officially announced, 122 involved individuals convicted of drug-related offences and 29 were carried out in public. At least 81 death sentences were imposed. This figure included those that were officially announced and those that were not. In addition, at least 22 commutations were granted while at least 81 people were on death row at the end of the year.

During the year, the UN Special Rapporteur on the situation of human rights in the Islamic Republic of Iran expressed concern about the continued high rate of executions and use of the death penalty against juvenile offenders in Iran.¹⁴⁸

Amnesty International received reports that Iran executed at least 14 people who were under 18 at the time of the crime. In December, the Supreme Court issued a "pilot judgment" ruling that all individuals currently on death row for crimes committed while they were under the age of 18 can submit judicial review requests to the Supreme Court pursuant to Article 91 of the revised Islamic Penal Code. The revised Penal Code allows the execution of juvenile offenders under *qesas* (retribution-in-kind) and *hodoud* (offences and punishments for which there are fixed penalties under Islamic law) crimes, unless the juvenile offender is found to

¹⁴⁶ Following the mass trials in March and April, the Minya criminal court recommended death sentences for 528 people and 683 people respectively. However, after the opinion of the Grand Mufti was received the court only imposed death sentences on 37 and 183 people respectively.

¹⁴⁷ On 2 February 2015 the final verdict sentencing 183 people to death was issued by the court after the opinion of the Grand Mufti was received.

¹⁴⁸ UN General Assembly, Situation of human rights in the Islamic Republic of Iran, UN doc. A/69/356, 27 August 2014, para7.

have not understood the nature of the crime or its consequences, or if there are doubts about the offender's mental capacity. The use of the death penalty against juvenile offenders is strictly prohibited under the International Covenant on Civil and Political Rights (ICCPR) and the UN Convention on the Rights of the Child; Iran is a party to both International human rights treaties.

Iran continued to carry out executions in secret. Hadi Rashedi and Hashem Sha'bani Nejad, of the Ahwazi Arab minority, were executed in secret in January 2014, following an unfair trial in 2012 which resulted in them being convicted of "enmity against God" and "corruption on earth." The authorities did not tell their families when they were executed and refused to hand over their bodies for burial.¹⁴⁹

Death sentences were generally imposed following trials that fell short of international fair trial standards. Defendants often had no access to lawyers during pre-trial investigations, and courts generally dismissed allegations of torture and admitted as evidence "confessions" obtained under torture.

Reyhaneh Jabbari was executed on 25 October in Raja'i Shahr Prison, in Karaj near Tehran, for the killing of Morteza Abdolali Sarbandi, a former employee of Iran's Ministry of Intelligence. Reyhaneh Jabbari was arrested in 2007 and admitted the stabbing immediately after arrest. She said she had acted in self defence, after he had tried to sexually abuse her. Following her arrest, she was held in solitary confinement for two months in Tehran's Evin Prison, where she did not have access to a lawyer or her family. She was sentenced to death under *qesas* by a criminal court in Tehran in 2009. The death sentence was upheld by the Supreme Court the same year. Sentences of *qesas* are not open to pardon or amnesty by the Supreme Leader.

Iranian courts continued to sentence people to death for crimes that did not meet the threshold of the "most serious crimes" and crimes not recognizably criminal offences under international human rights law.

Soheil Arabi was sentenced to death on 30 August by a criminal court in Tehran for "insulting the Prophet of Islam" (*sabbo al-nabbi*). The charge was based on postings he made on eight Facebook accounts, which the authorities said belonged to him. The Supreme Court upheld the sentence on 24 November. Soheil Arabi had been arrested in November 2013 by the Islamic Revolutionary Guard Corps (IRGC) and spent two months in solitary confinement in section 2A of Tehran's Evin Prison, which is under the control of the IRGC. During interrogation, he was pressured into making a "confession".

Earlier in February 2014, the Supreme Court upheld the death sentence of another man, Rouhollah Tavana, for "insulting the Prophet of Islam" in a video clip. He had been sentenced to death on 3 August 2013 by a criminal court in Khorasan.

In December, the threat of execution was used to punish some death row inmates. The authorities threatened to expedite the execution of 10 men, including a juvenile offender, for going on hunger strike. The men were among 24 prisoners from Iran's Kurdish minority who

¹⁴⁹ Amnesty International, Two Ahwazi Arab Men Executed Three at Risk, 14 February 2014, available at www.amnesty.org/en/documents/MDE13/008/2014/en/

started a hunger strike on 20 November in protest at the conditions of Ward 12 of Oroumieh Central Prison, West Azerbaijan Province, where political prisoners are held. The juvenile offender, Saman Naseem, was sentenced to death following an unfair trial in 2013 on the charges of "enmity against God" and "corruption on earth" for his alleged membership of the armed opposition group, Party For Free Life of Kurdistan, and engaging in armed activities against the state. Saman Naseem was 17 at the time of the alleged offences.

In Iraq executions were carried out and death sentences imposed for offences that included terrorism, murder and kidnapping. Since 2005 the vast majority of those executed have been sentenced to death for terrorism-related offences, in most cases after unfair trials. At least 61 executions were known to have been carried out in 2014, a reduction from the 2013 of at least 169 executions.¹⁵⁰ At least 38 death sentences were imposed and at least one commutation was granted. Although the majority of those sentenced to death and executed were Iraqi nationals, nationals from Libya, Saudi Arabia and other countries were also sentenced to death and executed. No executions took place in the Kurdistan Region of Iraq.

Ahmed al-'Alwani, a former member of Iraq's Council of Representatives and a prominent member of the secular political party al-Iraqiya Bloc, was sentenced to death on 23 November by the Central Criminal Court of Iraq in Baghdad for killing two soldiers. He had been charged with "assaulting military assets and killing and injuring security forces for terrorist ends" under Article 4 of the 2005 Anti-Terrorism Law. Ahmed al-'Alwani was denied access to his lawyer and family. In court, his lawyer was not allowed to cross-examine the prosecution witnesses or ask questions as these were deemed "not productive" by the court. The court refused to record his questions in the minutes of the hearing. Ahmed al-'Alwani's lawyer was intimidated on several occasions by security forces until he withdrew from the case.

On 21 January the Iraqi Ministry of Justice issued a statement confirming that the authorities had executed 26 men on 19 January. Amnesty International was able to confirm that at least 12 more men were also executed. The organization also learned that on the same day the presidency's office ratified around 200 death sentences.

In 2014, a number of ministers in Israel called for the resumption of the death penalty, which was abolished for ordinary crimes in 1954. In May, Minister of Transportation Yisrael Katz called for the death penalty to be reinstated as a deterrent for Palestinian prisoners.¹⁵¹ In June, Housing Minister Uri Ariel called for the use of the death penalty for "terrorists", following the kidnapping and murder of three Jewish teenagers.¹⁵²

¹⁵⁰ More executions may have been carried out in Iraq in 2014; however, Amnesty International was only able to confirm 61 executions.

¹⁵¹ "Israeli minister demands death sentences for Palestinian prisoners", *Middle East Monitor*, 12 May 2014, www.middleeastmonitor.com/news/middle-east/11411-israeli-minister-calls-for-death-sentences-for-palestinian-prisoners (accessed on 5 February 2015).

¹⁵² "Minister Ariel Calling for the Death Penalty for Terrorists", *The Yeshiva World*, 17 June 2014, www.theyeshivaworld.com/news/headlines-breaking-stories/240001/minister-ariel-calling-for-the-death-penalty-for-terrorists.html (accessed on 8 February 2015).

Jordan resumed executions on 21 December after an eight-year hiatus. On that day 11 men were executed at short notice at Swaqa Correctional and Rehabilitation Centre. All had been convicted and sentenced to death for murder prior to 2006; their sentences had been upheld by the Court of Cassation. The Jordanian media outlet *Ammon News* quoted a government source as saying that the final decision to execute the 11 men was made by the authorities only on the night before. This raises serious concerns about whether the authorities adhered to international human rights standards which require that individuals on death row and their families be given advance notice of their execution. The executions followed the establishment, in November, of a special committee of the Cabinet to look into lifting the suspension on executions, as a deterrent to murder and in response to public demand. The authorities did not make any public announcement about the formation of the special committee until the executions were carried out.

At least 113 people were under sentence of death in Jordan at the end of the year. According to government information, five death sentences were imposed, all on men, during 2014. Three were Jordanian nationals, the fourth was a Syrian national and the fifth was a Palestinian national. Three men, two Egyptians and one Jordanian, had their death sentences commuted to 20 years' imprisonment.

No executions were carried out in **Kuwait**. Seven death sentences were imposed; at least eight people were under sentence of death and four commutations were granted.

No executions were carried out in **Lebanon**. At least 11 people were sentenced to death and five commutations were granted in 2014.¹⁵³

In **Libya** at least one death sentence was imposed; no executions were recorded. Former al-Gaddafi officials continue to face trials that may lead to the use of the death penalty.

According to government information, nine death sentences were imposed in **Morocco/Western Sahara** in 2014; 117 people – 114 men and three women – were on death row at the end of the year. No executions were carried out.

Amnesty International has been unable to confirm figures on the use of the death penalty in **Oman**.

¹⁵³ Five out of the 11 death sentences were imposed in the defendants' absence. The five people whose sentences were commuted were initially sentenced to death in 2014 but had their death sentences reduced to life imprisonment with hard labour.

At least two executions were carried out and four death sentences were imposed in **Palestine** (State of). The executions were carried out and the death sentences were imposed by the Hamas authorities in Gaza.¹⁵⁴ In the West Bank no executions took place and no death sentences were imposed by Palestine.

No executions were recorded in **Qatar**. At least two death sentences were imposed, on a Qatari national and a Philippine national. During the UN UPR in March, Qatar rejected recommendations to commute all death sentences, declare a moratorium on executions and abolish the death penalty.

At least 90 executions were recorded in **Saudi Arabia**. This figure is a slight increase from previous years (2013: 79+; 2012: 79+; 2011: 82+). Two of those executed were women, an Ethiopian national and a Nepali national. The 88 men comprised: 53 Saudi Arabians, seven Syrians, one Iranian, 21 Pakistanis, one Philippine national, two Yemenis, one Indian, one Turkish and one Iraqi.

Close to half of the executions were carried out for crimes involving killings. The others were carried out for non-lethal crimes: 42 for drug-related offences; and the remainder for kidnapping, torture, rape, and witchcraft and sorcery.

Amnesty International recorded the imposition of at least 44 death sentences in Saudi Arabia, all against men. The real number is likely to be much higher. At least six commutations and six pardons were granted. Scores of people remain on death row but the exact number cannot be confirmed.

Court proceedings in Saudi Arabia fall far short of international standards for fair trial. Trials in death penalty cases are often held in secret. Defendants are rarely allowed formal representation by lawyers, and in many cases are not informed of the progress of legal proceedings against them. They may be convicted solely on the basis of "confessions" obtained under duress or involving deception.

On 18 August, four members of one family were executed in the south-eastern city of Najran for "receiving large quantities of hashish". The four men had been sentenced to death on the basis of "confessions" they claimed were extracted under torture.

¹⁵⁴ In addition to the judicial executions that were carried out, Hamas forces in Gaza extrajudicially and/or summarily executed at least 22 people they accused of "collaborating" with Israel, in the context of the July-August 2014 conflict between Israel and Gaza known as Operation Protective Edge. The executions were carried out by members of Hamas' armed wing and the Internal Security Force. Some of those killed were prisoners who were appealing against death sentences passed by military courts in Gaza.

Hajras al-Qurey was executed on 22 September for drug trafficking, despite maintaining that he was tortured into "confessing" to the crime and the fact that he was convicted after an unfair trial. He had been sentenced to death on 16 January 2013 by the General Court in Najran. The sentence was later upheld by both an appeal court and the Supreme Court.

Hajras al-Qurey and his son, Muhammad al-Qurey, were arrested on 7 January 2012 at the al-Khadra crossing with Yemen, when customs officers suspected them of carrying drugs in their car. According to the court documents, Hajras al-Qurey tried to drive away at speed to escape from the border police, which gave chase and caught them. According to his family, Hajras al-Qurey suffered from psychological problems and had been known to lose control of himself when under pressure. Both men were taken for interrogation and claimed they were tortured to extract "confessions". Muhammad al-Qurey "confessed" to the crime and testified that his father had not known that he, Muhammad, was smuggling drugs. Both men were denied access to lawyers during interrogation. The General Court in Najran ignored evidence from an assessment it had commissioned which found that Hajras al-Qurey had a mental condition that might have impaired his judgment. No investigations are known to have been carried out into the allegations that the men were tortured and received an unfair trial.

The Saudi Arabian authorities have responded with repressive measures, including the use of the death penalty, against those suspected of taking part in or supporting protests or expressing views critical of the state. At least 20 people connected with protests in the Eastern Province have been executed since 2011. In early and mid-2014, at least seven Shi'a activists detained in connection with protests were sentenced to death on vaguely worded security charges related to their activism. One of the seven, Ali al-Nimr, was 17 at the time of his arrest and was tortured to extract a "confession".

Sheikh Nimr Baqir al-Nimr, a prominent Saudi Arabian Shi'a Muslim cleric, was sentenced to death by the Specialized Criminal Court in Riyadh on 15 October for various offences including "disobeying and breaking allegiance to the ruler", "calling to overthrow the regime", "calling for demonstrations", "inciting sectarian strife", "questioning the integrity of the judiciary", "meeting with and supporting wanted suspects", and "interfering in a neighbouring state's affairs" (in reference to Bahrain). "Evidence" for the charges came from religious sermons and interviews attributed to the cleric. Amnesty International's review of these texts confirms that Sheikh Nimr Baqir al-Nimr's was exercising his right to free expression and was not inciting violence.

A number of charges, including "disobeying the ruler", are not recognizably criminal offences under international human rights law. Sheikh Nimr Baqir al-Nimr's trial was also flawed. The cleric was denied the most basic requirements to prepare a defence, including regular access to his lawyer and writing materials. Key eyewitnesses were not allowed to testify in court in violation of Saudi Arabian laws, and his lawyer was not informed of the dates of a number of court hearings.

Sheikh Nimr Baqir al-Nimr's, who is the imam of al-Awamiyya mosque in al-Qatif, eastern Saudi Arabia, was arrested without a warrant on 8 July 2012 when security officers forced his car to stop and shot him when he refused to accompany them. He spent most of his detention in solitary confinement in military hospitals and in al-Ha'ir prison in Riyadh. He is paralyzed in one leg as a result of being shot.

In February, in its response to recommendations made during the UN UPR, Saudi Arabia rejected the following recommendations: to declare a moratorium on the death penalty; abolish the death penalty; and accede to the Second Optional Protocol to the ICCPR. However, Saudi Arabia accepted the recommendation to make further efforts to increase the transparency and openness of legal proceedings contemplating death sentences.

The death penalty remained in force in **Syria**. However, due to the internal armed conflict involving government forces and non-state armed groups it was not possible to confirm whether any death sentences were imposed, nor whether any judicial executions were carried out by the state.¹⁵⁵

According to media reports, at least two death sentences were imposed in **Tunisia** and three commutations were granted. No executions were carried out.

One execution was carried out in the **United Arab Emirates (UAE)** in 2014.¹⁵⁶ Twenty-five death sentences were imposed; this is an increase compared to the figure recorded for 2013. One woman was sentenced to death by stoning for "adultery".¹⁵⁷ The other sentences were imposed on men for crimes including murder, drugs offences and rape. Foreign nationals constituted the largest number of people who received death sentence during the year. They included nationals of Afghanistan, Bangladesh, Egypt, India, Kuwait, Pakistan and Saudi Arabia. Twelve commutations were granted. At least 25 people were under sentence of death at the end of 2014. A new anti-terror law introduced during the year widened the scope of the death penalty.¹⁵⁸

In **Yemen**, at least 22 executions were carried out in 2014, all for murder. At least 26 new death sentences were imposed, an increase compared to 2013, when at least three were recorded.¹⁵⁹

¹⁵⁵ This does not include reports of extrajudicial executions and other unlawful killings by both government forces and non-state armed groups during the armed conflict, or deaths in custody following torture or other ill-treatment.

¹⁵⁶ A Sri Lankan migrant worker, Ravindra Krishna Pillai, was executed by firing squad on 21 January 2014 in Sharjah Central prison, Sharjah Emirate.

¹⁵⁷ The usual method of execution in the UAE is by firing squad.

¹⁵⁸ "Sheikh Khalifa approves anti-terrorism law", *The National*, August 2014, www.thenational.ae/uae/government/sheikh-khalifa-approves-anti-terrorism-law (accessed on 13 March 2015).

¹⁵⁹ The Ministry of Interior officially recorded the imposition of five death sentences but 21 more were reported in the media, making a total of 26 in 2014.

SUB-SAHARAN AFRICA

REGIONAL TRENDS

- There was a 28% reduction in the number of known executions, compared with 2013.
- Fewer countries carried out executions and imposed death sentences: in 2014, three countries carried out executions, while in 2013 five countries carried out executions.
- The overall number of death sentences imposed in the Sub-Saharan Africa region increased significantly, largely due to high numbers in Nigeria.
- The National Assembly in Madagascar adopted a bill abolishing the death penalty.
- Gabon became a state party to the Second Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR), aiming at the abolition of the death penalty, on 2 April.

EXECUTIONS AND DEATH SENTENCES IN SUB-SAHARAN AFRICA

At least 46 judicial executions were carried out in three countries: Equatorial Guinea (9), Somalia (14+) and Sudan (23+).

Amnesty International recorded at least 907 death sentences in 18 countries: Botswana (1), Congo (Republic of) (3+), Democratic Republic of the Congo (14+), Gambia (1+), Ghana (9), Kenya (26+), Lesotho (1+), Mali (6+), Mauritania (3), Nigeria (659), Sierra Leone (3), Somalia (52+), Somali Federal Government (31), Puntland (1+), Somaliland (10+), South Sudan (1), Sudan (14+), Tanzania (91), Uganda (1), Zambia (13+) and Zimbabwe (10).

There were both positive and negative developments in the use of the death penalty in Sub-Saharan Africa during the year. Fewer countries carried out executions and fewer people were executed. A total of 46 executions were recorded for 2014, compared to 64 in 2013, representing a drop of 28%.

Despite a reduction in the number of countries that imposed death sentences – from 19 in 2013 to 18 in 2014 – the number of death sentences imposed rose sharply. Amnesty International recorded 423 sentences in 2013 and 907 in 2014, an increase of 114%. This increase was largely due to the high number of death sentences recorded in Nigeria during 2014.

Progress towards the abolition of the death penalty in the region was slow, with some setbacks recorded. Countries that had appeared to be moving towards abolition in 2013 did not make anticipated progress during 2014. However, on 10 December Madagascar's National Assembly adopted a bill abolishing the death penalty.

While calls were made by members of parliament in Kenya to widen the scope of the death penalty, the National Assembly in Cameroon adopted a bill applying the punishment to acts of terrorism. Government ministers in Chad and Sierra Leone announced their countries' intentions to introduce legislation abolishing the penalty. Malawi declared it had no such plans.

In July, the Working Group on Death Penalty and Extra-Judicial, Summary or Arbitrary Killings in Africa of the African Commission on Human and Peoples' Rights and the government of Benin jointly organized in Benin's capital Cotonou, a continental conference on the Abolition of the Death Penalty in Africa. Participants included representatives from African Union Member States, parliamentarians, national human rights institutions and civil society organizations. The main objectives were to finalize the draft Additional Protocol to the African Charter on Human and Peoples' Rights on the Abolition of the Death Penalty; issue a Declaration for African Union Member States to support the adoption of the draft Protocol and the UN Resolution on a moratorium on the use of the death penalty; and launch an advocacy and awareness campaign.

COUNTRY DEVELOPMENTS

No death sentences were imposed in **Benin** for the fourth year running. Thirteen people remained under sentence of death at the end of 2014. The last known executions in Benin were carried out in 1987.

According to government information, no executions were carried out in **Botswana** in 2014. One person was sentenced to death on 3 July; three men were under sentence of death at the end of the year. The death penalty continues to be applicable in law and is mandatory for murder unless there are extenuating circumstances.

No executions were carried out and no death sentences imposed in **Burkina Faso** during the year. On 15 October, before the start of mass protests that led to the resignation of President Blaise Compaoré, the Council of Ministers discussed a bill on the abolition of the death penalty. This would bring the laws in line with Burkina Faso's international commitments to human rights. The Council agreed to transmit the bill to the National Assembly but its status was unclear at the end of the year.

No executions were carried out in **Cameroon** in 2014. However, in December the parliament voted in favour of a bill which provides for the death penalty for acts of terrorism.

At the end of 2014, the **Central African Republic** (CAR) was yet to abolish the death penalty and ratify the Second Optional Protocol to the ICCPR, despite accepting recommendations to do so during the UN Human Rights Council Universal Periodic Review (UPR) in 2013. Armed conflict continued in CAR during 2014. Amnesty International did not record any judicial executions in 2014.

The last known executions in **Chad** took place in 2003. Following the UN UPR in 2013, Chad accepted, in March 2014, the recommendation to abolish the death penalty. In September, Minister of Communication and government spokesperson Hassan Sylla Bakari announced that a penal code aimed at abolishing the death penalty had been adopted by the government.¹⁶⁰ According to the Minister, the death penalty will be replaced with life

¹⁶⁰ "Chad: Towards abolishing the death penalty", Hands Off Cain, 9 September 2014, available at www.handsoffcain.info/archivio_news/index.php?iddocumento=18307842&mover=0 (accessed on 13 February 2015).

imprisonment with no possibility of conditional release. At the end of the year parliament was yet to adopt the penal code.

No executions were carried out in **Congo** (Republic of) in 2014. At least three death sentences were imposed, all for murder. At the end of the year Congo was yet to ratify the Second Optional Protocol to the ICCPR and abolish the death penalty, despite accepting recommendations to do so during the UN UPR in 2013.

The last known execution in **Comoros** was carried out in 1997. No known death sentences were imposed in 2014; at least six people were on death row.¹⁶¹ During the UN UPR in 2014, Comoros accepted recommendations to: speed up the process of adopting the new Penal Code that foresees the abolition of the death penalty; ratify the Second Optional Protocol to the ICCPR; and proceed with formal abolition of the death penalty.

In the **Democratic Republic of the Congo** (DRC) the last known execution took place in January 2003. In 2014, at least 14 death sentences were imposed, mostly on civilians, by military courts, for crimes including murder, armed robbery, conspiracy, participation in an insurrectional movement, and terrorism. In November, two men were sentenced to death by the Operational Military Court of North Kivu province sitting in Beni; one was a member of the DRC military and the other belonged to an armed group. The latter was sentenced in his absence. Neither man has a right of appeal as there is no remedy against any decision made by the Operational Military Court. As part of the outcome of the UN UPR in April, the DRC rejected recommendations to abolish the death penalty and ratify the Second Optional Protocol to the ICCPR.

In January, nine people – one Mali national and eight Equatorial Guinea nationals – were executed by firing squad in **Equatorial Guinea**; all had been convicted of murder. On 13 February the government adopted a temporary moratorium on the use of death penalty to enable Equatorial Guinea to join the Community of Portuguese-Speaking Countries in July. No new death sentences were handed down. During the UN UPR in May, Equatorial Guinea committed to consider the possibility of ratifying the Second Optional Protocol to the ICCPR.

Eritrea was examined during the UN UPR in February. As part of its reply to recommendations made, Eritrea rejected the following: to abolish the death penalty and ratify the Second Optional Protocol to ICCPR. The justice system in Eritrea is not transparent and official information on the use of the death penalty is very difficult to obtain. Therefore, no executions or death sentences could be confirmed.

During the year **Ethiopia** rejected recommendations made during the UN UPR to abolish the death penalty and ratify the Second Optional Protocol to the ICCPR. Amnesty International did not record any executions during 2014.

¹⁶¹ "Comoros: Radicals and HOC delegation meets Minister of Justice on voting for the UN resolution", Hands Off Cain, 18 November 2014, available at www.handsoffcain.info/news/index.php?iddocumento=18309593 (accessed on 13 February 2015).

At least one death sentence was imposed in **Gambia** in 2014. In November, Gambia's Supreme Court commuted seven death sentences to life imprisonment. A conditional moratorium on executions, which was announced by President Yahya Jammeh in 2012 and which he said would be "automatically lifted" if crime rates increased, remained in place in 2014. In November, the President announced that the death penalty would be applied for anyone convicted of raping a child.¹⁶² In October, during the UN UPR Gambia promised to examine recommendations to abolish the death penalty for all crimes and ratify the Second Optional Protocol to the ICCPR, with a view to providing responses no later than the 28th session of the Human Rights Council in March 2015.

No executions were carried out in **Ghana**; nine death sentences were imposed. President John Mahama commuted 21 death sentences to life imprisonment in commemoration of Ghana's 54th Republic Day Anniversary.¹⁶³ The government's plans to put to a referendum recommendations of the Constitutional Review Commission that require changes to the Constitution, including the removal of the death penalty, were not implemented in 2014.

No executions were recorded in **Guinea**. Amnesty International was unable to confirm any death sentences.

Kenya has an established practice of not carrying out executions although it continues to impose death sentences. According to media reports, at least 26 death sentences were imposed in 2014. During the year calls were made by some members of parliament to impose the death penalty for terrorism, homosexuality, corruption and economic crimes. In June, following the deaths of more than 80 people who drank illegally made alcohol, the Chair of the National Authority for the Campaign Against Alcohol and Drug Abuse proposed an amendment to the Alcohol Drink Control Act 2010 to include death sentences for people found dealing in illegal and inferior quality brews.¹⁶⁴ In August, Kenya's National Assembly, as part of amendments to the Anti-Corruption and Economic Crimes Act, rejected the inclusion of the death penalty as a punishment under the Act.

¹⁶² "Gambia: Jammeh declares tougher punishment for child abusers", *Daily Observer*, 24 November 2014, available at <http://allafrica.com/stories/201411242256.html> (accessed on 13 February 2015).

¹⁶³ The commutations were granted to 21 death row prisoners who had been on death row for at least 10 years. President Mahama had acted on the advice of the Council of State and the recommendation of the Ghana Prison Services.

¹⁶⁴ "Mututho seeks death penalty for killer brew peddlers", *Capital News*, 24 June 2014, available at www.capitalfm.co.ke/news/2014/06/mututho-seeks-death-penalty-for-killer-brew-peddlers/ (accessed on 13 February 2015).

No executions were recorded in **Lesotho**; at least one death sentence was imposed. In August the High Court sentenced Makhotso Molise to death by hanging for murder.¹⁶⁵

No executions or death sentences were recorded in **Liberia**. One pardon was granted.

Following the acceptance by **Madagascar** of the recommendation to abolish the death penalty during the UN UPR in November, on 10 December the National Assembly adopted a bill replacing the punishment with life imprisonment with hard labour. The bill requires signing into law by the President of Madagascar.

The death penalty is applicable in **Malawi** for crimes including treason, murder and aggravated robbery; it is no longer mandatory in murder cases. The last known execution was carried out in 1992.

During the year Malawi informed the UN Human Rights Committee that it has no plans to abolish the death penalty.¹⁶⁶ The Committee expressed concern that death sentences are still imposed and that the punishment is not reserved for the most serious crimes.¹⁶⁷ It also expressed concern that the right to seek a pardon is not effectively ensured. The Committee recommended that Malawi should consider abolishing the death penalty and acceding to the Second Optional Protocol of the ICPPR; review its Penal Code and ensure that the death penalty, if imposed at all, is applicable only to the most serious crimes; provide adequate funds for a prompt process for resentencing prisoners who have received a mandatory death penalty; and ensure the right to seek pardon or commutation of the death sentence.

Although the death penalty is provided for under the law in **Mali**, death sentences are systematically commuted to terms of imprisonment. The last execution took place in 1981. At least six people were sentenced to death and at least six death sentences were commuted in 2014.

Three men were sentenced to death in **Mauritania**, one for apostasy and the other two for murder. In December, Mohamed Cheikh ould Mohamed Mkhaitir, was sentenced to death for writing an article deemed blasphemous against Islam. This was believed to be the first death sentence for apostasy since Mauritania's independence in 1960.

¹⁶⁵ "Woman gets death sentence for murder", Lesotho News Agency, 21 August 2014, available at www.lena.gov.ls/index.php?model=headline&function=display&text_id=44403 (accessed on 13 February 2015).

¹⁶⁶ "Malawi will not abolish the death penalty, UN told", Nyasa Times, 11 July 2014, available at www.nyasatimes.com/2014/07/11/malawi-will-not-abolish-the-death-penalty-un-told/ (accessed on 13 February 2015).

¹⁶⁷ UN Human Rights Committee, Concluding observations on the initial periodic report of Malawi, 111th session 7–25 July 2014, UN doc CCPR/C/MWI/CO/1/Add.1, 19 August 2014, para 11.

The last execution in Niger took place in 1976 and no death sentences were imposed in 2014.

No executions were carried out in Nigeria in 2014. According to information received from the Nigerian Prisons Service: 589 people were sentenced to death; 49 death sentences were commuted; 69 pardons were granted; 32 death row prisoners were exonerated; and five foreign nationals were on death row in 2014. The number of death sentences reported by the Nigerian Prisons Service does not include those imposed on 70 soldiers by military courts during the year.¹⁶⁸ Therefore, inclusive of the soldiers, a total of 659 people were sentenced to death in 2014. At least 1,484 people were under sentence of death at the end of the year.¹⁶⁹ Most death sentences imposed are for murder and armed robbery.

During the year Nigerian military courts imposed mass death sentences. In September, 12 soldiers were sentenced to death for mutiny and attempted murder after firing shots at their commanding officer in the north-eastern city of Maiduguri in May. The convicted soldiers belonged to the Nigerian Army's Seventh Division, which is at the forefront of the fight against the armed group Boko Haram.

In December, a military court in Abuja imposed death sentences on 54 soldiers who were convicted of conspiracy to mutiny and mutiny for refusing to join operations to retake three towns in Borno State that had been captured by Boko Haram. According to testimony given by the soldiers during the trial, they had complained to their superiors about not having the weaponry needed to complete their mission against Boko Haram. The lawyer for the soldiers said that the military court had refused to consider the soldier's defence that they were improperly equipped. Halfway through the trial, journalists were prevented from covering the proceedings. Amnesty International is concerned that the trial may not have complied with internationally recognized standards for fair trial.

In December the military court in Abuja sentenced four more soldiers, accused of mutiny, to death. All 58 soldiers belonged to the Nigerian Army's Seventh Division.

Article 6(2) of the ICCPR, to which Nigeria is a party, stipulates that "sentence of death may be imposed only for the most serious crimes". Under international human rights standards, "most serious crimes" has been interpreted as being limited to crimes involving intentional killing. Since the charges against all the soldiers failed to meet the threshold of "most serious crimes" the death sentences should not have been imposed and are in violation of international human rights law.

On 29 May, the Governor of Ogun State commuted nine death sentences to life imprisonment. This was done to commemorate Democracy Day and followed the advice of the Commission on the Prerogative of Mercy. On 1 October, during Independence Day celebrations and following the advice of the State Advisory Council on the Prerogative of

¹⁶⁸ Reliable sources have also informed Amnesty International that, as at the time the organization received the statistics from the Nigerian Prisons Service, the 70 soldiers were not in the custody of the Nigerian Prisons Service but still in the custody of the Nigerian Army.

¹⁶⁹ The figure stated is for death row inmates in Nigerian prisons as at 30 June 2014. However, the 2014 statistics in comparison with those of 2013 indicate that the real figure as at 31 December is likely to be higher than 1,484.

Mercy, the Governor of Delta State announced that he had pardoned three death row prisoners and commuted the death sentences of nine others to terms of imprisonment.

ThankGod Ebhos was released on 24 October after 19 years on death row. Following Nigeria's Independence Day celebrations on 1 October, the Governor of Kaduna State announced that he was using his power of Prerogative of Mercy under section 212 of the Nigerian Constitution to sign a release order for ThankGod Ebhos.

ThankGod Ebhos was accused of an armed robbery that took place in 1988; he was sentenced to death by firing squad by a Robbery and Firearms Tribunal in Kaduna in 1995 and was on death row in Benin Prison in Edo State before his release. On 24 June 2013 ThankGod Ebhos was taken to the gallows in Benin Prison with four other men. The men were hanged in his presence but he escaped execution because at the last moment the prison authorities realized that his death sentence required a firing squad. In January 2014 the Economic Community of West African States (ECOWAS) Court of Justice granted an injunction restraining the government from executing ThankGod Ebhos. On 10 June the Court delivered a final judgment ordering that ThankGod Ebhos' name be removed from the death row list.

As part of the outcome of the UN UPR in 2013, on 20 March 2014 Nigeria rejected recommendations relating to abolition of the death penalty.

In **Sierra Leone**, no executions were carried out; three death sentences were imposed. The death penalty is still retained for treason and aggravated robbery and is mandatory for murder, although there have been no executions since 1998. According to government information, on 27 April President Ernest Bai Koroma commuted to life imprisonment the death sentences of five death row prisoners.

In March, the UN Human Rights Committee expressed regret at Sierra Leone's slow progress towards abolition and requested that the country expedite efforts to abolish the death penalty and ratify the Second Optional Protocol to the ICCPR.¹⁷⁰

In May, the Attorney-General and Minister of Justice, Franklyn Bai Kargbo, told the UN Committee against Torture that Sierra Leone would abolish the death penalty in a matter of weeks. He stated: "The President has at the same time directed my office, as a matter of urgency, to draft legislation removing the death penalty from our laws and making it a thing of the past in Sierra Leone. We anticipate completing the task in the space of a few weeks." At the end of 2014 Sierra Leone was yet to abolish the death penalty.

At least 14 people were executed and at least 52 sentenced to death in **Somalia**.¹⁷¹ At least 13 executions were carried out under the authority of the Somali Federal Government, and at least 31 death sentences were imposed, despite the government's vote in favour of the UN General Assembly resolution on a moratorium on the use of the death penalty in 2012 and

¹⁷⁰ UN Human Rights Committee, Concluding observations on the initial report of Sierra Leone, 110th session 10-28 March 2014, UN doc CCPR/C/SLE/CO/1, 17 April 2014, para18.

¹⁷¹ These figures do not include reports of public unlawful killings by Somali armed opposition groups such as al-Shabab.

2014. One more execution was recorded in the Jubaland region. Executions by the Somali Federal Government are usually carried out by firing squad.

At least 11 death sentences were imposed in the semi-autonomous region of Puntland in northern Somalia, and at least 10 in the self-declared Republic of Somaliland.

No executions were recorded in **South Sudan**. While it is believed that death sentences were imposed, numbers could not be confirmed.

At least 23 executions were recorded in **Sudan** and at least 14 death sentences were imposed. At least 215 people were on death row at the end of the year, and at least four people were exonerated in 2014.

On 23 June Meriam Yehya Ibrahim was released from prison after an appeal court overturned her sentence. She had been sentenced to death by hanging for apostasy, and to flogging for adultery. Meriam Yehya Ibrahim had been charged with adultery in 2013, allegedly after relatives reported her to the authorities for her marriage to a Christian man. Under Shari'a law as practised in Sudan, a Muslim woman is not permitted to marry a non-Muslim man, and any such marriage is considered adulterous. Meriam Yehya Ibrahim was detained in February 2014 after the court added the charge of apostasy when she informed the court that her mother had raised her as an Orthodox Christian. On 11 May the court gave her three days to renounce her Christian faith or be sentenced to death, an option that she rejected. At the time of her trial Meriam Yehya Ibrahim was eight months pregnant. On 27 May she gave birth to her second child in the clinic of Omdurman Women's Prison. Her 20-month-old son had been detained with her. The case of Meriam Yehya Ibrahim attracted widespread international attention with over one million people responding to Amnesty International's appeal for her release.

No executions were recorded in **Swaziland**. Amnesty International was unable to confirm any death sentences.

According to government information no executions were carried out in **Tanzania**; 91 people were sentenced to death; six death sentences were commuted; and 59 people were exonerated. As of 31 December, 410 people were under the sentence of death, this included eight foreign nationals (four Kenyans, two Burundians, one Ivorian, and one Indian).

No executions were carried out in **Uganda**; one death sentence was imposed.

At least 13 death sentences were imposed in **Zambia**, all for murder. Among them were three men sentenced to death by the Mansa High Court in November.¹⁷²

According to government information no executions were carried out in **Zimbabwe** in 2014. Ten death sentences were imposed; 95 people were on death row; four people had their death sentences commuted to life imprisonment; and one person was exonerated. At the end of the year, one foreign national – a Mozambican – was on death row.

¹⁷² "Three sentenced to death by hanging", Lusaka Voice, 28 November 2014, <http://usakavoice.com/2014/11/28/three-sentenced-to-death-by-hanging/> (accessed on 13 February 2015).

ANNEX I: DEATH SENTENCES AND EXECUTIONS IN 2014

This report only covers the judicial use of the death penalty. The figures presented are those that can safely be drawn from Amnesty International's research, although the true figures for some countries are significantly higher. Some states intentionally conceal death penalty proceedings; others do not keep or make available data on the numbers of death sentences and executions.

Where "+" appears after a figure next to the name of a country – for instance, Yemen (22+) – it means that Amnesty International confirmed 22 incidents but has reason to believe that the true number is greater. Therefore 22+ means at least 22. Where "+" appears after a country name without a figure – for instance, death sentences in South Sudan (+) – it means that there were executions or death sentences (more than one) in that country but insufficient information to provide a credible minimum figure. When calculating global and regional totals, "+" has been counted as 2, including for China.

REPORTED EXECUTIONS IN 2014

China +	Pakistan 7
Iran 289+	Afghanistan 6
Saudi Arabia 90+	Taiwan 5
Iraq 61+	Belarus 3+
USA 35	Viet Nam 3
Sudan 23+	Japan 3
Yemen 22+	Malaysia 2+
Egypt 15+	Palestine (State of) (in Gaza) 2+
Somalia 14+	Singapore 2
Jordan 11	United Arab Emirates 1
Equatorial Guinea 9	North Korea +

REPORTED DEATH SENTENCES IN 2014

China +	United Arab Emirates 25	Singapore 3
Nigeria 659	Algeria 16+	Qatar 2+
Egypt 509+	Democratic Republic of the Congo 14+	Trinidad and Tobago 2+
Pakistan 231	Sudan 14+	Tunisia 2+
Bangladesh 142+	Zambia 13+	Barbados 2
Tanzania 91	Afghanistan 12+	Japan 2
Iran 81+	Lebanon 11+	Maldives 2
USA 72+	Zimbabwe 10	Gambia 1+
Viet Nam 72+	Ghana 9	Lesotho 1+
India 64+	Morocco/Western Sahara 9	Libya 1+
Sri Lanka 61+	Kuwait 7	Myanmar 1+
Thailand 55+	Mali 6+	Botswana 1
Somalia 52+ (31+ by the Somali Federal Government; 11+ in Puntland; 10+ in Somaliland)	Indonesia 6	Guyana 1
Saudi Arabia 44+	Bahrain 5	South Korea 1
Iraq 38+	Jordan 5	Taiwan 1
Malaysia 38+	Palestine (State of) (Gaza) 4+	Uganda 1
Kenya 26+	Congo (Republic of) 3+	North Korea +
Yemen 26+	Mauritania 3	South Sudan +
	Sierra Leone 3	

ANNEX II: ABOLITIONIST AND RETENTIONIST COUNTRIES AS OF 31 DECEMBER 2014

More than two-thirds of the countries in the world have now abolished the death penalty in law or practice. As of 31 December 2014 the numbers were as follows:

Abolitionist for all crimes: 98

Abolitionist for ordinary crimes only: 7

Abolitionist in practice: 35

Total abolitionist in law or practice: 140

Retentionist: 58

The following are lists of countries in the four categories: abolitionist for all crimes, abolitionist for ordinary crimes only, abolitionist in practice and retentionist.

1. ABOLITIONIST FOR ALL CRIMES

Countries whose laws do not provide for the death penalty for any crime:

Albania, Andorra, Angola, Argentina, Armenia, Australia, Austria, Azerbaijan, Belgium, Bhutan, Bolivia, Bosnia and Herzegovina, Bulgaria, Burundi, Cambodia, Canada, Cabo Verde, Colombia, Cook Islands, Costa Rica, Côte d'Ivoire, Croatia, Cyprus, Czech Republic, Denmark, Djibouti, Dominican Republic, Ecuador, Estonia, Finland, France, Gabon, Georgia, Germany, Greece, Guinea-Bissau, Haiti, Holy See, Honduras, Hungary, Iceland, Ireland, Italy, Kiribati, Kyrgyzstan, Latvia, Liechtenstein, Lithuania, Luxembourg, Macedonia, Malta, Marshall Islands, Mauritius, Mexico, Micronesia, Moldova, Monaco, Montenegro, Mozambique, Namibia, Nepal, Netherlands, New Zealand, Nicaragua, Niue, Norway, Palau, Panama, Paraguay, Philippines, Poland, Portugal, Romania, Rwanda, Samoa, San Marino, Sao Tome and Principe, Senegal, Serbia (including Kosovo), Seychelles, Slovakia, Slovenia, Solomon Islands, South Africa, Spain, Sweden, Switzerland, Timor-Leste, Togo, Turkey, Turkmenistan, Tuvalu, Ukraine, UK, Uruguay, Uzbekistan, Vanuatu, Venezuela.

2. ABOLITIONIST FOR ORDINARY CRIMES ONLY

Countries whose laws provide for the death penalty only for exceptional crimes such as crimes under military law or crimes committed in exceptional circumstances:

Brazil, Chile, El Salvador, Fiji, Israel, Kazakhstan, Peru.

3. ABOLITIONIST IN PRACTICE

Countries which retain the death penalty for ordinary crimes such as murder but can be considered abolitionist in practice in that they have not executed anyone during the last 10 years and are believed to have a policy or established practice of not carrying out executions:

Algeria, Benin, Brunei Darussalam, Burkina Faso, Cameroon, Central African Republic, Congo (Republic of), Eritrea, Ghana, Grenada, Kenya, Laos, Liberia, Madagascar, Malawi, Maldives, Mali, Mauritania, Mongolia, Morocco, Myanmar, Nauru, Niger, Papua New Guinea, Russian Federation,¹⁷³ Sierra Leone, South Korea, Sri Lanka, Suriname, Swaziland, Tajikistan, Tanzania, Tonga, Tunisia, Zambia.

4. RETENTIONIST

Countries that retain the death penalty for ordinary crimes:

Afghanistan, Antigua and Barbuda, Bahamas, Bahrain, Bangladesh, Barbados, Belarus, Belize, Botswana, Chad, China, Comoros, Democratic Republic of the Congo, Cuba, Dominica, Egypt, Equatorial Guinea, Ethiopia, Gambia, Guatemala, Guinea, Guyana, India, Indonesia, Iran, Iraq, Jamaica, Japan, Jordan, Kuwait, Lebanon, Lesotho, Libya, Malaysia, Nigeria, North Korea, Oman, Pakistan, Palestine (State of), Qatar, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Saudi Arabia, Singapore, Somalia, South Sudan, Sudan, Syria, Taiwan, Thailand, Trinidad and Tobago, Uganda, United Arab Emirates, USA, Viet Nam, Yemen, Zimbabwe.

¹⁷³ The Russian Federation introduced a moratorium on executions in August 1996. However, executions were carried out between 1996 and 1999 in the Chechen Republic.

ANNEX III: RATIFICATION OF INTERNATIONAL TREATIES AS OF 31 DECEMBER 2014

The community of nations has adopted four international treaties providing for the abolition of the death penalty. One is of worldwide scope; the other three are regional.

Below are short descriptions of the four treaties, lists of states parties and of countries which have signed but not ratified the treaties, as of 31 December 2014. (States may become parties to international treaties either by acceding to them or by ratifying them. Signature indicates an intention to become a party at a later date through ratification. States are bound under international law to respect the provisions of treaties to which they are parties, and to do nothing to defeat the object and purpose of treaties which they have signed.)

SECOND OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

The Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, adopted by the UN General Assembly in 1989, is of worldwide scope. It provides for the total abolition of the death penalty but allows states parties to retain the death penalty in time of war if they make a reservation to that effect at the time of ratifying or acceding to the Protocol. Any state which is a party to the International Covenant on Civil and Political Rights can become a party to the Protocol.

States parties: Albania, Andorra, Argentina, Australia, Austria, Azerbaijan, Belgium, Benin, Bolivia, Bosnia and Herzegovina, Brazil, Bulgaria, Canada, Cabo Verde, Chile, Colombia, Costa Rica, Croatia, Cyprus, Czech Republic, Denmark, Djibouti, Ecuador, El Salvador, Estonia, Finland, France, Gabon, Georgia, Germany, Greece, Guinea-Bissau, Honduras, Hungary, Iceland, Ireland, Italy, Kyrgyzstan, Latvia, Liberia, Liechtenstein, Lithuania, Luxembourg, Macedonia, Malta, Mexico, Moldova, Monaco, Mongolia, Montenegro, Mozambique, Namibia, Nepal, Netherlands, New Zealand, Nicaragua, Norway, Panama, Paraguay, Philippines, Poland, Portugal, Romania, Rwanda, San Marino, Serbia, Seychelles, Slovakia, Slovenia, South Africa, Spain, Sweden, Switzerland, Timor-Leste, Turkey, Turkmenistan, Ukraine, UK, Uruguay, Uzbekistan, Venezuela (total: 81)

Signed but not ratified: Angola, Madagascar, Sao Tome and Principe (total: 3)

PROTOCOL TO THE AMERICAN CONVENTION ON HUMAN RIGHTS ON THE ABOLITION OF THE DEATH PENALTY

The Protocol to the American Convention on Human Rights to Abolish the Death Penalty, adopted by the General Assembly of the Organization of American States in 1990, provides for the total abolition of the death penalty but allows states parties to retain the death penalty in wartime if they make a reservation to that effect at the time of ratifying or acceding to the Protocol. Any state party to the American Convention on Human Rights can become a party to the Protocol.

States parties: Argentina, Brazil, Chile, Costa Rica, Dominican Republic, Ecuador, Honduras, Mexico, Nicaragua, Panama, Paraguay, Uruguay, Venezuela (total: 13)

PROTOCOL NO. 6 TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS

Protocol No. 6 to the (European) Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) concerning the abolition of the death penalty, adopted by the Council of Europe in 1982, provides for the abolition of the death penalty in peacetime; states parties may retain the death penalty for crimes "in time of war or of imminent threat of war". Any state party to the European Convention on Human Rights can become a party to the Protocol.

States parties: Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Macedonia, Malta, Moldova, Monaco, Montenegro, Netherlands, Norway, Poland, Portugal, Romania, San Marino, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, Turkey, Ukraine, UK (total: 46)

Signed but not ratified: Russian Federation (total: 1)

PROTOCOL NO. 13 TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS

Protocol No. 13 to the (European) Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) concerning the abolition of the death penalty in all circumstances, adopted by the Council of Europe in 2002, provides for the abolition of the death penalty in all circumstances, including time of war or of imminent threat of war. Any state party to the European Convention on Human Rights can become a party to the Protocol.

States parties: Albania, Andorra, Austria, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Macedonia, Malta, Moldova, Monaco, Montenegro, Netherlands, Norway, Poland, Portugal, Romania, San Marino, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, Turkey, Ukraine, UK (total: 44)

Signed but not ratified: Armenia (total: 1)

ANNEX IV: VOTING RESULTS OF UN GENERAL ASSEMBLY RESOLUTION 69/186, ADOPTED ON 18 DECEMBER 2014

Co-sponsors of UN General Assembly resolution 69/186, adopted on 18 December 2014

Albania, Algeria, Andorra, Angola, Argentina, Armenia, Australia, Austria, Belgium, Benin, Bolivia, Bosnia and Herzegovina, Brazil, Bulgaria, Burundi, Cambodia, Cabo Verde, Chile, Colombia, Congo (Republic of), Costa Rica, Côte d'Ivoire, Ecuador, El Salvador, Estonia, Finland, France, Gabon, Georgia, Germany, Greece, Guinea-Bissau, Haiti, Honduras, Hungary, Iceland, Ireland, Israel, Italy, Kyrgyzstan, Latvia, Liechtenstein, Lithuania, Luxembourg, Macedonia, Madagascar, Malta, Marshall Islands, Mexico, Micronesia, Moldova, Monaco, Mongolia, Montenegro, Mozambique, Netherlands, New Zealand, Nicaragua, Norway, Palau, Panama, Paraguay, Philippines, Poland, Portugal, Romania, Russian Federation, Rwanda, Samoa, San Marino, Sao Tome and Principe, Serbia, Seychelles, Sierra Leone, Slovakia, Slovenia, Somalia, Spain, Sweden, Switzerland, Timor-Leste, Togo, Turkey, Turkmenistan, Tuvalu, Ukraine, UK, Uruguay, Vanuatu, Venezuela (total: 95)

Votes in favour – Albania, Algeria, Andorra, Angola, Argentina, Armenia, Australia, Austria, Azerbaijan, Belgium, Benin, Bhutan, Bolivia, Bosnia and Herzegovina, Brazil, Bulgaria, Burkina Faso, Burundi, Cambodia, Canada, Cabo Verde, Central African Republic, Chad, Chile, Colombia, Congo (Republic of), Costa Rica, Côte d'Ivoire, Croatia, Cyprus, Czech Republic, Denmark, Dominican Republic, Ecuador, El Salvador, Equatorial Guinea, Eritrea, Estonia, Fiji, Finland, France, Gabon, Georgia, Germany, Greece, Guatemala, Guinea-Bissau, Haiti, Honduras, Hungary, Iceland, Ireland, Israel, Italy, Kazakhstan, Kiribati, Kyrgyzstan, Latvia, Liechtenstein, Lithuania, Luxembourg, Macedonia, Madagascar, Mali, Malta, Marshall Islands, Mexico, Micronesia, Moldova, Monaco, Mongolia, Montenegro, Mozambique, Nepal, Netherlands, New Zealand, Nicaragua, Niger, Norway, Palau, Panama, Paraguay, Peru, Philippines, Poland, Portugal, Romania, Russian Federation, Rwanda, Samoa, San Marino, Sao Tome and Principe, Serbia, Seychelles, Sierra Leone, Slovakia, Slovenia, Somalia, South Africa, South Sudan, Spain, Suriname, Sweden, Switzerland, Tajikistan, Timor-Leste, Togo, Tunisia, Turkey, Turkmenistan, Tuvalu, Ukraine, UK, Uruguay, Uzbekistan, Vanuatu, Venezuela (total: 117)

Votes against – Afghanistan, Antigua and Barbuda, Bahamas, Bangladesh, Barbados, Belize, Botswana, Brunei Darussalam, China, Dominica, Egypt, Ethiopia, Grenada, Guyana, India, Iran, Iraq, Jamaica, Japan, Kuwait, Libya, Malaysia, North Korea, Oman, Pakistan, Papua New Guinea, Qatar, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Saudi Arabia, Singapore, Sudan, Syria, Trinidad and Tobago, USA, Yemen, Zimbabwe (total: 38)¹⁷⁴

Abstentions – Bahrain, Belarus, Cameroon, Comoros, Cuba, Democratic Republic of the Congo, Djibouti, Gambia, Ghana, Guinea, Indonesia, Jordan, Kenya, Laos, Lebanon, Liberia, Malawi, Maldives, Mauritania, Morocco/Western Sahara, Myanmar, Namibia, Nigeria, Senegal, Solomon Islands, South Korea, Sri Lanka, Tanzania, Thailand, Tonga, Uganda, United Arab Emirates, Viet Nam, Zambia (total: 34)

Not present – Lesotho, Mauritius, Nauru, Swaziland (total: 4)

¹⁷⁴ The USA voted against the resolution but its vote was not captured in the official voting sheet.

WHETHER IN A HIGH-PROFILE CONFLICT
OR A FORGOTTEN CORNER OF THE
GLOBE, **AMNESTY INTERNATIONAL**
CAMPAIGNS FOR JUSTICE, FREEDOM
AND DIGNITY FOR ALL AND SEEKS TO
GALVANIZE PUBLIC SUPPORT TO BUILD
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HCP-000880

DEATH SENTENCES AND EXECUTIONS 2014

Amnesty International recorded fewer executions globally in 2014, compared to 2013 – a year in which the organization recorded a spike in executions. In 2014, executions were recorded in 22 countries, the same number of countries as in 2013. Although this number remained constant, some countries resumed executions while others – which had executed in 2013 – did not carry out executions in 2014.

In the Middle East and North Africa, the resumption of executions in Egypt, Jordan and the United Arab Emirates led to an increase in the number of executing countries in the region in 2014. In Europe and Central Asia, Belarus resumed executions after two execution-free years. Belarus remains the only country in the region to use the death penalty.

Although the USA remained the only country in the Americas to impose death sentences and carry out executions, numbers for both declined in 2014. Seven US states carried out executions, two fewer than the previous year. The state of Washington imposed an official moratorium on executions in February 2014.

The overall number of executions recorded in Asia-Pacific decreased slightly, despite resumptions in Pakistan and Singapore. In sub-Saharan Africa, executions were recorded in three countries; two fewer than in 2013.

This report analyzes some of the key elements in the worldwide application of the death penalty in 2014.

Amnesty International opposes the death penalty in all cases without exception, regardless of the nature or the circumstances of the crime; guilt, innocence or other characteristics of the individual; or the method used by the state to carry out the execution.

April 2015
Index: ACT 50/001/2015
amnesty.org



HCP-000881

EXHIBIT 44

Juror Questionnaire for Richelle Nice

Return date: 4/12/04 - 2:29

JUROR ID: 06756

JUROR QUESTIONNAIRE

PLEASE NOTE THAT THERE IS A BLANK PAGE AT THE END OF THIS QUESTIONNAIRE THAT WILL GIVE YOU ROOM TO FULLY ANSWER ALL QUESTIONS ASKED BELOW. PLEASE RECALL THAT IF YOU REQUEST CONFIDENTIALITY AS TO ANY ANSWER, YOU MUST SO INDICATE.

1. Juror Number: 06756
2. Gender: Male Female
3. Age: 34
4. Place of birth: Stanford Ca.
5. Where did you grow up (City, State, Country)? East Palo Alto Ca.
6. Race or ethnic background you most identify with: (Check one)
 African American Native American
 Caucasian Asian (specify: _____)
 Pacific Islander Hispanic (specify: _____)
 Other (specify: _____)
7. Where were your parents born? (City, State, Country)
Father: ?
Mother: ?
8. If they were not born in the United States, when did they come to this country?
Mother: _____ Father: _____
9. Do you have a religious preference?
 YES NO
If yes, please name: _____
Are you active? _____
10. Would your religious or philosophical beliefs interfere with your ability to serve as a juror in this case?
 YES NO
If yes, please explain: _____

11. In terms of your religious beliefs, do you think of yourself as:
- Very religious Somewhat religious
 Moderately religious Not very religious
 Not religious at all

RESIDENCE

12. How long have you lived in San Mateo County? 5 years In California? All my life
13. What is your current area (i.e. city) of residence? East Palo Alto
14. How long you have you lived at your current residence? 5 years
15. Do you: own rent neither (Check one)

FAMILY

16. Marital Status:

Single Married
 Separated Divorced
 Widowed Living with significant other

How many times have you been married? 0

How many times have you been divorced? 0

17. If married, how long have you been married? _____
 If living with a significant other, how long have you lived with this person?
5 years

18. If married or living with another person, what is your spouse's or significant other's job or occupation? mail carrier

a) Job Description mail carrier

b) Educations Background High School

19. If he or she is retired or unemployed, what was his or her occupation before retiring or being unemployed? _____

20. If previously married, what was your former spouse's occupation: _____

21. Do you have children?

- Yes, and at least one lives at home
 Yes, but none live at home
 No

22. Please list the age, sex, occupation (or area of study), and marital status of each of your children or stepchildren:

Age	Male/Female	Occupation (or area of study)	Marital Status
15	male	High School	_____
11	male	Grade School	_____
2	male	_____	_____
1	male	_____	_____
_____	_____	_____	_____

23. Have you or any relative or close friend ever lost a child? (Miscarriage, accident, crime, etc.)

YES NO

24. What are/were your parents' occupations? Mother - Drug Counselor
Dad - (passed away) mailman

25. If anyone else is living in your home, what is their relationship to you, age and occupation?

my mother, 61

26. Do you have any opinions about people involved in extramarital affairs?

YES NO

If yes, please explain _____

EDUCATION

27. What is your highest level of education completed?
 Less Than High School Tech School Degree
 Some High School College Degree
 High School Degree Some Graduate School
 Some College or Tech School Post-Graduate Degree

Please list all degrees, certificates, licenses, and major areas of study, telling when and from what institution Medical ASST. '92' CNA

28. Have you ever studied or received training in medicine, psychology, psychiatry, social work, sociology, or counseling? YES NO

If yes, please explain _____

29. Do you have any friends who are physicians, psychiatrists or psychologists?

YES NO

30. If yes, do you discuss their work with them? YES NO

31. Have you received any training in law, law enforcement or criminology?

YES NO

If yes, please explain. _____

32. Have you ever had any training, education or jobs or have you ever done any volunteer work in any of the following areas? (Check each one that applies to you.)

- | | | |
|--|---|--|
| <input checked="" type="checkbox"/> Banking/Finance | <input type="checkbox"/> Correctional/Jail/Prison | <input type="checkbox"/> Counseling |
| <input checked="" type="checkbox"/> Drugs/alcohol | <input type="checkbox"/> Firearms/Guns | <input type="checkbox"/> Forensic Science |
| <input type="checkbox"/> Genetics/DNA | <input type="checkbox"/> Handwriting analysis | <input type="checkbox"/> Investigations |
| <input type="checkbox"/> Justice systems/courts | <input type="checkbox"/> Laboratory | <input type="checkbox"/> Law |
| <input checked="" type="checkbox"/> Medicine/nursing | <input type="checkbox"/> Local/state government | <input type="checkbox"/> Police procedures |
| <input type="checkbox"/> Mental Health | <input type="checkbox"/> Pathology | <input type="checkbox"/> Law enforcement |
| <input type="checkbox"/> Psychology | <input type="checkbox"/> Science or biology | <input type="checkbox"/> Security |
| <input type="checkbox"/> Telecommunications | <input type="checkbox"/> TV/radio | <input type="checkbox"/> Statistics |
| <input type="checkbox"/> Victims of crimes | | |

If YES to any of these, please explain: I work at Stanford Credit Union, my work background is in medical ASST, CNA, Home Health Care.
Deborah

33. Are you related to or close friends with anyone who works or has special training in any of the following areas? Check each on that applies to them.

- | | | |
|--|---|--|
| <input checked="" type="checkbox"/> Banking/Finance | <input type="checkbox"/> Correctional/Jail/Prison | <input type="checkbox"/> Counseling |
| <input checked="" type="checkbox"/> Drugs/alcohol | <input type="checkbox"/> Firearms/Guns | <input type="checkbox"/> Forensic Science |
| <input type="checkbox"/> Genetics/DNA | <input type="checkbox"/> Handwriting analysis | <input type="checkbox"/> Investigations |
| <input type="checkbox"/> Justice systems/courts | <input type="checkbox"/> Laboratory | <input type="checkbox"/> Law |
| <input checked="" type="checkbox"/> Medicine/nursing | <input type="checkbox"/> Local/state government | <input type="checkbox"/> Police procedures |
| <input type="checkbox"/> Mental Health | <input type="checkbox"/> Pathology | <input type="checkbox"/> Law enforcement |
| <input type="checkbox"/> Psychology | <input type="checkbox"/> Science or biology | <input type="checkbox"/> Security |
| <input type="checkbox"/> Telecommunications | <input type="checkbox"/> TV/radio | <input type="checkbox"/> Statistics |
| <input type="checkbox"/> Victims of crimes | | |

If YES to any of these, please explain: my mother is a drug/methadone counselor

34. Do you have further education plans for the future? YES NO
If YES, please explain: Get my nursing license

EMPLOYMENT

35. What is your present job or occupation? Bank Teller

- | | |
|---|------------------------------------|
| <input checked="" type="checkbox"/> Full Time | <input type="checkbox"/> Part Time |
| <input type="checkbox"/> Unemployed | <input type="checkbox"/> Disabled |
| <input type="checkbox"/> Retired | <input type="checkbox"/> Homemaker |
| <input type="checkbox"/> Student | |

If you are retired, what was your last job or occupation? _____

If you are currently unemployed, what is your customary work? _____

36. By whom are/were you last employed? Stanford Federal Credit Union

Length of employment: 1 year (next month)

37. What are/were your duties and responsibilities? Helping people with their daily acts.

38. How long have you worked at your present employment or last employment? 1 year

39. Do/did you supervise others? ___ YES NO

If so, how many? _____

40. How do/did you feel about supervising others? No feelings

41. Do/did you make policy decisions? ___ YES NO
If yes, how do you feel about this responsibility? _____

42. Do/did you have authority to hire and fire employees? ___ YES NO

43. Number of people who work for your employer:
- Large business (employing over 250 people)
 - Medium-sized business (employing 50-249 people)
 - Small business (employing fewer than 50 people)
 - Federal Government
 - State Government
 - Local Government

44. Have you ever considered or pursued a career in law enforcement?
 YES ___ NO

If yes, please explain: When I was younger I wanted to be a lawyer. Took a citizen police academy class.

PERSONAL

45. Do you have a bumper sticker on your car? ___ YES NO
If yes, please describe: _____

46. In terms of your political outlook, do you usually think of yourself as:
- | | |
|--|---|
| <input type="checkbox"/> very conservative | <input type="checkbox"/> somewhat liberal |
| <input type="checkbox"/> somewhat conservative | <input type="checkbox"/> very liberal |
| <input checked="" type="checkbox"/> middle of road | |

47. What would you describe as your hobbies? Reading, Spending time with my family

48. Have you ever or do you currently participate in any of the following recreational activities? (Check each one that applies to you.)

- a) Hiking YES, currently YES, past NO
- b) Golf YES, currently YES, past NO
- c) Fishing (Ocean) YES, currently YES, past NO
- d) Fishing (Freshwater) YES, currently YES, past NO
- e) Boating YES, currently YES, past NO

If yes to any of the above, please describe your involvement in the activity/ies:

49. Do you have any knowledge of boats? YES NO
If YES, please describe your experience with boats: _____

50. Do you currently own a gun? YES NO
If YES, for what reason (i.e. hunting, protection)? _____

51. To what clubs or organizations do you belong? None

52. Have you ever held a leadership position in these organizations? _____

53. Have you ever belonged to or attended a grief/loss counseling group or organization?
 YES NO
If YES, please describe: _____

54a. Have you ever been involved in a lawsuit (other than divorce proceedings)?
 YES NO

54b. If yes, were you: The plaintiff The defendant Both

Please explain: _____

55. What is your main source of news? (Check only one)

- Television Radio
- Newspapers Internet
- Friends I DO NOT FOLLOW THE NEWS

56. What kind of books do you regularly read? Non Fiction

57. If you read magazines, which ones do you prefer to read? (Check each one that applies to you.)

- | | |
|--|--|
| <input type="checkbox"/> Architectural Digest | <input type="checkbox"/> Car & Driver |
| <input type="checkbox"/> Business Week | <input type="checkbox"/> Consumer Reports |
| <input checked="" type="checkbox"/> Cosmopolitan | <input type="checkbox"/> Field & Stream |
| <input type="checkbox"/> Forbes | <input type="checkbox"/> Ladies Home Journal |
| <input type="checkbox"/> National Enquirer | <input type="checkbox"/> Newsweek |
| <input type="checkbox"/> People | <input type="checkbox"/> Popular Mechanics |
| <input type="checkbox"/> Reader's Digest | <input type="checkbox"/> Sports Illustrated |
| <input type="checkbox"/> Martha Stewart | <input type="checkbox"/> U.S. News and World Reports |
| <input type="checkbox"/> Golf Digest | <input type="checkbox"/> Golf Magazine |
| <input type="checkbox"/> American Angler | <input type="checkbox"/> California Game & Fish |
| <input type="checkbox"/> Good Housekeeping | <input type="checkbox"/> Money Magazine |

Others (Please List Here)
Ebony, ~~Rolling Stone~~ Fashion mag.

58. What television and radio programs do you view or listen to on a regular basis?

Channel 2

59a. Do you use a computer? YES NO

59b. How often do you access the Internet?

- Multiple times a day
- Once or twice a day
- Once or twice a week
- Monthly
- I only use the Internet for e-mail
- I do NOT use the Internet

59c. If you access the Internet, what web sites do you typically visit? Yahoo

59d. Do you log-on to internet chat rooms? YES NO
 If YES, what Topics? _____

60a. How often do you read a newspaper?

- Daily
 Several times a week
 Seldom or never
 Only on Sundays

61b. Which section of the newspaper do you typically read first?

- Front Section Sports Section
 Calendar/Events Section Business Section
 Other

62a. How often, if at all, do you tune in to cable news programs on TV?

- Daily
 Several times a week
 Seldom
 Never

62b. Have you seen any movies in the last six (6) months depicting the law or legal system, excluding this case?

- YES NO

If yes, please list: _____

62c. Do you, or anyone in your household, watch such television shows as Larry King, Greta Van Susteren, or Geraldo Rivera?

- Yes (self) Yes (other) Yes (both) No

If yes, about how often?

- Daily
 Several times a week
 A few times a month
 A few times a year

63. Do you currently or have you in the past owned any pets?

- Yes, currently
- Yes, in the past
- No

If yes, please note what kind of pet: Cat & Dog

MILITARY

64. Were you ever in the military? YES NO

If yes, answer the following. If no skip to question #67

- a. What branch? _____
- b. Date of service? _____
- c. Rate or rank? _____
- d. Where were you stationed? _____
- e. Character of discharge (honorable, general, etc)? _____
- f. Reason for discharge? _____
- g. Reason for discharge? _____

65. Were you ever involved in any way with military law enforcement, non-judicial punishment, courts martial, or administrative boards or hearings?

- YES NO

66. Were you ever in combat? YES NO

If YES, when and where were you in combat? _____

LAW ENFORCEMENT AND JUDICIAL CONTACTS

67a. Have you, any friends or relatives ever been involved in law enforcement (for example, F.B.I., D.E.A., Sheriff's Department, County Prosecutor's Office, California State Police, Attorney General's Office, United States Attorneys Office) or been employed by any such agency? YES NO

If yes, please explain. _____

- 67b. Have you, any of your family members or close friends ever been employed by or volunteered in any aspect of criminal defense work, including any Public Defender's office, a Legal Aid, or with a related support or advocacy group having to do with the rights of people charged with crimes?

___ YES NO

If yes, who (relationship to you): _____

If yes, please explain: _____

- 67c. Have you, a family member or close friend ever belonged to, donated money to, signed a petition for, or otherwise supported an advocacy group(s) for people accused of crimes or people who are in prison?

___ YES NO

If yes, who (relationship to you): _____

Which group(s)? _____

68. Have you, any relatives, or friends ever been arrested, charged with a criminal offense (other than minor traffic violations), or convicted of a crime?

YES ___ NO

If so, explain who, when, the charges and the outcome. Brother was in
prison? why

69. If you answered yes to the previous question, please explain how you feel about the way each matter was handled by the police, prosecution, defense attorney, court, probation department and others involved in the law enforcement and judicial systems: NO feeling, I was too young

70. Are you personally acquainted with any judges, prosecuting attorneys, or criminal defense attorneys? ___ YES NO

If yes, please give the name and position of the person(s), how you came to know them, and the extent of your relationship with them: _____

71. Are you a member of a Neighborhood Watch, M.A.D.D., or any other program devoted to crime prevention or victims' rights? ___ YES NO

If yes, please explain. _____

72. Have you ever participated in a trial as a party, witness, or interested observer?
 YES NO
If yes, please explain: _____

73. What is your attitude, in general, toward law enforcement officers? They help
serv the people.

74. Have you, or any member of your family, or close friends, ever been the VICTIM or WITNESS to any crime? YES NO
If yes, please explain. _____

How did you feel about what happened? _____

75. If you answered yes to the previous question, was the crime reported to the police?
 YES NO
If yes, how do you feel about the way the police handled the case? _____

CRIMINAL JUSTICE SYSTEM

76. Do you have any, for whatever reason, negative feelings toward any law enforcement or prosecution agency including but not limited to San Mateo or Stanislaus County?
 YES NO
If yes, please name the agency and explain why you feel this way: _____

77. Do you have any feelings/opinions about the effectiveness of law enforcement in California?
 YES NO
Please explain: _____

78. Would your attitudes on our criminal justice system influence you to favor the prosecution or the defense before hearing all of the evidence?
 YES NO
Please explain: _____

79. If selected as a juror in this case, will you be able to follow the Court's instruction that a defendant arrested for any offense is presumed innocent?

YES NO

80. If selected as a juror in this case, will you be able to follow the Court's instruction that such a defendant is innocent until the State proves guilt beyond a reasonable doubt?

YES NO

81. Police officers are more likely to tell the truth than other witnesses.

Strongly Agree Slightly Disagree
 Agree Disagree
 Slightly Agree Strongly Disagree

82. The police are too quick to arrest a suspect in cases where there is a significant amount of publicity or pressure to find a perpetrator?

Strongly agree Somewhat disagree
 Somewhat agree Strongly disagree

83. How much confidence do you have in the following types of evidence?

	A lot	Some	Not much	Undecided
Eyewitness testimony	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
DNA	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Forensic evidence	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Chemical residue	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Fibers	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Hairs	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Fingerprints	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Circumstantial evidence	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Documentary evidence	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Originals	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Photocopies	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Expert witness testimony	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Photographs	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

If you checked "Some" or "Not much," please explain why: I would need to hear and see before I make a choice

JURY SERVICE

84. Have you ever served on a jury or a grand jury? ___ YES NO

85. If you have served on a jury before, please answer the following:

<u>Year</u>	<u>Criminal or Civil</u>	<u>Charge or Issue</u>	<u>Were you Foreperson</u>	<u>Was verdict reached Y/N</u>

86. How did your jury service affect your opinions about the jury system? _____

87. Do you know or recognize the defendant, Scott Peterson, the prosecutors, the defense attorneys, the judge or any other court personnel involved in this case?

 YES ___ NO

If yes, please explain. Well who doesn't?

MISCELLANEOUS

88. There are two types of evidence: direct evidence and circumstantial evidence. Do you have any attitudes or beliefs that would prevent you from relying on circumstantial evidence in a murder case?

___ YES NO

89. The judge will instruct you that both direct and circumstantial evidence are entitled to equal weight. Will you follow the court's instruction in that regard?

 YES ___ NO

PUBLICITY

90. Do you know, or have you read, seen, or heard anything about this case?

 YES ___ NO

91. If yes, what have you read, seen or heard about this case? Just the basic's.
~~_____~~

92. If yes, when did you first hear, see or read anything about this case? The day
it was on TV: about her disappearing.

Please explain: _____

93. If yes, please indicate where you have heard something about this case:

TV:	Which stations:	<u>All</u>
Radio News:	Which stations:	_____
Radio Talk Shows:	Which ones:	_____
Newspaper:	Which ones:	<u>P.A. Daily-</u>
Magazines:	Which ones:	_____
Internet Chat Rooms:	Which ones:	_____
Conversations with others:	Who:	_____
Other:	Who:	_____

94. If you have been exposed to pre-trial publicity about this case, it would be natural to form some opinions about what you have heard. Have you formed any preliminary opinions about this case? YES NO
If you answered yes to the previous questions, please explain what they are.

95. Have you formed or expressed any opinions about the guilt or innocence of the defendant, Scott Peterson?
 YES, guilt YES, innocence Not enough information to decide
Please explain: _____

96. Has anyone expressed any opinion as to his guilt or innocence to you?
 YES, guilt YES, innocence NO

97a. The jurors that sit on this case will be instructed that they must base their decision entirely on the evidence produced in court, not from any outside source or pre-existing opinion or attitudes. Can you do that, despite what you have read, heard, or seen about this case?
 YES NO

Please explain: _____

- 97b. Do you think the news media always presents the story accurately?
 YES NO
98. If you have already formed opinions about this case, can you set them aside and base your decision entirely on the evidence presented in this courtroom, even if it conflicts with what you have previously heard? YES NO
99. Despite anything you may have heard, read or seen about this case, can you still be fair to the prosecution and the defense? YES NO
100. If selected as a juror in this case, will you be able to follow the court's instruction to avoid any news coverage about this case beginning today? YES NO
101. Is there anything else that you feel the court should know about your qualifications as a juror? YES NO
 If yes, please explain. _____

102. Is there any reason you would not be a fair juror in this case?
 YES NO
 If yes, please explain. _____

103. a. If after hearing all of the evidence in this case you are convinced beyond a reasonable doubt that the defendant is guilty of one or more of the counts of the Information, would you be able to return a verdict of guilty on that count or counts?
 YES NO
- b. If after hearing all of the evidence in this case you are not convinced beyond a reasonable doubt that the defendant is guilty of one or more of the counts of the Information, would you be able to return a verdict of not guilty on that count or counts?
 YES NO
104. During the trial you may become aware that members of the defendant's family and/or members of the victim's family will generally be present in the courtroom during the proceedings. Will you be able to ignore their presence and consider only the evidence in determining the defendant's innocence or guilt?
 YES NO
105. Have you seen the movie "The Perfect Husband: The Laci Peterson Story"?
 YES NO
106. If so, how has it affected your views and/or opinions about the case, if at all?

**VIEWS ON THE DEATH PENALTY AND THE PENALTY OF LIFE IN PRISON
WITHOUT THE POSSIBILITY OF PAROLE**

The court is asking the following questions regarding your feelings about the death penalty because one of the possible sentences for a person convicted of the charges the prosecution has filed is the death penalty. Therefore, the court must know whether you could be fair to both the prosecution and the defense on the issue of punishment if you reach that issue. By asking these questions, the court is not suggesting that you will ever need to decide this question because the court has no way of knowing what the evidence in this case will be, or whether or not you will find the defendant guilty of anything at all. In other words, the only way the issue of punishment will be decided by the jury is if it should find the defendant guilty beyond a reasonable doubt of first degree murder of at least one count, and guilty of first or second degree murder on the other count, and the alleged special circumstance true beyond a reasonable doubt.

By asking about your views on penalty now, the court is not suggesting that the jury in this case will find the defendant guilty.

A. Will asking questions concerning your views about the death penalty and the penalty of life in prison without possibility of parole suggest to you that the defendant must be guilty?

NO

B. Do you understand that the only task jurors are asked to perform during the first phase of trial is to judge guilt or innocence?

YES

Do you understand that if there is a penalty trial, the only two possible sentences will be the death penalty and life in prison without the possibility of parole?

YES

107. What are your feelings regarding the death penalty? "If" without a
doubt someone did something that had all the
evidence was there when it that is the sentence given
they the person needs to have that sentence.

108. What are your feelings regarding life in prison without the possibility of parole?
Same as above. "If" without a doubt all evidence
is there.

109. How would you rate your attitude towards the death penalty?

- Strongly Oppose
- Oppose
- Weakly Oppose
- Weakly Support
- Support
- Strongly Support

110. Would it be difficult for you to vote for the death penalty if the crime was the guilty party's first offense?

YES NO Depends on the Evidence

111. Briefly describe any article, book, or news programs that influenced your feelings about the death penalty: None

112. Have you ever been involved in any way, such as circulating a petition, in support of the death penalty? YES NO

If yes, please explain: _____

113. Have you ever been involved in any way, such as circulating a petition in opposition to the death penalty? YES NO

114. Over the last ten years, have your views on the death penalty changed?

YES NO

If yes, please explain: _____

115. Do you have any moral, religious, or philosophical opposition to the death penalty so strong that you would be unable to impose the death penalty regardless of the facts? YES NO

If yes, please explain: _____

116. Do you have any moral, religious, or philosophical beliefs in favor of the death penalty so strong that you would be unable to impose life without possibility of parole regardless of the facts? YES NO

If yes, please explain: _____

I declare under penalty of perjury that the answers set forth on this Jury Questionnaire are true and correct to the best of my knowledge, information, and belief.

Executed on March 9th, 2004, 2004, in San Mateo County, California.

06756
Prospective Juror Number

**DECLARATION UNDER PENALTY OF PERJURY
REGARDING REQUEST FOR HARDSHIP DISQUALIFICATION**

TO: Judge Alfred A. Delucchi

JUROR ID NUMBER: _____

REQUEST FOR HARDSHIP DISQUALIFICATION

REASON:

EXPLANATION SHEET

If you feel that in the spaces provided, you were unable to sufficiently answer any particular question, please use this area to provide that information. That you very much for your cooperation.

I certify, under penalty of perjury, that the foregoing is true and correct, and that I have received no assistance from any other person in completing this questionnaire.

Executed in the County of San Mateo on _____
Date

JUROR ID and INITIALS
(Do NOT write your name)

EXHIBIT 45

Richelle Nice v. Marcella Kinsey, San Mateo County
Superior Court Case No. 415040, filed November 27, 2000

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, state bar number, and address):

ADDRESS WHERE YOU WANT MAIL SENT:

TELEPHONE NO.:

FAX NO.:

ATTORNEY FOR (Name):

SUPERIOR COURT OF CALIFORNIA, COUNTY OF

STREET ADDRESS:

MAILING ADDRESS:

CITY AND ZIP CODE:

BRANCH NAME:

PLAINTIFF: Richard Motz

DEFENDANT: Marcella Kinsey

ORDER TO SHOW CAUSE (Harassment) and Temporary Restraining Order (CLETS)

FOR COURT USE ONLY

FILED
SAN MATEO COUNTY

NOV 27 2000

Clerk of the Superior Court
By [Signature]
DEPUTY CLERK

CASE NUMBER: 415040

- To defendant (name): Marcella Kinsey
- A court hearing has been set at the time and place indicated below:

Date: 12/13/00 Time: 9am Dept.: 14 Room:

- You have the right to attend the court hearing, with or without an attorney, to give any legal reason why the orders requested in the attached petition should not be granted. NOTICE: If you do not attend the hearing, the court may grant the requested orders without further notice to you. Restraining Orders may last up to three (3) years.

TEMPORARY RESTRAINING ORDER

THE COURT FINDS

- a. The defendant is (name): Marcella Kinsey

Sex: M F Ht.: 52 Wt.: 156 Hair color: Blk Eye color: Brn Race: Blk Age: 32 Date of birth: 10-9-67

- b. The protected person(s) are (list names of all persons, including yourself, if applicable, to be protected by this order):

UNTIL THE TIME OF HEARING, IT IS ORDERED

- The restrained person

- shall not contact, molest, harass, attack, strike, threaten, sexually assault, batter, telephone, send any messages to, follow, stalk, destroy the personal property of, disturb the peace of, keep under surveillance, or block movements in public places or thoroughfares.
- shall stay at least (specify): 100 yards away from the following protected persons and places: (The addresses of these places are optional and you do not have to provide them.)
 - Person seeking the order
 - The other plaintiffs listed in item 4b
 - Residence of person seeking the order
 - Place of work of person seeking the order
 - The children's school or place of child care
 - Other (specify):

(Temporary Restraining Order continued on reverse)

PLAINTIFF (Name): <u>Richelle D'Arc</u>	CASE NUMBER:
DEFENDANT (Name): <u>Marcella Kinsey</u>	

6. OTHER ORDERS (specify):

7. By the close of business on the date of this order, a copy of this order and any proof of service shall be given to the law enforcement agencies listed below as follows:

- a. plaintiff shall deliver.
- b. plaintiff's attorney shall deliver.
- c. the clerk of the court shall deliver.

<u>Law enforcement agency</u>	<u>Address</u>
<u>Menlo Park</u>	<u>Summit</u>
<u>Redwood City</u>	
<u>MTN. View</u>	
<u>Palo Alto</u>	
<u>E. PALO ALTO</u>	

- 8. a. Application for an order shortening time is granted and the following documents shall be personally served on the defendant no fewer than (specify number): _____ days before the time set for hearing.
- b. The following documents shall be personally served on defendant within five days from the date the TRO is issued, or two days before the hearing, whichever is earlier:
 - (1) Order to Show Cause (Harassment) and Temporary Restraining Order
 - (2) Petition for Injunction Prohibiting Harassment (form CH-100)
 - (3) Blank Response to Petition for Injunction Prohibiting Harassment (form CH-110)
 - (4) Other (specify):

9. Filing fees for the filing of this action are duly waived.

Date: 11/27/04

[Signature]
JUDICIAL OFFICER

This order is effective when made. It is enforceable in all 50 states, the District of Columbia, all tribal lands, and all U.S. territories, and shall be enforced as if it were an order of that jurisdiction by any law enforcement agency that has received the order, is shown a copy of the order, or has verified its existence on the California Law Enforcement Telecommunications System (CLETS). If proof of service on the restrained person has not been received, and the restrained person was not present at the court hearing, the law enforcement agency shall advise the restrained person of the terms of the order and then shall enforce it. Violations of this restraining order are subject to federal and state criminal penalties. By California state law, violation of this temporary restraining order is a misdemeanor, punishable by one year in jail, a \$1,000 fine, or both, or may be punishable as a felony. Any person subject to a restraining order is prohibited from purchasing or attempting to purchase, receiving or attempting to receive, or otherwise obtaining a firearm. Such conduct is subject to a \$1,000 fine and imprisonment. If a final order is entered against the restrained person after the hearing, even if the restrained person did not attend, he or she may be prohibited from possessing, transporting, or accepting a firearm under the 1994 amendments to the Gun Control Act, 18 U.S.C. § 922(g)(8). A violation of this prohibition is a separate offense.

(SEAL)

CLERK'S CERTIFICATE

I certify that the foregoing Order to Show Cause and Temporary Restraining Order (CLETS) is a true and correct copy of the original on file in the court.

Date: _____ Clerk, by _____, Deputy

HCP-000904

<p>NAME OF PARTY OR ATTORNEY (and state bar number if attorney): ADDRESS WHERE YOU WANT MAIL SENT: TELEPHONE NUMBER (Optional): ATTORNEY FOR (Name):</p>	<p>FOR COURT USE ONLY</p> <p>FILED SAN MATEO COUNTY</p> <p>NOV 27 2000</p> <p>Clerk of the Superior Court By <u>[Signature]</u> DEPUTY CLERK</p>
<p>SUPERIOR COURT OF CALIFORNIA, COUNTY OF San Mateo STREET ADDRESS: 400 COUNTY CENTER MAILING ADDRESS: REDWOOD CITY CITY AND ZIP CODE: CA 94063-1655 BRANCH NAME:</p>	
<p>PLAINTIFF:</p>	
<p>DEFENDANT:</p>	
<p>PETITION FOR INJUNCTION PROHIBITING HARASSMENT <input type="checkbox"/> Application for Temporary Restraining Order</p>	<p>CASE NUMBER: 415040</p>

(THIS IS NOT AN ORDER)

Read the Instructions for Lawsuits to Prohibit Harassment (form CH-150) before completing this form.

1. PERSONS TO BE PROTECTED (List names and ages of all persons including yourself, if applicable, to be protected by this order and their relationship to the party seeking the orders; all named parties must sign this petition): Richelle J. Nice & unborn child.

2. a. Defendant (name): Marcella Kinsey

Sex: M F Ht.: 5'2" Wt.: 156 Hair color: BLK Eye color: Brown Race: BLK Age: 32 Date of birth: 10-9-67

b. Defendant's residence address (if known):

2724 Xavier St.
E. Palo Alto, Ca 94303

c. Defendant's work address and name of business (if known):

3. This action is filed in this county because

- a. defendant resides in this county.
- b. defendant has caused physical or emotional injury to plaintiff in this county.
- c. other (specify):

4. How is it that you know defendant (i.e., landlord/tenant, neighbor, etc.)? (Specify):

marcella is my ex-boyfriend's ex-girlfriend.

5. Defendant has

- a. threatened to commit acts of violence against plaintiff(s). (Specify in item 19.)
- b. committed acts of violence against plaintiff(s). (Specify in item 19.)
- c. not threatened to commit and has not committed any acts of violence.

6. Defendant has committed a series of acts that seriously alarm, annoy, or harass plaintiff. (Specify in item 19.) ON Sept. 23, 2000 marcella came to my house kicked in my front door, slashed my ex-boyfriend's tires, tried to mose

7. Plaintiff has actually suffered substantial emotional distress as a direct result of defendant's conduct described in item 19, and defendant's conduct would have caused a reasonable person to suffer substantial emotional distress. yes

8. Defendant's continuing course of conduct has been directed specifically against plaintiff and is knowing, willful, not constitutionally protected, and without legitimate purpose. yes

(Continued on reverse)

PLAINTIFF (Name) :	CASE NUMBER: 415040
DEFENDANT (Name) :	

(THIS IS NOT AN ORDER)

PLAINTIFF(S) REQUEST THE COURT TO MAKE THE ORDERS INDICATED BY THE CHECK MARKS IN THE BOXES BELOW.

9. PERSONAL CONDUCT ORDERS To be ordered now and effective until the hearing.
 Restrained person must not contact, molest, harass, attack, strike, threaten, sexually assault, batter, telephone, send any messages to, follow, stalk, destroy any personal property, disturb the peace, keep under surveillance, or block movements in public places or thoroughfares.
10. STAY-AWAY ORDERS To be ordered now and effective until the hearing
 Defendant must stay at least (specify) : _____ yards away from the following persons and places (the addresses of the places are optional and you do not have to reveal them):
- a. Plaintiff and the other named plaintiffs (names) :
 - b. Plaintiff's residence (address optional) :
 - c. Plaintiff's place of work (address optional) :
 - d. Plaintiff's children's school or place of child care (address optional) :
 - e. Other (specify) :
 (address optional) :
11. Will granting of any of the stay-away orders in Item 10 interfere with defendant's access to defendant's residence or place of employment? Yes No
 (If yes, explain) :
12. Plaintiff(s) will suffer great and irreparable harm before this petition can be heard in court unless the court makes those orders requested above effective now and until the hearing. (Specify the harm and why it will occur before the hearing) :
13. ATTORNEY FEES AND COSTS
 Defendant should be ordered to pay plaintiff's attorney fees and costs as follows (specify) :
14. OTHER ORDERS (specify other orders you are requesting) :

(Continued on next page)

PLAINTIFF (Name): Richelle Nice NUMBER: 415040
 DEFENDANT (Name): Marcella Kinsey

(THIS IS NOT AN ORDER)

15. Plaintiffs request that copies of orders be given to the following law enforcement agencies:

Law enforcement agency	Address
<u>E. Palo Alto</u>	
<u>Palo Alto</u>	
<u>Mundo Park</u>	
<u>MTV. view</u>	
<u>Redwood City</u>	
<u>Sunnyvale</u>	

16. a. Plaintiff has asked for restraining orders against the defendant before. (Specify county and case number, if known.)
 b. Defendant has asked for restraining orders against plaintiff before. (Specify county and case number, if known.)

17. Plaintiff requests additional relief as may be proper.

18. I request that time for service of the Order to Show Cause and accompanying papers be shortened so that they may be served no less than (specify number): _____ days before the date set for the hearing. I need to have the order shortening time because of the facts contained in this application. (Add additional facts if necessary):

19. DESCRIPTION OF CONDUCT See Attach on back
 Describe in detail the most recent incidents of abuse. State what happened, the dates, and who did what to whom. Describe any injuries. on Sept. 23 2008 at about 10:30am Marcella came to Richelles house and slashed her ex-friends tires yelled and screamed in front of her house. Kicked in her front door while I was on the phone with police. Marcella has continued to make threats to Richelle. on Nov. 11th Marcella called her house. then on Nov. 21st Marcella pulled up behind Richelle in her work van yelling things and pointing at her, ended up following her to work when drove off. She has told Richelle she knows where she lives & she will handle things on the streets when she (Marcella) sees her. Richelle
 Continued in Attachment 19.

20. Plaintiff is not required to pay a fee for filing this petition because plaintiff is seeking order(s) restraining violence or threats of violence. (Note: If the court finds there has been no violence or threats of violence, then you may be ordered to pay the appropriate fees.)

21. Number of pages attached: 1

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _____
 _____ (TYPE OR PRINT NAME) Richelle Nice _____ (SIGNATURE OF PLAINTIFF)
 _____ (TYPE OR PRINT NAME) Richelle Nice _____ (SIGNATURE OF PLAINTIFF)
 _____ (TYPE OR PRINT NAME) Richelle Nice _____ (SIGNATURE OF PLAINTIFF)

IS about 4 1/2 months pregnant, marcella knows this, still
is making threats towards her. She drives by her
house. Marcella has brought people by her new house
to show them where she lives. She has for the last
month ^{Richelle} put stress on ~~me~~ my unborn child
& family. ~~me~~ my family & I were put out of our
house we had been in for 9 years. ^{Richelle} ~~me~~ had to take
off much time ~~me~~ from work to find a new
place to live & to go to court and get ~~me~~ papers.
Richelle really fears for her unborn child. ^{Richelle} She
is also in fear for her ^{new} place of residence & her
family. In result to all the stress she has caused Richelle,
she started having early contractions.

On September 23, 2000 Marcella Kinsey came to Richelle's house in Mtn. View, slashed Richelle's ex-boyfriends (Eddie Whiteside) tires on his car, came up to Richelle's front door where she had a friend knock on her door. After Richelle came to the door to see who it was she realized she did not know this person., she listened to her and then shut the door. Richelles son looked out the window and saw a woman hiding in the bushes. Marcella then started yelling and screaming in front of her house. Telling Richelle and Eddie to come outside. Eddie then told Richelle to call the police. Eddie went outside to try and tell Marcella and the others to leave, at that point Marcella tried to spray Eddie with mase, Eddie then ran back into the house and shut the door. Marcella continued to scream and yell in front of Richelles house. Marcella then kicked in the front door to Richelle's house and then ran and got into her car and left.

As a result of that Richelle and her family were given a 30 day notice. Since then we had to move to where we could. We found a house in East Palo Alto. Marcella has found out where Richelle lives and has been to her house where she said to Eddie that she saw his car in Richelles drive way, which she would have had to come down a long driveway to see this. You can not see it from the street. Marcella has brought people to show them how close Richelle lives to her.

On November 11th Marcella called Richelle's home and hung up when Richelle answered the phone. Richelle *69 the person calling until someone answered the phone, Marcella stated that her name was Kim. Richelle had the new number for only one week , Richelle had thought no one had the number yet. Richelle was told that Marcella checks the caller ID at Eddies mothers house. On November 21st on Richelle's way back to work she saw a gold colored mini van pull up behind her. She noticed a lady pointing at her and what looked like saying something to her, so she looked again and noticed it was Marcella who was in her work van. Marcella continued to say things to Richelle, then followed Richelle. Later that day Richelle thought she could call Marcella and talk to her about this and try to put a stop to it. Marcella told Richelle she knew where she lives and she would not come there but she would handle it on the streets.

Richelle is about 5 months pregnant and is in fear for her unborn child. In the last month Marcella has put Richelle and her unborn child through so much stress. As a result in all of this stress Richelle has had early contraction's and fears having the baby to early. Richelle's family has been under a lot of stress as well. We also fear for our new place of residence. Richelle has had to take off time from work to deal with matter. Richelle does not want Marcella to be able to come anywhere near her child after it is born. Richelle feel's like Marcella would try to hurt the baby, with all the hate and anger she has for Richelle.

415040

*** FOR OFFICE USE ONLY ***

DATE: _____ TYPE OF ENTRY: _____ CLETS ENTRY BY: _____
PROOF OF SERVICE ENTRY DATE: _____ MODIFY DATE: _____

COUNTY OF SAN MATEO

RESTRAINING ORDER INFORMATION FOR LAW ENFORCEMENT AGENCIES

- PLEASE PRINT ONLY -

MANDATORY INFORMATION: (Without this information, the Restraining Order cannot be entered in the statewide reporting system which may prevent Restrained Persons from buying or attempting to buy firearms as long as the order is in effect.)

RESTRAINED PERSON'S DESCRIPTION: Black Female
FULL NAME: Kinsey Marcella _____ SEX: F DATE OF BIRTH: 10-9-67
LAST FIRST MIDDLE M/F/X MM/DD/YY

RACE: (Check Only One)

- | | | | |
|---|--|---|---|
| <input type="checkbox"/> AMERICAN INDIAN (I) | <input type="checkbox"/> FILIPINO (F) | <input type="checkbox"/> KOREAN (K) | <input type="checkbox"/> PACIFIC ISLANDER (P) |
| <input type="checkbox"/> ASIAN, Other (A) | <input type="checkbox"/> GUAMANIAN (G) | <input type="checkbox"/> LAOTIAN (L) | <input type="checkbox"/> SAMOAN (S) |
| <input type="checkbox"/> ASIAN, INDIAN (Z) | <input type="checkbox"/> HAWAIIAN (U) | <input type="checkbox"/> LATIN AMERICAN (H) | <input type="checkbox"/> UNKNOWN (X) |
| <input checked="" type="checkbox"/> BLACK (B) | <input type="checkbox"/> HISPANIC (H) | <input type="checkbox"/> MEXICAN (H) | <input type="checkbox"/> VIETNAMESE (V) |
| <input type="checkbox"/> CAMBODIAN (D) | <input type="checkbox"/> JAPANESE (J) | <input type="checkbox"/> OTHER, ALL (O) | <input type="checkbox"/> WHITE (W) |
| <input type="checkbox"/> CHINESE (C) | | | |

Can Restrained Person contact Protected Person? YES NO
Was the Restrained Person present in Court? YES NO

ADDITIONAL USEFUL RESTRAINED PARTY IDENTIFICATION INFORMATION:

HAIR: (Check Only One)

- | | | | |
|---------------------------------------|---|---|---------------------------------------|
| <input type="checkbox"/> AUBURN (RED) | <input type="checkbox"/> BLOND (BLN) | <input type="checkbox"/> RED (RED) | <input type="checkbox"/> UNKNOWN (XX) |
| <input type="checkbox"/> BALD (XXX) | <input checked="" type="checkbox"/> BROWN (BRO) | <input type="checkbox"/> SANDY (SANDY) | <input type="checkbox"/> WHITE (WH) |
| <input type="checkbox"/> BLACK (BLK) | <input type="checkbox"/> GRAY (GRY) | <input type="checkbox"/> STRAWBERRY BLOND (BLN) | |

CAUTION CODES: (Check If Applicable)

- A = Armed & Dangerous E = Escape Risk M = Mentally Disturbed S = Suicidal Tendencies
 X = Explain

ALIAS (Other Names Used) (AKA): _____

ADDRESSES: (HOME) 2724 Xavier St. E. Palo Alto, Ca 94303
(WORK) _____

OTHER IDENTIFICATION:
SOCIAL SECURITY NUMBER: 571-65-9168 DRIVER'S LICENSE NUMBER: LO641172 STATE: CA

OTHER PHYSICAL DESCRIPTION:

- HEIGHT: 5'2" EYE COLOR: BLACK (BLK) GRAY (GRY) MAROON (MAF)
WEIGHT: 130 BLUE (BLU) GREEN (GRN) MULTI (MUL)
 BROWN (BRO) HAZEL (HAZ) PINK (PNK)
 UNKNOWN (XXX)

PROTECTED PERSON'S INFORMATION: *** CONFIDENTIAL *** FOR OFFICE USE ONLY ***

FULL NAME: Nice Richelle J SEX: F DATE OF BIRTH: 2-20-70
LAST FIRST MIDDLE M/F/X MM/DD/YY
ADDRESS: 2202 Clarke Ave. E. Palo Alto, Ca 94303
NO. STREET CITY STATE ZIP CODE

IF NOT SERVED, PLEASE PROVIDE US WITH A COPY OF THE "PROOF OF SERVICE" WHEN SERVED.

SIGNATURE OF PLAINTIFF/RP: [Signature] DATE: 11/27/00 REC'D BY: _____

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, street number, and address): <div style="font-size: 1.2em; font-weight: bold;">Richelle Nice</div> <div style="font-size: 0.8em; color: gray;">Confidential</div>		FOR COURT USE ONLY <div style="font-size: 1.5em; font-weight: bold;">FILED</div> <div style="font-weight: bold;">SAN MATEO COUNTY</div> NOV 27 2000 Clerk of the Superior Court By DEPUTY CLERK
TELEPHONE NO.: Confidential FAX NO.:		
ATTORNEY FOR (Name): Confidential		
INSERT NAME OF COURT, JUDICIAL DISTRICT, AND BRANCH COURT, IF ANY: SUPERIOR COURT SAN MATEO COUNTY		
CASE NAME:		
CIVIL CASE COVER SHEET <input type="checkbox"/> Limited <input type="checkbox"/> Unlimited	Complex Case Designation <input type="checkbox"/> Counter <input type="checkbox"/> Joinder Filed with first appearance by defendant (Cal. Rules of Court, rule 1811)	CASE NUMBER: <div style="font-size: 1.2em; font-weight: bold;">415040</div> ASSIGNED JUDGE:

Please complete all five (5) items below.

1. Check one box below for the case type that best describes this case:

Auto Tort <input type="checkbox"/> Auto (22) Other PI/DPD/WD (Personal Injury/Property Damage/Wrongful Death) Tort <input type="checkbox"/> Asbestos (04) <input type="checkbox"/> Product liability (24) <input type="checkbox"/> Medical malpractice (45) <input type="checkbox"/> Other PI/DPD/WD (23) Non-PI/DPD/WD (Other) Tort <input type="checkbox"/> Business tort/unfair business practice (07) <input type="checkbox"/> Civil rights (e.g., discrimination, false arrest) (08) <input type="checkbox"/> Defamation (e.g., slander, libel) (13) <input type="checkbox"/> Fraud (16) <input type="checkbox"/> Intellectual property (19) <input type="checkbox"/> Professional negligence (e.g., legal malpractice) (25) <input type="checkbox"/> Other non-PI/DPD/WD tort (35) Employment <input type="checkbox"/> Wrongful termination (36)	<input type="checkbox"/> Other employment (15) Contract <input type="checkbox"/> Breach of contract/warranty (06) <input type="checkbox"/> Collections (e.g., money owed, open book accounts) (09) <input type="checkbox"/> Insurance coverage (18) <input type="checkbox"/> Other contract (37) Real Property <input type="checkbox"/> Eminent domain/Inverse condemnation (14) <input type="checkbox"/> Wrongful eviction (33) <input type="checkbox"/> Other real property (e.g., quiet title) (26) Unlawful Detainer <input type="checkbox"/> Commercial (31) <input type="checkbox"/> Residential (32) <input type="checkbox"/> Drugs (38) Judicial Review <input type="checkbox"/> Asset forfeiture (05) <input type="checkbox"/> Petition re: arbitration award (11)	<input type="checkbox"/> Writ of mandate (02) <input type="checkbox"/> Other judicial review (39) Provisionally Complex Civil Litigation (Cal. Rules of Court, rules 1800-1812) <input type="checkbox"/> Antitrust/Trade regulation (03) <input type="checkbox"/> Construction defect (10) <input type="checkbox"/> Claims involving mass tort (40) <input type="checkbox"/> Securities litigation (28) <input type="checkbox"/> Toxic tort/Environmental (30) <input type="checkbox"/> Insurance coverage claims arising from the above listed provisionally complex case types (41) Enforcement of Judgment <input type="checkbox"/> Enforcement of judgment (e.g., sister state, foreign, out-of-county abstracts) (20) Miscellaneous Civil Complaint <input type="checkbox"/> RICO (27) <input type="checkbox"/> Other complaint (not specified above) (42) Miscellaneous Civil Petition <input type="checkbox"/> Partnership and corporate governance (21) <input type="checkbox"/> Other petition (not specified above) (43)
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2. This case is is not complex under rule 1800 of the California Rules of Court. If case is complex, mark the factors requiring exceptional judicial management:

a. <input type="checkbox"/> Large number of separately represented parties	d. <input type="checkbox"/> Large number of witnesses
b. <input type="checkbox"/> Extensive motion practice raising difficult or novel issues that will be time-consuming to resolve	e. <input type="checkbox"/> Coordination and related actions pending in one or more courts in other counties, states or countries, or in a federal court
c. <input type="checkbox"/> Substantial amount of documentary evidence	f. <input type="checkbox"/> Substantial post-disposition judicial disposition

3. Type of remedies sought (check all that apply):

a. <input type="checkbox"/> monetary	b. <input type="checkbox"/> nonmonetary; declaratory or injunctive relief	c. <input type="checkbox"/> punitive
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4. Number of causes of action (specify):

5. This case is is not a class action suit.

Date: Richelle Nice

(TYPE OR PRINT NAME) (SIGNATURE OF PARTY OR ATTORNEY FOR PARTY)

NOTICE

- Plaintiff must file this cover sheet with the first paper filed in the action or proceeding (except small claims cases or cases filed under the Probate, Family, or Welfare and Institutions Code). (Cal. Rules of Court, rule 982.2.)
- File this cover sheet in addition to any cover sheet required by local court rule.
- If this case is complex under rule 1800 et seq. of the California Rules of Court, you must serve a copy of this cover sheet on all other parties to the action or proceeding.
- Unless this a complex case, this cover sheet shall be used for statistical purposes only.

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, state bar number, and address): ADDRESS WHERE YOU WANT MAIL SENT: <i>Marcella Kinsey</i> <i>2724 Xavier St. Palo Alto, CA 94303</i> TELEPHONE NO. (Optional): _____ FAX NO. (Optional): _____ ATTORNEY FOR (Name): _____	FOR COURT USE ONLY <div style="text-align: center;"> FILED SAN MATEO COUNTY DEC 13 2000 Clerk of the Superior Court By <i>[Signature]</i> DEPUTY CLERK </div> CASE NUMBER: 415040
SUPERIOR COURT OF CALIFORNIA, COUNTY OF ... STREET ADDRESS: County of San Mateo MAILING ADDRESS: 400 County Center CITY AND ZIP CODE: Redwood City, CA 94063-1855 BRANCH NAME: _____	
PLAINTIFF: <i>Richelle Nice</i> DEFENDANT: <i>Marcella Kinsey</i>	
ORDER AFTER HEARING ON PETITION FOR INJUNCTION PROHIBITING HARASSMENT (CLETS)	

1. THIS ORDER, EXCEPT FOR AWARD OF ATTORNEY FEES AND COSTS, SHALL EXPIRE AT MIDNIGHT ON

(date): *12/13/03*

2. This proceeding came on for hearing as follows:

Date: <i>12-13-00</i>	Time: <i>9:20am</i>	Dept.: <i>14</i>	Room: _____
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3. Judicial officer (name): Temporary judge

4. a. Plaintiff present Attorney present (name): _____
 b. Defendant present Attorney present (name): _____

THE COURT FINDS

5. a. The defendant is (name): *Marcella Kinsey*

Sex: M F Ht.: *52* Wt.: *156* Hair color: *Blk* Eye color: *Bru* Race: *Blk* Age: *32* Date of birth: *10-9-67*

b. The protected person(s) are (name(s)): *Richelle Nice & unborn child.*

6. After the hearing on the petition, IT IS ORDERED THAT DEFENDANT

a. shall not contact, molest, harass, attack, strike, threaten, sexually assault, batter, telephone, send any messages to, follow, stalk, destroy the personal property of, disturb the peace of, keep under surveillance, or block movements in public places or thoroughfares of

the person seeking the order the other protected person(s) listed in item 5b.
b. shall stay at least (specify): *100* yards away from the following protected persons and places:

- (1) Person seeking the order
- (2) The other protected persons listed in item 5b
- (3) Residence of person seeking the order
- (4) Place of work of person seeking the order
- (5) The children's school or place of child care
- (6) Other (specify): _____

(Continued on reverse)

PLAINTIFF (Name):	CASE NUMBER:
DEFENDANT (Name):	

7. Other orders (specify):

8. By the close of business on the date of this order, a copy of this order and any proof of service shall be given to the law enforcement agencies listed below as follows:

- a. plaintiff shall deliver.
- b. plaintiff's attorney shall deliver.
- c. the clerk of the court shall deliver.

Law enforcement agency

Address

Date:

12/13/01


 JUDICIAL OFFICER'S SIGNATURE

CERTIFICATION OF COMPLIANCE WITH VAWA This order meets all Full Faith and Credit requirements of the Violence Against Women Act, 18 U.S.C. § 2265 (1994) (VAWA). This court has jurisdiction over the parties and the subject matter; the defendant has been afforded notice and a timely opportunity to be heard as provided by the laws of this jurisdiction. This order is valid and entitled to enforcement in this and all other jurisdictions.

This order is effective when made. It is enforceable in all 50 states, the District of Columbia, all tribal lands, and all U.S. territories, and shall be enforced as if it were an order of that jurisdiction by any law enforcement agency that has received the order, is shown a copy of the order, or has verified its existence on the California Law Enforcement Telecommunications System (CLETS). If proof of service on the restrained person has not been received, and the restrained person was not present at the court hearing, the law enforcement agency shall advise the restrained person of the terms of the order and then shall enforce it. Violations of this restraining order are subject to federal and state criminal penalties. By California state law, violation of this temporary restraining order is a misdemeanor, punishable by one year in jail, a \$1,000 fine, or both, or may be punishable as a felony. Any person subject to a restraining order is prohibited from purchasing or attempting to purchase, receiving or attempting to receive, or otherwise obtaining a firearm. Such conduct is subject to a \$1,000 fine and imprisonment.

(SEAL)	CLERK'S CERTIFICATE
	I certify that the foregoing Order After Hearing on Petition for Injunction Prohibiting Harassment (CLETS) is a true and correct copy of the original on file in the court.
	Date: _____ Clerk, by _____, Deputy

Superior Court of California
County of San Mateo
Minute Order

Case No.: 415040 Date: 12/13/00 Dept.:PJLM
Case Name: RICHELLE NICE V MARCELLA KINSEY
Case Category: HARASSMENT
Hearing: HEARING: ORDER TO SHOW CAUSE RE: TEMPORARY RESTRAINING ORDER (HARASSMENT) FILED BY RICHELLE NICE AND SIGNED BY JUDGE PF

Honorable Rosemary Pfeiffer, Judge presiding. Clerk: Donna Carter.
Court Reporter: Loretta Duran.

RICHELLE NICE present in pro per.

MARCELLA KINSEY present in pro per.

Richell Nice and Marcella Kinsey were each sworn and testified.

Petition granted.

Defendant to stay 100 yards away and have no contact in person, by phone or mail.

Entered by Donna on 12/13/00.

=====

LAW & MOTION
FILE PREPARATION

CASE
NAME

NICE V. KINSEY

CASE#

415040

HRG DATE

DEC 18 2000

-
-
-
-
-
-
-

Moving papers tagged with red tag
Proof of Service filed regarding moving papers
File in chronological order
Notice of hearing in file
Minute form submitted with file
File checked for misfilings
Documents missing (list)

FUTURE CALENDAR EVENTS

DATE

FILE VERIFIED BY:

SILO SALA

DATE

DEC 01 2000

December 9, 2001

Req file 10

Dear Judge Rosemary Pfeiffer:

I Marcella Kinsey am writing to you regarding the restraining order that was placed against me on 12-13-00 by the plaintiff Richelle Nice case number 415040. A restraining order was placed against me because of an incident that occurred between myself and my ex-boyfriend Eddie Whiteside at Ms. Nices home last year. Ms. Nice and my ex-boyfriend Eddie Whiteside met at Stanford Hospital where they were both employed at the time, they developed a sexual relationship while he and I were boyfriend and girlfriend and while he was lived with me in my home. Ms. Nice knew Eddie and I were living together and when I came to know of their relationship I threatened to break things off with Eddie. I asked him to return my house keys and to stay away from my home. Eddie continued to ask for us to stay together but continued to lie and cheat on me with Ms. Nice. In addition to the betrayal that I learned of, a few weeks later I learned that Ms. Nice was now pregnant. Finally I got tired of it and went over to her house to obtain my house key from Mr. Whiteside got into a verbal heated argument with him which resulted in my doing some things to Mr. Whitesides vehicle that I am not proud of. As a result of my actions I was punished for vandalism and served one week in the Elmwood facility at Santa Clara County Jail. I am 34 years old and I have never gone to jail before. That experience was humiliating and degrading and I was ashamed that I allowed myself to get into a situation that we cause me to serve time in jail.

Judge Pfeiffer since those incidents occurred I have moved on and began to heal myself from the pain and suffering that I experienced from that incident; however, Ms. Nice continues to harass me. I am no longer involved with Mr. Whiteside on a romantic level but we have remained friends. Ms. Nice has felt threatened by this and feared that Mr. Whiteside would come back to me. As a result she has continued to harass me. Ms. Nice continuously plays on my telephone to the point where I recently got a new phone number that has ultimately caused a loss in contact with my clients. I am a well known hair braider and have built up a high clientel and now my clients have a hard time contacting me for appointments. Ms. Nice has falsely obtained my social security number. I am currently on housing and Ms. Nice has contacted the housing authority and made false accusations that Mr. Whiteside was living in my home. Your honor those lies could have caused myself and my children to become homeless. I have recently learned that Mr. Whiteside and Ms. Nice are no longer together. Ms. Nice assumed he was living here so she contacted the San Mateo County District Attorney's Office Family Support Division and advised them that he was residing at my address so they have begun sending his mail to my home. Judge, Ms. Nice has become quite annoying and I feel that it is her ultimate goal to see me suffer. I was assigned a probation officer Mr. Robert Wells as a result of the vandalism charge that was brought against me, and I have reported the harassment to him. I learned at that time that Ms. Nice had been harassing me as well, and was advised by him at that time to get a restraining order against her for my protection. I attempted to have this done but was denied. Your honor, I don't feel I should have to continue to walk on egg-shells not knowing what this woman is going to do next. I have no control over Mr. Whiteside or his actions. He chose to cheat on me with her and now he has chosen to leave her for whatever

reason and I should not have to be harassed just because she does not know of his whereabouts.

Last, Ms. Nice blames me for being evicted from her home and she is attempting to seek relief from the courts. I have attached letter from her manager of her previous residence who acknowledges that I was not the reason for the eviction. If you would kindly consider over turning the restraining order, or yet allowing me to place one against her. As I do not feel that it is fair for her to have all of this access to me and continuously make efforts to ruin my life, and have no means of protection from the law.

If you need to verify my reports of harassment to my probation officer Robert Wells his phone number is 650-324-6514.

Sincerely Yours

Marcella Kinsey

HCP-000917



FAMILY SUPPORT DIVISION

San Mateo County Office of the District Attorney

555 County Center, second Floor ~ Redwood City ~ California 94063
From California, call: (866)366-8221 ~ Outside CA, call: (650)366-8221 ~ FAX: (650)366-4711

MARCELA KINSEY
2724 XAVIER STREET
EAST PALO ALTO, CA 94303

December 12, 2001

Re: EDDIE WHITESIDE

DA# 054197*3

DEAR MS. KINSEY,

THIS LETTER IS TO VERIFY THAT YOUR HOME ADDRESS:
2724 XAVIER STREET, EAST PALO ALTO, CA 94303
WAS LISTED AS AN ADDRESS FOR MR. EDDIE WHITESIDE.

THIS ADDRESS IS NOW LISTED AS A NOT VALID ADDRESS ON
MR. WHITESIDE'S CASE.

SINCERELY,

SONIA MARTINEZ
Family Support Division


DON RYAN PROPERTIES
2310 ROCK ST. #37, MOUNTAIN VIEW, CA 94043
(650) 961-1366

9/14/01

To Whom It May Concern,

This letter is in reference to the eviction of the tenants in our apartment #29 at 2310 Rock Street, Rachel Cosio and Richelle Nice. They were given a 30 day notice to move after an incident involving Marcella Kinsey in which damage was done to the unit and disturbance was caused to others who live in the complex. This was not the sole reason for their eviction. This incident was one in a long series of problems with that unit and its occupants, which caused the managers to take this action and follow through with it. The tenants had been given a 30 day notice once before, but was rescinded by the managers after assurances by the tenants that the problems would stop. Unfortunately, when one problem stopped, others would arise, causing much time to be spent by management dealing with issues with apartment #29 and its occupants, Rachel Cosio, Richelle Nice, Richelle's children, their pets, and other adults that visited.

The incident involving Marcella Kinsey at 2310 Rock Street was the final, but not the sole incident which caused management to serve a 30 day notice to Rachel Cosio and Richelle Nice.



Paul Ryan
Manager

HCP-000919

Losses

1. Deposit & rent 1st last & deposit	6000.00
2. Rental agency #1	75.00
3. Rental agency #2	85.00
4. Cabal Hook up	81.00
5. Telephone Hook up	20.00
6. Truck rental (Move)	49.95
7. Lost wages PTO.	2,505.00
8. Loss of Retirement	7,382.64
9. Tires for Car	125.00
10. Security Deposit lost (old place)	500.00
11. Police Report	7.00

(Please Review)

Mrs Rosemary Phio

INSIDE ARE A PREVIOUS LETTER FROM Ms. Nice Manager A FORM FROM DISTRICT ATTORNEY OFFICE ALSO COPY OF CIVIL SUIT SHE'S TALKING ME TO COURT FOR.

MY ADDRESS IS 2724 XAVIER ST EAST PHOENIX AZ 85033

Thank you Mrs. Kinsey

[Faint, mostly illegible text, possibly bleed-through from the reverse side of the page]

EXHIBIT 46

Voir Dire of Richelle Nice

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1 evidence there was, you know.

2 Q. Well, that's -- I don't understand your answer.

3 You said: Personally I could not take another's life.

4 Does that mean that you could never select the death

5 penalty because you have some moral --

6 A. I wouldn't -- I wouldn't, no.

7 Q. You would not select --

8 A. No.

9 Q. Okay. We'll excuse you. Thank you.

10 A. Thank you.

11

12 (Prospective Juror 7041 exits the courtroom)

13

14 THE COURT: Okay. So the only one left is 6756,
15 and that juror is scheduled at 2:30.

16 MR. GERAGOS: Could I -- the last juror was over
17 defense objection.

18 THE COURT: Yes.

19 MR. GERAGOS: And, for the record, I'd like to
20 note that she indicated she could base her decision on the
21 evidence, but she was not prejudging guilt, and that she
22 appeared to not have formed an opinion at this point.

23 THE COURT: Okay. When 70 -- when 6756 gets
24 here, would you let us know? Because that's the only
25 one -- she's scheduled for 2:30.

26 THE BAILIFF: Yes.

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1 THE COURT: So whenever she gets here.

2 Can you guys hear me now?

3 MR. GERAGOS: Loud and clear.

4 THE COURT: All right. So we're down to one this
5 afternoon.

6

7

(□Recess)

8

9 THE COURT: All right. This is People vs.
10 Peterson. The record should reflect the defendant is
11 present with counsel. And juror number 6756 has, in fact,
12 arrived so we can start with her right off.

13

14

(□Prospective Juror 6756 enters courtroom)

15

16

PROSPECTIVE JUROR 6756

17 having been previously sworn, was examined as follows:

18

19

EXAMINATION BY THE COURT

20

THE COURT: Q. Hi. Good afternoon.

21

A. Hi.

22

Q. The first thing I want to ask you, will they pay
23 you if you're here for five months?

24

A. No.

25

Q. I didn't think so. How long will they pay you

26

for?

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1 A. Two weeks.

2 Q. Two weeks. Then you wouldn't make it. Okay.
3 You're excused.

4 A. That's it?

5 Q. That's it. We can't expect you to be here and
6 not earn a living.

7 A. Thank you.

8 MR. GERAGOS: Did you ask her if it was a
9 hardship?

10 THE COURT: What?

11 MR. GERAGOS: Did you ask her if it was a
12 hardship?

13 THE COURT: Only gets paid for two weeks. I take
14 judicial notice it's a hardship.

15 That's right; you can't sit here for five months
16 without getting paid, right?

17 PROSPECTIVE JUROR: Okay.

18 MR. GERAGOS: I think she's willing to --

19 THE COURT: You want to sit here for five months
20 without getting paid? If you want to, that's fine. I'll
21 go through the process.

22 PROSPECTIVE JUROR: I mean I'm willing to, you
23 know --

24 THE COURT: Okay. Sit down.

25 PROSPECTIVE JUROR: Okay.

26 THE COURT: I'll withdraw my judicial notice.

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1 MR. GERAGOS: I was going to say you're not being
2 so welcoming.

3 THE COURT: Well, only two weeks, most people
4 would say...so the problem is after a month or two they say
5 --

6 MR. GERAGOS: Yeah, but we've got a couple of
7 others who have said the same thing.

8 THE COURT: I know. It creates issues down the
9 line.

10 Q. You understand now if you get selected on this
11 jury you'd be here for five months or more; you understand
12 that?

13 A. (Nods head)

14 Q. And I can't let you go if something develops or
15 you say Gee, Judge, I need the money. You're here for the
16 duration; do you understand that?

17 A. Yeah. We've talked about it.

18 Q. Okay.

19 A. My family and I.

20 Q. Good. Okay. Okay.

21 Now, I'll take you through this. Do you remember
22 when you were here last time I explained to you that when
23 you came back today we were going to ask you some questions
24 about the two possible penalties, the death penalty and
25 life without parole?

26 I want to remind you today this is not a test and

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1 there's no right or wrong answers and nobody's going to
2 argue with you about the way you feel; okay?

3 A. (Nods head)

4 Q. We're not trying to get you to tell us today how
5 you would vote in this case because we know you haven't
6 heard the evidence, so that would really be premature.
7 Just trying to find out how you would feel about these two
8 penalties as possible penalties; all right?

9 A. (Nods head)

10 Q. First thing I want you to do is forget about Mr.
11 Peterson, forget about this trial, just as if I and I were
12 talking somewhere.

13 And the question is you, knowing the type of
14 person you are, do you think you could ever vote to execute
15 another human being? Is that something you think you could
16 ever do?

17 A. Yes.

18 Q. I assume --

19 A. With all the evidence there.

20 Q. Right. Right. And I assume it would depend on
21 what happened?

22 A. (Nods head)

23 Q. That's part of it; you're not going to pick the
24 death penalty in every case, right?

25 A. No.

26 Q. All right. Now, remember I told you that there's

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1 the possibility of two trials in this case, the first one
2 is called the guilt phase, and that's like any other murder
3 case.

4 But if the jury finds the defendant guilty of one
5 count of first degree murder -- don't have to worry about
6 that, I'll explain to you what that is -- and a second
7 count of first or second degree murder, and if they find
8 the special circumstance true that this was a multiple
9 murder, then that would make Mr. Peterson eligible for
10 either the death penalty or life without parole, which
11 means the very same jury that found him guilty would be
12 called upon to decide the penalty; all right?

13 A. (Nods head)

14 Q. Now, for our purposes you have to accept the fact
15 that, if this jury returns a verdict of death, that in due
16 course he will be executed. Whether it takes 20 years,
17 it's going to happen.

18 Life without the possibility of parole means he's
19 going spend the rest of his life in prison, never get out.
20 Because it's without the possibility of parole, right?

21 A. (Nods head)

22 Q. So we're going to spend some time today talking
23 to you about the penalties in this case.

24 And I don't mean to suggest to you that I'm
25 expressing my personal opinion that the jury's going to
26 find him guilty, because I don't know, and I don't even

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1 know if we're going to get to penalty phase, either. So
2 this is all sort of make believe and we're putting the cart
3 before the horse, because I don't know if we're ever going
4 to get there.

5 But that's why you're here so we can talk to you
6 about it, so we're going to ask you about it today; all
7 right?

8 A. (Nods head)

9 Q. Let's pretend then that you have been selected on
10 this jury and let's pretend then that the jury does, in
11 fact, find him guilty of those offenses that make him
12 eligible for the death penalty or life without parole.

13 So that puts us into the penalty phase. Now, the
14 penalty phase is different from the guilt phase now because
15 now the emphasis sort of shifts to who this person is, and
16 the evidence is going to be different.

17 So you're going to be sitting there like a judge,
18 now, listening to the evidence in the penalty phase to help
19 you decide which of these two penalties you think is
20 appropriate; okay?

21 Now, the first thing you're going to hear from me
22 is that you can take into account and consider anything you
23 heard in the first trial in deciding the penalty in the
24 second trial. So the nature and circumstances around any
25 crimes that he's been committed -- that he's been convicted
26 of committing, can be considered by you in deciding the

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1 penalty; all right? That's the first thing.

2 Also, the district attorney's entitled to present
3 to you what are known as aggravating factors in the penalty
4 phase. These are things you never would have heard about
5 in the guilt phase, because they don't apply then. But if
6 we get to a penalty phase, the district attorney can
7 present what they call aggravating factors.

8 An aggravating factor is a fact, condition or
9 event attending the commission of a crime which increases
10 its gravity. Something that makes it worse; okay?

11 A. (Nods head)

12 Q. Now, there is only two things that the district
13 attorney -- that the law permits the district attorney to
14 present. Number one, if the defendant has any prior felony
15 convictions, you'd hear about those in the penalty phase;
16 or if the defendant's responsible for any other acts
17 involving violence or threats of violence, you would hear
18 about that in the penalty phase. That's about it.

19 Now, the defense attorneys are entitled to
20 present to you what are known as mitigating factors. This
21 mitigating factor can be a fact, condition, anything about
22 the defendant, his background, which would be offered to
23 you not as an excuse for the crime, because you would have
24 already found him guilty, so that part of the trial is
25 over, right?

26 A. (Nods head)

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1 Q. But it's being offered to you as extenuating
2 circumstances in an attempt to persuade you that the
3 appropriate penalty should be life without parole, not the
4 death penalty, okay?

5 A. (Nods head)

6 Q. And almost anything out there can be a mitigating
7 factor, things like what kind of a family does he come
8 from, how was he raised, is this the first time he's ever
9 been in trouble with the law, was he active in his
10 community; you know, how far did he go in school. Almost
11 anything like that can be a mitigating factor.

12 What we ask you then to do is listen to these
13 aggravating and mitigating factors and to weigh them out in
14 your mind.

15 And it's not a numerical weighing. In other
16 words, supposing the prosecutor presents three aggravating
17 factors and the defense has only one mitigating factor -- I
18 like to use something as simple as this, like he was kind
19 to animals; that could be a mitigating factor -- it doesn't
20 necessarily mean that these three aggravating factors
21 outweigh the one mitigating factor, because that one
22 mitigating factor, whatever it is, could be so important to
23 you that, in your mind, it outweighs all the bad things
24 that you heard about him.

25 And that's perfectly okay. You can do that
26 because there aren't any guidelines. You as a juror are

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1 free to attach whatever moral or sympathetic value you feel
2 any of these aggravating or mitigating circumstances are
3 entitled to. That's up to you, okay?

4 A. (Nods head)

5 Q. Also, in the penalty phase only, you can consider
6 sympathy for the defendant. If you have any sympathy for
7 the situation he's in, that can be a mitigating factor, but
8 only in a penalty phase. In the guilt phase you cannot
9 consider any sympathy; okay?

10 A. (Nods head)

11 Q. Now, as you sit there now, do you have any
12 feelings about either the death penalty or life without the
13 possibility of parole that you think might prevent you from
14 making a choice between those two penalties in this case,
15 if you were selected as a trial juror?

16 A. No.

17 Q. Okay. So they're both on the table for you,
18 right?

19 A. (Nods head)

20 Q. Okay. Now, I'm going to take you into this case
21 just a little deeper.

22 And, again, I want to emphasize this is just a
23 hypothetical question here.

24 Let's assume now we're in the guilt phase; you
25 know, just what happened. You're sitting there and you
26 hear the evidence, and you and your other eleven jurors are

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1 convinced beyond a reasonable doubt that this is what he
2 did:

3 That he murdered his wife Laci Peterson, who was
4 eight months pregnant at the time, that resulted in the
5 death of the fetus, which would have been his son, Conner
6 Peterson; then he took the body of his wife, drove her to
7 Berkeley, down to the Berkeley Marina, put her in a boat,
8 took her out into the middle of the Bay and dumped her body
9 into the Bay in order to cover up his crime.

10 Let's assume you find him guilty of that type of
11 misconduct.

12 The question is without hearing anything else
13 about him, is that crime so inflammatory to you and so
14 heinous to you that in your mind you've eliminated life
15 without parole, that you always would pick the death
16 penalty?

17 A. No.

18 Q. Okay.

19 A. No.

20 Q. Some people have said, Look, if that's what he
21 did, as far as I'm concerned that cuts it for me, I'm
22 picking the death penalty every time, I couldn't care less
23 about what kind of a family does he come from, has he ever
24 been in trouble, I couldn't care less about that.

25 Other people have said, Well, that's an extremely
26 serious offense, but the State of California is going to be

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1 asking me as a juror to execute that person over there;
2 before I make a decision like that I want to know
3 everything I can about him to help me decide which of these
4 two penalties is the just one in this case.

5 Is that the way you feel?

6 A. Uh-huh, yes.

7 Q. Good. Okay.

8 Now, let's assume for a second you have been
9 selected and say we do get to the penalty phase, right?
10 And you hear these aggravating and mitigating factors and
11 now you're ready to go with your fellow jurors and see if
12 you can all agree on a penalty.

13 In order to return a verdict on a penalty in this
14 case, that has had been unanimous also, has to be twelve
15 zero on the penalty, too.

16 There's going to be some instructions I'm going
17 to give you. One of the instructions I'm going to give you
18 goes like this, and this is about all the direction you're
19 going get from me.

20 It goes like this: That before the jury in this
21 case can return a verdict of death, the jury must be
22 persuaded that the factors in aggravation, the bad stuff,
23 is so substantial, when compared to the factors in
24 mitigation, that the jury feels that death is warranted in
25 this case and not life without the possibility of parole,
26 okay?

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1 Now, that phrase, "so substantial," I can't
2 define that for you because you have to decide that. And
3 that depends on, you know, how you were raised, what kind
4 of a family you come from, what you think is important.

5 This is when we ask you to go through this
6 weighing process. And the defendant is entitled to the
7 individual judgment of each juror, okay?

8 A. (Nods head)

9 Q. Now, one last thing. I will never, ever tell you
10 that you must return a verdict of death in this case.
11 That's never going to happen because only the jury can
12 decide that; do you understand that?

13 A. (Nods head)

14 Q. Okay. This is Mr. Harris from the DA's office.
15 He's going to ask you some questions. Then Mr. Geragos
16 will have some questions for you.

17 MR. HARRIS: Thank you, Judge.

18

19

20 EXAMINATION BY THE PROSECUTION

21 MR. DAVID HARRIS: Q. Good afternoon.

22 A. Hi.

23 Q. I start off telling everybody it's a little bit
24 awkward because we only get to refer to you by number, so I
25 can't call you by name. So like I say, if I call you 6756,
26 don't hold it against me.

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1 A. Okay.

2 Q. Now, I've got to start right from the beginning
3 and kind of follow-up on the question that the judge was
4 asking about this hardship. You said that you discussed
5 it. From looking at the questionnaire, you currently live
6 with a significant other?

7 A. (Nods head)

8 Q. So you had a discussion with that person --

9 A. (Nods head)

10 Q. -- about the finance on you sitting on this case?

11 A. Uh-huh.

12 Q. And at this point in time you can work that out
13 as a family?

14 A. (Nods head)

15 Q. Okay.

16 A. He'll just have to carry the load.

17 Q. Okay. And that person's okay with it?

18 A. Yeah.

19 Q. Okay. Now, going through this what I'm going to
20 do is the judge spent in time with you on the penalty and
21 punishment aspect. I just want to kind of go through the
22 rest of the questionnaire and start, like, right from the
23 employment aspect.

24 The other thing that we'll do is, just to let you
25 know that, I do kind of know what's in there, but we refer
26 to stuff generically so we don't give away too much.

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1 information. So if I'm talking about something and you're
2 not quite sure what the answer is, just let me know and I
3 can show you the questionnaire and you can look at it in
4 specifics.

5 A. Okay.

6 Q. I notice in there you are currently working in
7 the banking field?

8 A. Uh-huh.

9 Q. But you had training in the medical field
10 previously?

11 A. Uh-huh. That's my background, the medical field.

12 Q. Was there a reason for the switch? Or you just
13 got tired of it?

14 A. Well, I was in the medical field and I decided to
15 go to a law firm that went under. Go figure. And I was
16 laid off for a year, and I bank at that bank, and I walked
17 in one day and they said "now hiring" and I thought -- I
18 don't know, I just thought I'd give it a try. I didn't
19 think they'd hire me.

20 Q. Okay.

21 A. And here I am a year later.

22 Q. Following up on that, you also mention in your
23 questionnaire at one point in time thinking about being a
24 lawyer. Did working at the law firm change that position?

25 A. Huh-uh. No, that was when I was growing up as a
26 kid. And they joke about it at work, too.

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1 Q. So when you're at work there's jokes about you
2 being a lawyer?

3 A. (Nods head)

4 Q. Acting like a lawyer, or what?

5 A. I guess I like to debate.

6 Q. Okay. What do you normally debate about?

7 A. Give me a good topic. That's honest; give me a
8 good topic and I'll debate you.

9 Q. Okay. One of the things that we're looking for,
10 because I also notice that you don't have any prior jury
11 experience, so this is kind of the first time you're here
12 going through this particular process.

13 As the judge told you last time that you were
14 here, there are certain rules and procedures and things
15 like that; the presumption of innocence is where we start
16 from.

17 When you're -- you're talking about having these
18 debates, I also noticed in the questionnaire -- kind of
19 jumping around on the questionnaire a bit -- that there
20 isn't anything in terms of your opinion. Have you debated
21 about this case at all with anyone?

22 A. No, not really. I haven't.

23 Q. Okay. Now, you say "not really." Have there
24 been discussions about this case?

25 A. Well, who hasn't discussed it, but, I mean,
26 people comment, and to me -- I haven't got into a

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1 discussion where I've had to debate it, I guess.

2 Q. Okay. Now, it does mention -- in fact, I think
3 that was pretty close to the quote that you put in there --
4 do you know anything about this case, and I think your
5 response was who doesn't?

6 A. (Nods head)

7 Q. So you recognize the defendant?

8 A. (Nods head)

9 Q. And when you came into court you realized this
10 was the Scott Peterson case?

11 A. (Nods head)

12 Q. Okay. You indicated that some people have
13 expressed opinions to you about both the guilt and
14 innocence in this particular case.

15 A. (Nods head)

16 Q. So I want to talk about that for a second.
17 Who -- who is it that's expressed guilt to you?

18 A. Co-workers, friends.

19 Q. And do you recall who it is that's expressed
20 innocence towards you?

21 A. We haven't really discussed innocence, to be
22 honest with you. Most people that talk to me about it, you
23 know, or discuss it with me, it's mainly of guilt.

24 Q. Discuss this with your significant other at all?

25 A. No, he's not into this kind of stuff, to be
26 honest with you.

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1 Q. He's got other things to do?

2 A. If it was sports, yeah, we would be probably
3 discussing it, but he's not into this kind of stuff.

4 Q. Now, do you debate with him about sports?

5 A. Yeah, because I like sports.

6 Q. Okay. Now, in terms of going back to the people
7 that have expressed guilt to you, I want to talk about
8 that.

9 A. (Nods head)

10 Q. So this -- it's not really a debate, more a
11 discussion?

12 A. Yeah, it's not really a debate.

13 Q. And these individuals, they just come out and say
14 I think he's guilty?

15 A. (Nods head)

16 Q. And do you respond back to them?

17 A. No, because that's their opinion.

18 Q. Okay. So you don't have an opinion at this point
19 in time?

20 A. Not really, no. I mean I would -- being on this
21 jury, like one of the questions that the judge had really
22 made me think of the day I was sitting here, and in all
23 honesty, you have to in order to give anyone a fair trial,
24 whatever you feel, since I came that day I haven't read any
25 newspapers, and I haven't watched any TV because I don't
26 want to hear anything. I want to be able to come clean

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1 minded, pretty much.

2 Q. Okay. Now, let's go back to that first time that
3 you came, so when you -- you didn't know it was going to be
4 the Scott Peterson case --

5 A. No.

6 Q. -- until you got here?

7 A. (Nods head)

8 Q. So prior to that time -- I guess, from what
9 you're saying, you've stopped reading things now, that
10 would kind of imply that you had read things previously.

11 A. I watched more of the TV, if anything, the news
12 before work; but, no, I didn't read the newspaper. I'm not
13 a big reader of the newspaper.

14 Q. And from what you've seen on the TV, do you
15 remember any of that --

16 A. Just when it first started, when it first came
17 out, and then after a while it just died off because you
18 hear the same thing day after day.

19 Q. Is that when you'd have the discussions with
20 those co-workers?

21 A. When it first came out, when it very first
22 happened.

23 Q. And did you have -- as you're sitting here now in
24 the courtroom with the defendant, do you have any suspicion
25 about why he's here?

26 A. No.

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1 Q. No?

2 A. No.

3 Q. Okay. Now, I want to go through some other parts
4 in the questionnaire. And we're looking for jurors that
5 can be fair and impartial to both sides. So anything that
6 could be perceived one way or the other we kind of have to
7 ask questions. Don't mean to put you on the spot.

8 A. That's okay.

9 Q. Warn everybody in advance we only get a few
10 minutes to talk to you, so we have to ask.

11 There's one question in there, I won't mention
12 the person's name or even association, but a relative of
13 yours ended up going prison?

14 A. Uh-huh.

15 Q. So I want to talk about that. What was the case
16 about; do you remember?

17 A. Drugs.

18 Q. You indicated you were young, but how old were
19 you?

20 A. It was actually growing up all my life. He was
21 my older brother, so, just up until recently.

22 Q. He's been in and out of prison?

23 A. Uh-huh.

24 Q. Did you ever go visit him in prison?

25 A. We used to go to San Quentin all the time and go
26 visit him.

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1 Q. Now, there's also a note in there that someone
2 else in your family is -- has been a counselor, and looks
3 like a drug counselor?

4 A. Uh-huh.

5 Q. Are they kind of related?

6 A. Oh, yeah. Can I answer these questions? Because
7 I know you're trying to, like, not mention names, but can I
8 say yeah, that's my mom and my brother?

9 Q. Sure.

10 A. Okay.

11 Q. Like I said --

12 A. They're related. That's my mom, that's my
13 brother.

14 Q. Now, the -- was your mom always working as a drug
15 counselor?

16 A. No. She wasn't. She actually got into it when
17 my brother started going to prison.

18 Q. Again, that's back when you were pretty young?

19 A. Uh-huh.

20 Q. Is she still doing that?

21 A. Yeah. She's been doing it for 16 years.

22 Q. Did -- have you ever -- I'm not sure -- I'll
23 express my ignorance here. Is that kind of one of those
24 jobs that your mom can take you with her to the office?
25 Did you ever go with her to --

26 A. Yeah. Yeah. I've even brought my kids.

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1 Q. Okay.

2 A. Uh-huh.

3 Q. And when you -- when you go there, does -- is she
4 dealing with patients? Is this kind of an institutional
5 setting?

6 A. It's an outpatient methadone clinic for heroin
7 addicts.

8 Q. Under those circumstances, does she ever deal
9 with law enforcement?

10 A. I'm sure she does.

11 Q. And there's a question in there about your
12 general attitudes towards law enforcement, and trying to
13 remember what the answer for that one was.

14 A. I don't remember either.

15 Q. Nothing real negative, nothing real positive?

16 A. No.

17 Q. Just middle of the road?

18 A. Yeah.

19 Q. They're there to do their job?

20 A. Yeah.

21 Q. Now, you had indicated -- there's a couple other
22 questions, which is police officers are more likely to tell
23 the truth than other witnesses, and the police are too
24 quick to arrest a suspect in cases where there's
25 significant publicity. So I want to show you those
26 questions real quick. Kind of jump around. I'll show them

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1 to you make it easier.

2 81, the first one, police officers are more
3 likely to tell the truth, you put disagree, and 82, police
4 are too quick to arrest when there's a significant amount
5 of publicity, you put strongly disagree.

6 And we've heard from a lot of jurors these are
7 lawyer questions, they're not the best questions in the
8 world. Can you explain to me what you meant by that?

9 A. Well, I -- in that questionnaire a lot of
10 things -- I -- you know, I try to look at -- police are
11 human beings, so police are going to make mistakes, police
12 are not going to make mistakes. Police -- I mean in every
13 field there's good and there's bad.

14 And so, no, I don't believe just because he's an
15 officer he's going to tell the truth or just because
16 he's an officer he's going to lie. I mean there's good and
17 there's bad, and that's where you have to listen and have
18 an open mind to everything.

19 Q. Now, one of the things we're looking for in kind
20 of asking those questions, and the defense has asked this
21 type of question before, is we don't want people that are
22 going to come in and prejudge anything. We want you to sit
23 and listen to the facts.

24 So the fact that your brother may have gone to
25 prison off and on, you're not going to hold that against
26 any police officers if they come in and testify?

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1 A. No. If my brother's wrong, he's wrong, whether
2 he's my brother or not. If you're wrong, you're wrong.

3 Q. Again, I'm going to kind of put you on the spot.

4 A. That's okay.

5 Q. I don't mean to.

6 A. That's okay.

7 Q. But, again, trying to find out everything I can
8 about you.

9 I have to say I notice that you have a tattoo on
10 your arm.

11 A. I have nine.

12 Q. Do people tend to see you for your tattoos?

13 A. Some.

14 Q. And is that something that affects you in how you
15 relate with people?

16 A. No.

17 Q. Okay. So you understand about why it's important
18 not to prejudge --

19 A. Yeah.

20 Q. -- and get past that?

21 A. Yeah.

22 Q. Okay. What were -- the other thing in terms of
23 circumstantial evidence, you seemed to be accepting of
24 that. So if I were to tell you that there's going to be
25 potentially a lot of circumstantial evidence in this case,
26 do you think you're the kind of individual that can sit

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1 there, listen to the evidence and evaluate it and then come
2 to a decision when it's all said and done?

3 A. I would like to think I'm that type of person.

4 Q. Okay.

5 Now, in terms of -- go back to your debating, as
6 part of the -- being selected on the jury, you have to
7 reach your own individual opinion, but you also have to
8 work with eleven others. So you go back and you
9 deliberate, and the whole process by its own definition
10 means you go back and discuss the case with the other
11 eleven people.

12 A. (Nods head)

13 Q. Can you do that?

14 A. Yeah.

15 Q. Okay.

16 A. I'm always up for a good discussion.

17 Q. So even if you debate with them, can you listen
18 to other people's ideas?

19 A. Yeah.

20 Q. And do you find yourself the kind of person if
21 you do hear somebody else's idea and they point something
22 out to you that maybe you hadn't thought about or
23 considered, can you change your position?

24 A. Yeah. I try to be -- I try to be as open minded
25 as possible. I'm not perfect, but I do.

26 Q. Okay. To use a question that I've heard asked

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1 before, we're looking for people that are fair. And do you
2 consider yourself to be a fair person?

3 A. Yeah, I try to be.

4 Q. Okay. Can you explain to me why you believe
5 yourself to be a fair person?

6 A. Because I know what it's like to be judged, and I
7 know what it's like to be prejudged before somebody
8 actually, you know -- how many times have you walked in a
9 room and someone has automatically pinned you for a certain
10 type of person and that's completely opposite of how you
11 are. So....

12 Q. Okay.

13 A. I try.

14 Q. All right. I have no other questions.

15 THE COURT: Thank you. Mr. Harris.

16 Mr. Geragos?

17 PROSPECTIVE JUROR: Thank you.

18 MR. GERAGOS: Thanks, Judge.

19

20 EXAMINATION BY THE DEFENSE

21 MR. GERAGOS: Q. Good afternoon.

22 A. Hi.

23 Q. How are you?

24 A. Good.

25 Q. Good. The -- I notice you've got four boys?

26 A. Yeah.

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1 Q. Okay. So I would assume that you spend a lot of
2 time sorting out between them who's -- who's telling the
3 truth, who's not telling the truth?

4 A. (Nods head)

5 Q. Pretty good at that?

6 A. Yeah. If I don't see it, I don't -- whoever
7 comes running in, tells me first, if I don't see it, I
8 don't go with that, no.

9 Q. You know sometimes what they tell you may be
10 colored a little bit by their own motivation?

11 A. (Nods head)

12 Q. Do you have the -- I want to go back to the
13 publicity questions, because that's really what I'm
14 concerned about.

15 The -- you've heard a lot of people -- in fact, I
16 was curious on your questionnaire you checked both -- have
17 people expressed an opinion, put guilty and innocent, and I
18 was going to say you were the first person who's heard
19 somebody express an opinion of his innocence, then you
20 corrected it, said no, not really.

21 Part of the problem with this case, and the
22 reason it's taking a while to pick jurors, is that there's
23 been so much publicity. I assume you've heard quite a bit
24 about this case.

25 A. (Nods head)

26 Q. Where -- mostly from TV?

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1 A. Yeah. I like I said, I'm not a big reader, so I
2 don't pick up a newspaper and just -- has to be really good
3 for me to read it.

4 Q. Okay. What about the -- at work? Have you
5 talked about it at lot at work, or at least at some point?

6 A. No, because, you know, when I started this new
7 job, I started last April and it was pretty much already
8 out there and old. And so it's not like I started going,
9 Hey, have you heard about the Scott Peterson trial?

10 Q. Yeah. Now, when the people would express their
11 opinions to you, kind of what I'm getting at, is did you --
12 I mean did you express any kind of an opinion back? Did
13 you say Yeah, that looks bad, or he was cheating on his
14 wife, or anything along those lines?

15 A. Yeah, I mean, I -- yeah, it does look bad. If
16 anything I said it's not looking good.

17 Q. Okay. Now, when you come in here, do you think
18 that you -- I know that we asked those questions, and who
19 knows, I mean, you know, you've never been through this.

20 A. Right.

21 Q. I've never been through this; the judge has never
22 been through a case like this. But do you think that you
23 can set that kind of -- the fact that you have expressed an
24 opinion aside?

25 A. I think I can.

26 Q. Okay.

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1 A. I mean --

2 Q. Because as he sits here, when you look at Scott
3 sitting there, can you -- are you open to the possibility
4 he could be falsely accused in this case?

5 A. Yeah, I'm open to hear anything. Like I said,
6 there's -- it's very out there, this case is very out
7 there, and, you know, that's -- everybody's very aware of
8 that. But like I said, you know, I have to be able to
9 listen to everything. And that's, you know, as hard as it
10 may be for everyone to do, you have to, you have to -- I
11 mean this is somebody's life.

12 Q. Do you have the -- do you have any problems --
13 another question I've been asking some of the jurors
14 recently. It's so out there, this assumption that he's
15 guilty and this presumption -- almost instead of being
16 presumed innocent, he's almost presumed guilty out in the
17 community.

18 Do you have any fear that if you were to sit here
19 for five months, listen to all the evidence -- say they
20 didn't prove this case beyond a reasonable doubt, he's not
21 guilty, do you have any fear that if you go back, you know,
22 either to work or to the house or, you know, people you
23 hang out with, the people are going to in some way
24 stigmatize you or --

25 A. Do I have fear of that?

26 Q. Yeah. Is it --

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1 A. No.

2 Q. -- something that would ever cross your mind?

3 A. No.

4 Q. Okay. The -- do you have -- as you sit here -- I
5 asked another one of the jurors this morning, and she
6 actually quantified it, she said that she believed kind
7 of -- that she had a suspicion that he was guilty as he
8 sits here. Do you have that, do you think? Do you walk in
9 here with a suspicion that he's guilty?

10 A. A suspicion that he's guilty?

11 Q. Yeah.

12 A. No, because I don't know, I wasn't there.

13 Q. Okay. Do you think you can keep an open mind
14 when -- are you the kind of person -- you gave a nice
15 explanation to the prosecutor about prejudging and being
16 prejudged.

17 Do you think that because of that experience that
18 your -- whatever it is that people prejudice you on, that
19 you can -- you've got a unique ability to not prejudice
20 people? Or at least fight against the urge?

21 A. I wouldn't say unique, but I would say I try my
22 hardest to really look at things from all areas. I mean,
23 like I said to the prosecutor, I'm not perfect but I
24 really -- I really try.

25 Q. And I take it that you -- it's obviously a
26 financial hardship of some kind, I mean not working, but

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1 the bank obviously can't fire you for that because it's
2 against the law; but I assume you take this seriously
3 because you believe it's a civic duty? I mean the idea of
4 serving on a jury?

5 A. Serving, yeah.

6 Q. Okay. And you talked that over with your
7 significant other? I love that term.

8 A. Yes.

9 Q. Yes. And he's willing to shoulder that?

10 A. (Nods head) He's going to have to.

11 Q. Okay. The idea of the presumption of
12 innocence -- which is also tied in with that they have the
13 burden of proof, they've got to prove this case -- do you
14 have any problem with the idea that they have to prove it,
15 that it isn't one of these things where they -- they may
16 present something, and then you feel like the defense has
17 got to counter, they do something, the defense has got to
18 counter? That's not really what's going on here. Do you
19 have any problem with that?

20 A. (Shakes head)

21 Q. Do you have any problem with the idea -- given
22 this example; it's never going happen -- that I could just
23 sit there and not do a thing during this entire case, and
24 if they don't prove their case, you've got to vote not
25 guilty?

26 A. Do -- wait, I didn't --

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1 Q. I could actually sit and not --

2 A. Right.

3 Q. -- ask a single question of a witness, not make
4 any argument to you -- in fact, I wouldn't even question
5 you; just get up here, say That's fine, Judge, whatever you
6 want to do, and Scott doesn't have to get on the stand,
7 doesn't have to do a thing, and that at the end of the day,
8 when you go back into the deliberation room, that you can't
9 say Well, the defense didn't prove this or the defense
10 didn't do that and Scott didn't testify?

11 The judge tells you you can't do any of that; do
12 you understand that?

13 A. Uh-huh.

14 Q. Do you have any problem with that?

15 A. No.

16 Q. There's a couple of jurors have said Well, if you
17 didn't do anything, I would fire you if you were my lawyer.

18 So you have the -- I mean it's not going to
19 happen that I'm not going to do anything, but you
20 understand that that's the prosecution's burden?

21 A. (Nods head)

22 Q. Okay. What about the -- the reverse of that,
23 which is we have officers on the stand, and I think you
24 went to -- did you go to the academy, Citizen Academy?

25 A. Yeah.

26 Q. Do you think you're going to unduly identify with

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1 the -- with the police because you had gone to the academy?

2 A. No.

3 Q. The -- and the corollary to that, I guess, is I
4 get up here -- I can tell you right now there's a lot of
5 officers going to be up there.

6 A. I saw.

7 Q. And I'm going to be extremely aggressive with
8 some of those officers. And do you understand that that's
9 why we have cross-examination and that's how we ferret out
10 whether somebody's telling the truth or not?

11 A. (Nods head)

12 Q. Do you have any problem with that whatsoever?

13 A. (Shakes head)

14 Q. You could be a fair juror in this case?

15 A. I would hope so.

16 Q. Okay. Thank you.

17 I have no further questions, Judge.

18 THE COURT: Thank you.

19 PROSPECTIVE JUROR: Thanks..

20 THE COURT: Okay. Based on your answers I'm
21 satisfied you've qualified yourself to serve on this jury.
22 A lot of jurors don't make it through, but you have, okay?

23 PROSPECTIVE JUROR: Okay.

24 THE COURT: So let me ask you a couple questions.

25 Number one, did you recognize anybody's name in these

26 potential witness lists?

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1 PROSPECTIVE JUROR: (Shakes head)

2 THE COURT: You already followed this and I'm
3 glad you said that, but since now you're really in the mix,
4 because you could really make the cut and be one of the
5 jurors here, I want to readmonish you again.

6 You're not to discuss this case with any other
7 potential jurors or any other person, or form or express
8 any opinion about this case. You're not listen to, read,
9 or watch any media reports of this trial, nor discuss it
10 with any representatives of the media or their agents,
11 okay?

12 And I want to hold you to that, and I'm sure you
13 will.

14 Okay. So let me tell you the next thing that's
15 going to happen. We're going to order you back today on
16 May 13th. When you leave Jenn, will give you a reminder to
17 come back. So you come back May 13th, that's a Thursday,
18 at 9:30 in the morning. There will be about 70 people in
19 here out of over 300 that we've talked to that have
20 qualified.

21 We're going to put twelve in the box off a random
22 jury list. We don't know who those people are. Just the
23 way it comes out of the computer, that's the way you're
24 going to go in the box.

25 At the last minute the attorneys for either side
26 can excuse the juror without having to give me a reason.

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1 The point is in about an hour, hour and a half
2 you're going to know whether you're going be on this jury.
3 If you're selected, May 17th, the following Monday, at 9:30
4 we start out with opening statements, okay?

5 PROSPECTIVE JUROR: Okay.

6 THE COURT: If you're excused you don't have to
7 worry about it anymore, but if you get selected you're
8 going to be here five months approximately.

9 Okay. I want to thank you very much also for
10 stepping up and practically volunteering to serve. We
11 appreciate that and we really appreciate your time, too.
12 So we'll see you back here May 13th at 9:30. Right back
13 here.

14 PROSPECTIVE JUROR: Thank you.

15 THE COURT: Thank you very much.

16

17 (□Prospective Juror 5766 exits courtroom)

18

19 THE COURT: Okay. Just to recap for today for
20 the interested parties, we've qualified three jurors today.
21 That gives us 32. Ready to go. And we'll start up
22 tomorrow morning at 9:30, okay?

23 MR. DISTASO: That's fine.

24 THE COURT: You know we're going to be next door
25 tomorrow.

26

(Evening recess)

EXHIBIT 47

Selected Letters from Richelle Nice to Scott Peterson

Hello Scott,

8/8/05

I am not really sure all I want to say to you yet, but lately, I have felt so compelled to get in touch with you & express myself to you. Closure maybe?

Two weeks ago, on my way to Vallejo, I had the "pleasure" of seeing "the spot" first hand. My heart sank. On my way home, again, I passed the same spot... The spot where your beautiful wife, Laci washed ashore. I was so haunted with the thought of how she was just tossed in the bay like a piece of trash - like she never mattered in life. But she did! And YOU robbed her & your beautiful son of a life... even if not with you included, at least a life with each other & the rest of the family who loved & cared about them so much!

Before I go any further, I want you to know, whether it means anything to you or not, that I do not hate you. I hate what you did. I know that you & a lot of others say we were full of hate, but you are all so wrong. The verdict was not based on hate or emotions.

What happened that night, Scott? What pushed you so far to the limit, where you

felt that you needed to kill someone who not only loved you so much, but someone who was carrying a part of you inside of her?

What were you so afraid of? Being a Daddy? Commitment? Being a family man, or a husband? And if so, why didn't you just at least give it a try first? Or as Sharon said, why not a divorce or separation, maybe?

Despite how you felt in the heat of that moment, all of the pictures I, & millions of people around the world have seen, you looked so happy all of the time. Maybe looks are deceiving, but even if there were problems in your marriage, which I am sure there were - you couldn't have faked that smile or that look of happiness on your face all that time if things were on so bad.

Or maybe you did? Only you Scott Lee Peterson, and God know the truth & answers to these questions.

My heart aches for your son. Why couldn't he have the same chances in life as you were given? You should have been dreaming of your son being the best at whatever he did in life, not planning a way to get rid of him! Now, you will never know the feeling and joy of being a father.

To be able to experience the feeling

Inside when a father or mother witness their child's first steps, the sound of their laugh, the excitement in their eyes when their Mommy/Daddy walk in from being at work all day, the pain you feel in your heart when your child is hurt, whether physically or emotionally, etc.... May not sound like much to you as you sit in there standing by your selfish lies... But as a parent myself, these feelings are much more intense than the feelings you get for any man/woman you might ever meet in life and fall in love or LUST with. Those feelings can't even match the passion & unconditional love a parent feels for their child. And to know no matter what you do in life, your child will always have the same kind of love & loyalty right back. You, Scott messed that up for yourself, and to me, that is very sad & unfortunate. You really have no idea.... & you never will.

I know I am going to be slammed left & right for writing you this letter, but that's nothing new to me. I just had to ask you these questions, even though I know you will either not respond, or you will respond with lies. One of my best friends said to me, "Scott will never tell."

He is going to take that to his grave".

Maybe so - but if you have any love whatsoever, for Laci & Conner, then give them that justice. I think this is something you can do & should do. Don't you think you have been selfish enough?!

As adults in life, there come times where we make mistakes & we have ~~ans~~ ^{to} owe up to them. We have to take responsibility for our actions. Even though you may feel as though you are having to take responsibility by spending the rest of your life behind bars... really, you still have not owned up to your actions - your sins. I fear for your soul when your day finally comes, and I do mean that. When are you going to finally stop thinking about Scott & ask for forgiveness & put everyone's minds & hearts at peace?... even yours?

Laci & Conner deserve that. Sharon & the rest of the family deserve that. And your parents deserve the truth. You know in your heart that you are no longer "the 'Golden Child'" you once were.

It's time to stop pretending you still are. I will continue to pray for Laci, Conner & the rest of the family... as well as you.

I hope one day before you pass, you
will finally set their souls free.

Richelle Nice

Scott,

Dec 3, 05

Hi Scott, how are you? This month must be a tuff one for you? How are you doing? What helps you through the tuff times?

You have been in the news again lately. At least they arent reporting what you eat any more. At least once a month your name makes the news. Do reporters try to contact you still?

I havent been called for some time now. I thought around the 1 year anniversary the media would be calling again. Its nice to be back to a sumwhat normal life again.

People still come up to me every now & then but nothing like before.

Have your letters slowed down any? Why do you think people are so interested? Nothing better to do? I dont get it. I dont get why people do a lot of shit though!

The jury is going to get together on the 11th of Dec. Just for support. We were going

to on the 13, but some couldn't make it.

Scott, I just want you to know that, it's not at all a happy day for us. Each one of us felt like we were just struck by a Mac truck! We all have a bond now & we need the support of each other. We are the only ones, aside from you & your team, Caci's family, the prosecution team & anyone else who was there & involved. Can understand what a emotional roller coaster that was. The "trial followers" don't have a clue. The ones who agree or disagree have no idea. I respect all sides but don't think they can or will ever understand.

So we the jury support each other.

Have you told anyone, your legal team, family that we are in contact? I have no reason for asking other than I was just wondering.

I may be moving to Las Vegas. I have a brother

Reason this is a real bad time for me. Since the trial my life has taken a turn & it hasn't been for the best. So I was thinking a change might be a good thing. I really wanted to finish Cosmetology classes out here first but I don't have much support out here.

It really sucks not having money & having to struggle all your life. I'm not a lazy person, don't believe in "I can't"! I can do & want to do so much more for my kids.

Not a 100% sure if I will go on my break or wait until after I finish school.

I'm going out for a week after my kids this month.

I'm going to look at schools out there & is there a wait list. find out my options.

One day at a time... we shall see. It's not easy raising 4 boys on your own! It's so much fun & could be better!

You would have loved being a Dad, Scott! I wish you just would have tried. Your kids would have never known what it's like to struggle. You &

Laci would have been wonderful
parents. We can't turn back
time, what's done is all ready
done but you would have loved
it!

This may take some time
before you get this because
of the execution sched. for
the 13. So you take care
& I will talk with you
again.

Richelle

Believe it or not I look
forward in hearing from you
also. Yeah you can believe it!!
I'm sure you are use to
people being drawn to you.
Take Care

Scott,

12/17/05

Please excuse the pen & my writing. I haven't heard from you in a while now.

Is everything OK? On the 13th all I could do was think of you, for two reasons, the 1 year anniversary & the execution.

I wanted to let you know that I had a break down & I'm in the hospital on a locked "Crazy" unit.

I never knew how much this trial had an impact on me, plus I have never had a great life.

All the pressure just hit me. I think it has been the time of year. Our verdict, Laci & Conner.

I just wish you would have made a different choice. I know you don't admit to what happen & I have excepted that.

We to all would be in a different space & place. We all would be enjoying

the holidays.

How are you? How was the 13th for you?

I hope Laci & Conner will be able to hold each other on the 23rd. I still hope & pray you can one day make peace with your self. I know know how hard it is. But to keep some kind of sanity please do that.

I have been here going on two weeks now. I hope to be going home some time next week.

I have lost all sense of days & my memory is shot. But my goal is to get better for my kids. But here I am still worried about Laci & Conner. I think of you & how you are doing.

Scott I just can't help but constantly think why? Why was that your only option?

I wonder how Sharon is & her

family. The holidays will never be a good time for them. I can't even imagine how they feel that must be the worst feeling for them ever.

I just pray god has given Laci arms to hold her precious lil baby.

Scott I can't tell you what to do, but please stop fighting Sharon for any thing such as money or Laci's things.

I don't know for sure only what the news reports but let her have rest & a piece of mind with her daughter & grandson.

I have also heard about the lawyer who is or has written this book.

I want you to know I have thought about at some point doing my own book, but I promise you I will do nothing without your consent. I am not out to get you

or make shit any worse for you
as it all ready is. please believe
me when I say that.

I'm going to end this here
I just wanted to touch base with
you. you take care & hope to
hear from you soon.

Richelle

Scott,

1/11/06

Hello, how are you? Me, well everyday of my life has become a bigger struggle than what it had all ready been.

Now it's a fight to live & find things to live for. My 4 biggest things right now & the only thing is my sons!

Im a little mad at you right now Scott. I want to be honest with you. Have you been able to see any of Sharon's interviews? Well I have & they bring me right back & over flowing with sadness.

How could you Scott? Why did you destroy everyone's life? Including yours!

Or are you really this Sociopath they keep talking about?

If you arent admit Scott

Show me something, some emotion.

Don't give me that shit, your family was taken & you are knumb!!

HEP-000970

Did you know or have I told you during the trial my oldest was all most shot to death? Instead it hit two of his other friends, one died!

I had been at the trial ~~at~~ all day listening to this drama unfold, then I go to my part time night job & I get a call about a drive by shooting & my oldest was there.

I left work faster than I could hang up the phone!! What if? That's all that came in my head is what if! I can play back that scene in my head today if some one asked!

Damit Scott that was your son! your first born. if you never wanted children you should have married someone with the same wants & as you! I know I'm coming down on you pretty hard Scotty & I'm

Sorry for that. I'm just a little mad at you right now!

Why didn't you ever look Sharon in the face? You & Mr. G. Sat there laughing & talking!

That was so ~~an~~ rude of the both of you. You owed Sharon way more than that & you know that.

Again Scott for the sake of Laci & Conner (Litman) & Sharon to have some piece of mind & for you Scott, Come Clean.

Did she know what was happening to her is all I want to know. I believe she did.

Can you tell me that?

The fear that runs over a parent when they can't help them is the worst fear ever. You just ~~remember~~ remember that.

I don't mind if you yell back. I know you won't because you are not that type of person. But you can. You will respond maybe with some words of "wisdom", I

don't know.

I just had to get this
off my chest!

Thanks

Richard

P.S. your see my
writing is getting a little
better from when I was
in the hospital & just got
home. ~~am~~ trying

Scott,

3/17/06

You will have gotten I think
3 letters from me in a weeks
time. One was old, I wrote you
while I was in the hospital &
for what ever reason it didnt
get out.

I have no idea what it
said. Can you even make it
out?

I'm just writing to say
hello. Sorry about the pen
change, it ran out of ink
right as I was doing

your letter. What have you
been doing with your time?

My battle to get some
income is still on going. How
can the Dr's say your unable
to work but it takes months
to get any income. What about
my 4 kids!? This world just
dont give a shit. Where am
I suppose to get my hope
from? Because I have lost

HCP-000974

at all. in life, love & relationships.
There is only one (4) thing that
keeps me going is my kids.
~~I~~ hate not being able to
provide for them.

Comer would have never had
to go through this. He would have
had a wonderful life.

I hate that my kids haven't
been on a vacation ever. or
even camping. My older two
have done more & experience more
because I was better off.

My 4 year old Ky'Rie
~~put~~ put up on my wall
a post card of Disneyland &
said "Mommy, can we go here?"
The post card is still up there
& will remain until I can take
them.

Any way, this is long enough.
Talk to you soon. Take Care

Richelle

1
Scott,

3/30/06

I haven't heard from you in a long time now? So this letter is to ask why?

I'd like to know, really to make sure no one is getting the letters you send me. I get worried about that kind of thing what people will do these days.

So Scott, if it's because you just haven't will you let me know?

Thank you

Richelle

P.S.

Laci & Conner have been on my mind so much these last few days. I think of them daily, but these past few days have been hard.

I keep praying for them & you Scott. I pray you will set your soul free.

Scott,

5/30/06

Hello, how are you? I hope you not mad at me for going public Scott.

I'm sure we both knew it would get out. Once it did, I want to be the one to tell the story.

So many will turn Chris into something it's not. You know that & so do I.

I just wanted you to be able to trust me Scott.

I wanted to get to know you, inside you know you feel & what you think.

I believe that you have all that some where. You know no one believes what you showed the world you had no feelings & you just don't care. You seem so flat.

I believe there is more to you than that. Laci wouldn't have fallen in love with someone like that.

You know what Scott, I see your son. I can visualize him. Dark hair, Dark skin, beautiful little boy. I can see him.

I see Laci's big beautiful smile shining down on him, there should

be you some where in there
Scott. you use to be human
let me see that side of you
Scott.

Maybe you will never
write me again & if that is
the case will you let
me know please.

Thank you Scott

Rachelle

EXHIBIT 48

Statement of Diane Campos

Modesto Police Department
Investigative Supplemental Report
MISSING PERSON

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02-142591

SUMMARY:

The following will be a supplemental report to case number 02-142591.

PHONE INTERVIEW OF DIANA CAMPOS:

W: CAMPOS, Diana
WFA, 10-15-56
1900 Larksberg Lane
Ceres, CA
Home phone: 581-9429
Work phone: 558-7545
Stanislaus County Hospital

NARRATIVE:

On Friday, 12-27-02, at approximately 1015 hrs., I contacted CAMPOS via phone. CAMPOS identified herself verbally to me. I confirmed that she had left a tip regarding missing person, Laci Denise PETERSON. The interview was tape-recorded. The following will be a summary of that conversation.

CAMPOS reports she is employed by Stanislaus County Hospital as a custodian. She had worked there for the past 9 years.

On Tuesday, 12-24-02, at approximately 1045 hrs., CAMPOS said she was taking a smoke break prior to going to work. She was at a location next to her office where they take smoke breaks that over looks Moose Park. From that location she saw three subjects walking together in a westbound direction. One of the subjects was a pregnant WFA with a dog on a leash. The other two were WMA'S. The dog was barking loudly.

CAMPOS watched the three subjects for approximately 5 minutes while they walked approximately the distance of a football field, a hundred yards. During this time, they walking the WFA was holding onto the Golden Retriever via a leash. The dog was constantly barking and the WFA had to pull at the dog with the leash. The male subject, who was wearing a beanie cap said, "Shut the fucking dog up". She watched them for approximately 5 minutes. CAMPOS said she did not think there was any kind of conflict going on between the three.

CAMPOS did not think anything of the incident until Thursday, 12-26-02. At that time she saw a flyer of Laci PETERSON. When she looked at the flyer she said to herself that she knew the girl. She then realized she was the same subject she saw walking through the Moose Park Area. She said she was sure, otherwise she would not have called the police. CAMPOS said she was not positive it was PETERSON, however she was pretty sure. CAMPOS said she is real good with faces. CAMPOS said at the time she did not feel anything unusual was going on

12-27-02

RD

DET. OWEN

10500

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SCANNED 99

HCP-000979

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02-142591

between the three subjects as they walked through the park, so she had no reason to call 911.

DESCRIPTION:

CAMPOS described the female as wearing, a white top, and sweat pants unknown color. She described the hair as worn short down to about the shoulders, and was dark in color. She said the hair was straight and the subject looked 6 to 7 months pregnant.

CAMPOS described the dog as a Golden Retriever, medium-size. The fur was brown, and closer to red. The dog had on an unknown color leash.

CAMPOS described the first male as a WMA in his late 30s, 5-7, medium build, wearing a dark beanie, dirty dark shirt and dirty blue jeans. She told me the jeans were dirty as if he had been sitting in the dirt. CAMPOS did not know if the subject had any facial hair, because the beanie was in the way. CAMPOS cannot identify the WMA with the beanie.

The second subject she identified as a WMA, late 30s, 5-7, medium build, brown hair that was short, wearing a blue Levi jacket with a tear and blue jeans. Unknown further description. CAMPOS said she could identify the second male if she saw him at a later date.

I asked CAMPOS to describe the distance between her and the three subjects. CAMPOS was unsure of the distance. I ask her to use car lengths to describe the distance. She told me there were two car lengths between her and the river. The river was approximately two car lengths wide. It was approximately one car length beyond the river where the subjects were. I asked her if she felt that would represent about 50 yards and she stated yes.

I advised CAMPOS to call me if she thought of any additional information. The phone interview with CAMPOS concluded at 1045.

SCANNED
tlt
1800

EXHIBIT 49

Supplemental Declaration of Mark Geragos

SUPPLEMENTAL DECLARATION OF MARK GERAGOS

I, Mark Geragos, declare as follows:

1. I was lead counsel for defendant Scott Lee Peterson in the criminal case, People v. Scott Lee Peterson, San Mateo Superior Court No. SC55500A.
2. I conducted the jury selection in Mr. Peterson's case. For that purpose, I reviewed the jury questionnaires submitted by potential jurors.
3. One of my biggest concerns, if not the biggest concern, in jury selection was to ferret out and challenge for cause jurors whom I believed had prejudged the case and wanted to get on the jury in order punish Mr. Peterson for the alleged crimes of killing his wife and unborn child. I referred to such jurors as "stealth jurors" and repeatedly expressed my concern to the court about such jurors.
4. During jury selection, I reviewed juror Richelle Nice's jury questionnaire. I remember this because she was ultimately selected as an alternate, and then took a seat on the jury.
5. While I do not independently recall the specifics of her answers, I have recently reviewed her questionnaire again. This refreshes my recollection that Ms. Nice indicated on the questionnaire that she had never been a victim of a crime (Question 74), that she had never been involved in a lawsuit (Question 54) and that she had never participated in a trial as a party or as a witness (Question 72).
6. Habeas counsel, Lawrence Gibbs, has provided me with a copy of a

case file from San Mateo County, in the case of *Richelle Nice v. Marcella Kinsey*. I have been advised that this case file will appear in Exhibit 45 to the Petition for Writ of Habeas Corpus. I have read that case file.

7. That case file discloses that, contrary to her answers in the jury questionnaire, Ms. Nice had in fact been a victim of a crime. She had in fact been a party in a lawsuit. She was the plaintiff. She alleged the defendant in that case, Marcella Kinsey, had kicked in her front door and thereby assaulted her, and threatened harm to her, and to her unborn child. She alleged that the Kinsey had stalked her. Ms. Nice participated in an evidentiary hearing on her allegations. The judge apparently credited Ms. Nice's allegations and granted her a restraining order against the defendant to protect her and her unborn child from the malicious acts of Ms. Kinsey.

8. Had I known about Ms. Nice's lawsuit, and that she had been the victim of threats of violence against her life and the life of her unborn child from malicious acts of another, I would absolutely have challenged her for cause. The state was alleging that Mr. Peterson had harmed his unborn child. There is no way in the world I would have wanted a juror to sit in judgment of Mr. Peterson, when that juror had been a victim of the very crime for which Mr. Peterson was on trial.

9. I believe the challenge for cause would have been sustained. Even if it had not, I would have exercised a peremptory challenge to remove Ms. Nice from the jury.

I declare under penalty of perjury that the foregoing is true and correct.
Executed in Los Angeles, California on November 9, 2015.


Mark Geragos