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# Death Penalty Appeals and Habeas Proceedings: The California Experience

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# DEATH PENALTY APPEALS AND HABEAS PROCEEDINGS: THE CALIFORNIA EXPERIENCE

GERALD F. UELMEN\*

## I. INTRODUCTION

I am especially delighted to participate in the Marquette University Law School Conference on Criminal Appeals because it is a homecoming of sorts for me. Sixty-eight years ago, I was born in Greendale, Wisconsin, just two miles south of Milwaukee. My godfather, Robert Nystrom, was starting his second year of law school here at Marquette in 1943 when he enlisted in the Army Air Corps. He served as a navigator on a B-17 bomber, flying missions out of Seething, England, for the Eighth Air Force. Three weeks after D-Day, he and his crew went down while flying their second mission. He never came home. I have always felt especially blessed that I was able to pursue the legal career he never had, and that he made it possible for me to do so. He is still my hero.

Five years ago, I was appointed to serve as executive director for the California Commission on the Fair Administration of Justice, created by the California Senate Rules Committee. At the time, I did not realize I was being invited to a wake. Although the Commission was remarkably successful in achieving consensus to fulfill its charge—to make recommendations designed to ensure that the application of criminal justice in California is just, fair, and accurate—and was remarkably successful in marshaling seven of its proposals through the California legislature, every one of those proposals was vetoed by California Governor Arnold Schwarzenegger.<sup>1</sup> We learned that having law enforcement participation on the Commission, and having unanimous Commission support for our recommendations, did not guarantee law enforcement support when these measures landed on the Governor's desk.<sup>2</sup>

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1. See CAL. COMM'N ON THE FAIR ADMIN. OF JUSTICE, FINAL REPORT (2008), <http://www.ccfaj.org/documents/CCFAJFinalReport.pdf> [hereinafter FINAL REPORT].

2. Commissioners included former Police Chief William Bratton of Los Angeles, former Sacramento County Sheriff and California Highway Patrol Commissioner Glen Craig, and Police Chief Pete Dunbar of Pleasant Hill, California. The Commission was chaired by former California Attorney General John Van de Kamp, and included three present or former county district attorneys. *Id.* at 1, 3–5, 7, 9.

And our current governor was apparently more impressed by the opposition of the California Police Chiefs Association and the California State Sheriffs' Association than by the recommendations of our Commission. Although this was a frustrating experience, I fully realize that criminal law reform is not a sport for the short-winded. I am confident that the election of a new governor will lead to full implementation of our Commission's proposals to improve eyewitness identification procedures, require the recording of police interrogations, require the corroboration of jail snitch testimony, improve standards for forensic science, require the reporting of prosecutorial misconduct to the state bar, and support the reintegration of the exonerated innocent into society. I am less optimistic about the effect of our report on the administration of California's death penalty law. The reform of California's death penalty law will take more than the election of a new governor. Our death penalty law was adopted by initiative, and in California an initiative measure can be amended only by a subsequent initiative.<sup>3</sup> Thus, death penalty reform will require a vote of the people, and the level of popular support for the death penalty in California remains at 63% according to a recent poll.<sup>4</sup>

Despite spending more than any other state on its implementation and administration, California today is saddled with a death penalty law that can be described only as completely dysfunctional. We have the longest death row in America, with approximately 670 inmates awaiting execution.<sup>5</sup> Typically, the lapse of time between sentence and execution is twenty-five years, twice the national average, and is growing wider each year.<sup>6</sup> One hundred nineteen inmates have spent more than twenty years on California's death row.<sup>7</sup> Most of them will certainly die before they are ever executed. Since restoration of the death penalty in 1978, the leading cause of death on California's death row has been death by natural causes (38), followed by suicides (14) and executions (13).<sup>8</sup> For all practical purposes, a sentence of death in California is a sentence of life imprisonment without the possibility of parole. The only difference is that the individual serves the life sentence on death row, while the state forks out millions of dollars to process appeals and habeas corpus proceedings. Additionally, the cost of confinement

3. CAL. CONST. art. II, § 10 (West 2008).

4. Mark DiCamillo & Mervin Field, *While Still Strongly Supporting the Death Penalty, Californians Have Mixed Views on Some Aspects of Capital Punishment, The Field Poll* (Mar. 3, 2006), available at <http://www.field.com/fieldpollonline/subscribers/RLS2183.pdf>.

5. FINAL REPORT, *supra* note 1, at 120–21. On July 1, 2008, “[t]he next two largest death rows after California were Florida with 397 and Texas with 393.” *Id.* at 124 n.32.

6. *Id.* at 122–23.

7. *Id.* at 125.

8. *Id.* at 120–21.

is quadruple what it would be if the individual was serving the life sentence in a maximum security prison, where those sentenced to life imprisonment normally serve their sentences.<sup>9</sup> How did we create this mess?

In constructing our machinery of death, we took four steps in California that inexorably led us into our current morass. First, we enacted the broadest death penalty law in America, with an array of special circumstances that can be applied to 87% of the murders committed in California.<sup>10</sup> There is nothing “special” about special circumstances under California’s death penalty law. Special circumstances, for example, include murders perpetrated in the commission of twelve different felonies, regardless of whether the defendant was the person who actually perpetrated the murder.<sup>11</sup> Second, we gave fifty-eight locally elected county prosecutors complete discretion to determine which murders should be prosecuted as death penalty cases. Our Commission discovered tremendous disparity among the various counties in California in the degree to which the death penalty was utilized. In San Francisco, two successive district attorneys have been elected on a pledge that they will never employ the death penalty.<sup>12</sup> In more rural counties, district attorneys are regularly elected and reelected on a pledge they will employ the death penalty as frequently as possible.<sup>13</sup> As a result, the numbers of new death judgments in California soon escalated beyond the capacity of courts to keep up. For the twenty years between 1980 and 2000, California averaged thirty-two new death judgments each year.<sup>14</sup>

Third, we enshrined this statutory scheme in an initiative measure, which rendered it virtually impossible to narrow the application of the law by legislative amendment.<sup>15</sup> Fourth, we purged our state supreme court of justices who attempted to narrow the application of California’s death penalty

9. The California Department of Corrections estimates that the cost of confinement on death row is \$90,000 per inmate per year in excess of the cost of maximum security confinement for a prisoner sentenced to life imprisonment. This alone accounts for \$63.3 million annually. *Id.* at 141.

10. *Id.* at 120.

11. CAL. PENAL CODE § 190.2(a)(17) (West 2008); *People v. Anderson*, 742 P.2d 1306, 1326–28 (Cal. 1987).

12. Glen L. Pierce & Michael L. Radelet, *The Impact of Legally Inappropriate Factors on Death Sentencing for California Homicides, 1990–1999*, 46 SANTA CLARA L. REV. 1, 26 n.128 (2005).

13. *See id.* at 38. Counties with the highest death penalty rates tended to have the highest proportion of non-Hispanic whites in their population and the lowest population density. *Id.* For instance, excluding counties in which fewer than five death sentences were imposed, death sentencing ratios varied from 0.0058 death sentences per homicide committed in Los Angeles County to a rate nearly ten times higher in rural Shasta County, which recorded a 0.05 death sentencing ratio. *Id.* at 27–28 tbl.8.

14. FINAL REPORT, *supra* note 1, at 120.

15. *See* CAL. CONST. art. II, § 10 (West 2008).

law by means of statutory interpretation. From 1978 until 1986, the California Supreme Court under Chief Justice Rose Bird affirmed only 8% of the death judgments it reviewed, imposing stringent requirements upon the jury instructions to be given in felony murder special circumstance cases.<sup>16</sup> In the November election of 1986, California voters removed Chief Justice Bird and Associate Justices Cruz Reynoso and Joseph Grodin from office,<sup>17</sup> largely on the campaign claim that votes against these three would be three votes in favor of the death penalty. The election results had a profound effect upon their successors. From 1986 to 1996, the California Supreme Court under Chief Justice Malcolm Lucas affirmed 94% of the death judgments it reviewed.<sup>18</sup>

## II. DIRECT APPEALS

As in nearly all death penalty states, judgments of death in California are directly appealed to the state supreme court, without intervention by the intermediate courts of appeal. This means that death cases are the only portion of its docket over which the California Supreme Court has no direct control. All other cases are heard only upon the grant of a petition for hearing by the court; with respect to death cases, the court has no discretion to deny direct review. Because nearly all death cases involve indigent appellants, the first step in processing these appeals is the appointment of counsel to represent the appellant. The high number of death judgments in California greatly exceeds the available pool of qualified attorneys who are competent and willing to accept appointments to handle the direct appeals.

In 1976, the California legislature created the State Public Defender's Office to handle all indigent criminal appeals.<sup>19</sup> In the early 1990s, the governor asked the office to restrict itself to capital cases.<sup>20</sup> In 1997, the legislature expanded the office to 128 funded positions in order to alleviate the growing backlog of death penalty appointments.<sup>21</sup> The backlog was reduced from 170 death row inmates without counsel to handle their direct appeals to 79.<sup>22</sup> But in 2003, the budget of the State Public Defender suffered

16. FINAL REPORT, *supra* note 1, at 120 n.21 (citing Gerald F. Uelmen, *Review of Death Penalty Judgments by the Supreme Courts of California: A Tale of Two Courts*, 23 LOY. L.A. L. REV. 237, 237 (1989)).

17. Uelmen, *supra* note 16, at 238.

18. *Id.* at 247, 257.

19. FINAL REPORT, *supra* note 1, at 132.

20. *Id.*

21. *Id.*

22. *Id.*

a cut of 41 positions, and another 10% cut was sustained in 2009.<sup>23</sup> The office currently handles 125 automatic appeals for death row inmates, but cannot accept any additional appointments.<sup>24</sup> The remaining death row inmates who have counsel for their direct appeals are represented by private lawyers who accept appointments to handle death row appeals at a rate of \$145 per allowable hour.<sup>25</sup> “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 case, or service as counsel of record in five completed felony appeals and service as supervised counsel in two death penalty appeals. Completion of training and demonstrated proficiency in appellate skills is also required.”<sup>26</sup> The California Supreme Court sets benchmarks to create presumptions regarding how many hours are allowable for a given task. Lawyers handling death appeals complain the benchmarks are set too low, and the hassle of challenging them is demeaning and time-consuming. At least twenty of the lawyers handling death appeals can no longer afford to live in California, and have relocated to other states. The Commission concluded that the level of experience required and the rigorous demands of death appeals have led to a significant decline in the pool of attorneys available to handle death penalty appeals.<sup>27</sup>

There is currently a delay of three to five years before a death row inmate has counsel appointed to handle his or her direct appeal.<sup>28</sup> “Once counsel is appointed, he . . . 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.”<sup>29</sup> The responsive brief of the attorney general is usually filed within six months, and a reply brief is then filed, again usually within six months. Then, the parties wait for the California Supreme Court to schedule oral arguments.<sup>30</sup>

As of July 1, 2008, eighty defendants were awaiting oral arguments before the California Supreme Court regarding their fully briefed death appeals.<sup>31</sup> The court ordinarily hears twenty to twenty-five of these cases a year. Current efforts to push this number to thirty cases per year already are

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*; see also CAL. CT. R. 8.605(d).

27. FINAL REPORT, *supra* note 1, at 132.

28. *Id.* at 131.

29. *Id.*

30. *Id.*

31. *Id.*

seriously impacting the court's ability to hear other cases. As a result, most appeals languish in the court for two years or more, and death cases usually languish for three years before being scheduled for oral argument. Once a case has been orally argued and submitted, the California Supreme Court is required to issue its decision within ninety days.<sup>32</sup>

The delay in hearing fully briefed cases has led California Supreme Court Chief Justice Ronald George to propose an amendment to the California constitution to permit the court to transfer fully briefed death cases to the intermediate courts of appeal for decision, with discretionary review of the court of appeal decision available in the California Supreme Court.<sup>33</sup> No action has been taken on this proposal. Even if adopted, concern has been expressed that it would increase rather than shorten the delay in deciding direct appeals, and require dispersion of the staff the supreme court has assembled to process death appeals. The California Commission on the Fair Administration of Justice endorsed the proposal, but only if its other recommendations for full funding of counsel were approved. The Commission recommended a one-third increase in the budget of the State Public Defender to enable the office to accept eighteen to twenty new appointments each year. "The current backlog of [seventy-nine] 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."<sup>34</sup> But, as previously noted, there are currently no limits on the discretion of locally elected district attorneys to file murder charges as death penalty cases.

An example of the dysfunctional delays in direct appeals recently was presented to the California Supreme Court in *People v. Burgener*.<sup>35</sup> Burgener was sentenced to death in 1981 for a robbery murder committed in 1980.<sup>36</sup> At the time, he was thirty years old.<sup>37</sup> By the time of this opinion's writing, Burgener was fifty-eight years old, and his direct appeals had not yet been concluded. As the court noted, this was the fourth published opinion on appeal, "and it may not be the last."<sup>38</sup> In 1986, his conviction was affirmed but the death penalty was reversed because of ineffective assistance of

32. *Id.*

33. News Release, Judicial Council of California, Supreme Court Proposes Amendments to Constitutions in Death Penalty Appeals (Nov. 19, 2007), available at <http://www.courtinfo.ca.gov/presscenter/newsreleases/NR76-07.PDF>.

34. FINAL REPORT, *supra* note 1, at 133.

35. 206 P.3d 420 (Cal. 2009).

36. *Id.* at 422.

37. See *People v. Burgener*, 62 P.3d 1, 16–18 (Cal. 2003) (noting that the defendant's first conviction was in 1969, when he was nineteen years old).

38. *Burgener*, 206 P.3d at 422.

counsel at the penalty phase. The case was remanded for a new penalty hearing, at which he was again sentenced to death. The trial judge granted a modification from death to life, but that modification was reversed by the intermediate court of appeal on an appeal by the prosecution. On remand, the case was assigned to a new judge, who again sentenced Burgener to death.<sup>39</sup> Twelve years later, the California Supreme Court reversed that judgment because the judge failed to exercise his independent judgment. On remand, the judge again imposed the death penalty after the defendant waived counsel and agreed to represent himself. On appeal, the supreme court again vacated the death judgment, concluding that the record was insufficient to show the waiver of counsel was knowing and intelligent.<sup>40</sup> The case was then remanded for another hearing on modification of the death sentence, to be heard by yet another trial judge because the second trial judge had passed away.<sup>41</sup> Thus, after twenty-eight years, the direct appeal has yet to be determined. Only then will habeas corpus review commence. It is likely to be another ten to twelve years before all proceedings in state and federal court have been concluded in Burgener's case. At that point, he will be seventy years old, if he is still alive. His confinement on death row for forty years will have cost the State of California \$3,680,000 more than if he had been confined pursuant to a sentence of life without parole.

### III. STATE HABEAS CORPUS PROCEEDINGS

Review on direct appeal is, of course, limited to the record compiled by trial counsel in the court below. In nearly every death case, the adequacy of performance of the trial counsel will be among the most significant issues to be litigated. Was the case fully investigated, and did counsel make all the efforts that a reasonably competent defense lawyer would make under the circumstances? There may also be issues of prosecutorial misconduct that are not fully illuminated by the trial court record. Was there potentially exculpatory evidence (including evidence which might persuade a jury to opt for life imprisonment rather than death) which was not disclosed to the defense? These issues are normally litigated in a petition for a writ of habeas corpus, in which counsel independently investigates what trial counsel did and did not do, and what was and was not turned over by the prosecution.

While California provides appointed counsel to represent death row inmates in state habeas corpus proceedings, currently 291 death row inmates

39. *Id.*

40. *Id.* at 422–23.

41. *Id.* at 430.

do not have habeas counsel.<sup>42</sup> The average wait to have habeas counsel appointed is eight to ten years after imposition of sentence.<sup>43</sup> Although the same lawyer could conceivably handle both the direct appeal and the habeas proceeding, lawyers are generally unwilling to accept appointment for both. California law now requires separate counsel for the direct appeal and the habeas proceeding, unless the prisoner and counsel request representation by the same attorney in both aspects of the capital case.<sup>44</sup>

Private lawyers appointed to handle habeas claims must meet qualifications similar to those required for appointment to handle direct appeals,<sup>45</sup> and are paid at the same rate. A recently increased maximum of \$50,000 is available to cover expenses, but lawyers complain even this amount is not sufficient to cover the costs of investigation and necessary experts. A total of 141 habeas petitions are currently being handled by private court-appointed counsel. In 1998, the California legislature established the California Habeas Corpus Resource Center (HCRC) to employ up to thirty-four attorneys to handle death penalty habeas corpus petitions in state and federal court. With an annual budget of \$14.9 million, HCRC now represents seventy clients in state habeas corpus proceedings.<sup>46</sup>

The delay in disposing of death penalty habeas petitions could be eliminated if habeas counsel were appointed at the same time as counsel for the direct appeal. Currently, however, habeas counsel is usually not appointed until the direct appeal is completed. Counsel then has three years to file the habeas petition. The average delay between the filing of a fully briefed petition and a decision by the California Supreme Court is twenty-two months.<sup>47</sup> As of this writing, the supreme court had 100 fully briefed death penalty habeas petitions on its docket, awaiting decision. The habeas petitions are routinely decided without a response from the attorney general and without a formal hearing. The court simply issues a summary order, declaring that even if true, the allegations in the petition would not merit relief. Out of 689 state habeas petitions decided by the California Supreme Court in death cases since 1978, the court has issued orders to show cause requiring the attorney general to respond to the petition in only 57 cases, and ordered evidentiary hearings before a *pro tem* judge in only 31 cases.<sup>48</sup> As a

42. Much of the information in Parts III & IV has been adapted directly from the Commission's Final Report. For a more in-depth discussion, see FINAL REPORT, *supra* note 1, at 134-37.

43. *Id.* at 134.

44. CAL. GOV'T CODE § 68663 (West 2008).

45. CAL. CT. R. 8.605(e).

46. FINAL REPORT, *supra* note 1, at 134-35.

47. *Id.* at 134.

48. *Id.*

result, the federal courts deciding subsequent federal habeas corpus claims rarely have factual findings to review.

#### IV. FEDERAL HABEAS CORPUS PROCEEDINGS

A state prisoner 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.”<sup>49</sup> Federal courts can grant a request for the appointment of counsel, who can be paid and reimbursed for expenses from federal funds.<sup>50</sup> An application for federal habeas corpus cannot be granted “unless it appears that the applicant has exhausted the remedies available in the courts of the State.”<sup>51</sup> Thus, a federal application cannot be filed until 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.

The likelihood of federal relief for state death row inmates increases in states that have high affirmance rates for death penalty appeals. A national study conducted by Columbia University researchers examined the review of all death judgments from 1973 through 1995 and found that 59% were affirmed by state supreme courts.<sup>52</sup> A more recent study of fourteen death penalty states from 1992 through 2002 reported an affirmance rate of 73.7% in death appeals.<sup>53</sup> Since 1987, the California Supreme Court has affirmed death judgments at a rate in excess of 90% and denied state habeas relief at an even higher rate.<sup>54</sup> The Columbia study found that 40% of death judgments reviewed on federal habeas corpus were set aside,<sup>55</sup> and this number increased where the state courts had a higher affirmance rate than the national average.<sup>56</sup> “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

49. 28 U.S.C. § 2254(a) (2006).

50. 18 U.S.C. § 3599(a)(2), (g) (2006).

51. 28 U.S.C. § 2254(b)(1)(A).

52. James S. Liebman et al., *A Broken System: Error Rates in Capital Cases, 1973–1995*, at 5–7 (June 12, 2000) (unpublished study), available at <http://www2.law.columbia.edu/instructionalservices/liebman/>.

53. Barry Lamer & James N.G. Cauthen, *Justice Delayed? Time Consumption in Capital Appeals: A Multistate Study 23* (Mar. 2007) (unpublished study, on file with the National Criminal Justice Reference Service), available at <http://www.ncjrs.gov/app/Publications/abstract.aspx?ID=239209>.

54. FINAL REPORT, *supra* note 1, at 136.

55. Liebman et al., *supra* note 52, at 6.

56. *Compare id.* at 57 tbl.6 with *id.* at 62 tbl.7 (demonstrating that nine of the sixteen states with state court affirmance rates higher than the national average also were more likely to have their death judgments reversed on federal habeas corpus review).

were asserted in state courts.”<sup>57</sup> In most cases, relief was limited to reversal of the penalty phase.<sup>58</sup> When federal courts have concluded that mitigating evidence that had not been investigated by trial counsel might have persuaded a jury to impose a life sentence rather than the death penalty, the likely explanations for this would include 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.<sup>59</sup>

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.<sup>60</sup> If the federal petition includes claims that have not been exhausted in state court, the federal court can stay the proceedings or dismiss the petition while the defendant returns to state court to exhaust the remedies available in the state courts.<sup>61</sup> 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.<sup>62</sup> Thus, the underfunding of state habeas proceedings in California increases the burden on federal courts and delays the final resolution of death penalty reviews.

The grant or denial of habeas relief by a federal district court in California can be appealed to the United States Court of Appeals for the Ninth Circuit. However, 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.<sup>63</sup>

Continuity of representation by the same lawyer in both state and federal habeas corpus proceedings helps to reduce the delays that 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 because the agency is available to accept federal appointments after the state proceedings are

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57. FINAL REPORT, *supra* note 1, at 136.

58. *See id.* at app. 11.

59. *Id.* at 136.

60. *Id.*

61. *Rhines v. Weber*, 544 U.S. 269, 277–78 (2005).

62. FINAL REPORT, *supra* note 1, at 136–37 (citing Arthur L. Alarcón, *Remedies for California’s Death Row Deadlock*, 80 S. CAL. L. REV. 697, 749 (2007)).

63. *Id.*

concluded, and the agency 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 recommended that the unmet need for habeas counsel be met by expanding HCRC rather than expanding the number of appointments of private counsel. This would address the need for continuity of counsel between state and federal habeas proceedings.<sup>64</sup>

#### V. THE NEED FOR GREATER RELIANCE ON PUBLIC DEFENDERS

While we may be sorely tempted to dismiss the California experience as the unfortunate consequences of collective lunacy, there may be some valuable lessons for other states that struggle to stay abreast of death penalty appeals and habeas corpus proceedings. While California presents the worst example, the problem of growing delays plagues every state that permits the death penalty. The U.S. Department of Justice has tracked the elapsed time from sentence to execution for all defendants who have been executed in the U.S. since 1978. The average time lapse has grown steadily throughout the U.S., from an average of 4.25 years during the period of 1977 to 1983 to an average of 12.25 years in 2005.<sup>65</sup> Efforts to meet the need for qualified counsel to competently represent death row inmates should not rely upon the recruitment of private counsel to accept appointments to handle appeals and habeas corpus proceedings. Handling these cases has become highly specialized, and the pool of lawyers who achieve the level of experience necessary to meet American Bar Association qualification standards is diminishing. The frustration and burnout experienced by these lawyers lead them to spurn repeat appointments. From both a practical and economic perspective, the development of public defender-type offices to meet the need for appointed counsel makes much more sense. Such offices can provide a consistent level of oversight and training, and deliver backup and support with greater economy.

The Commission recommended the expansion of both the State Public Defender and the HCRC to meet the need for appointed counsel to handle death penalty appeals and habeas corpus proceedings. While this would add \$95 million to the current cost of the administration of the death penalty in California, the Commission concluded it was the only practical alternative

64. *Id.*

65. See Bureau of Justice Statistics, U.S. Dep't of Justice, Capital Punishment, 2006: Statistical Tables, Time Under Sentence of Death and Execution, By Race, 1977-2006, <http://www.ojp.usdoj.gov/bjs/pub/html/cp/2006/tables/cp06st11.htm>.

available to reduce the California delays to the level of the national average.<sup>66</sup> In the current economic climate, the appropriation of the necessary funds to meet this recommendation is highly unlikely. The Commission noted that there are alternatives to avoid these costs. First, a significant narrowing of the breadth of California's death penalty law could cut the number of death penalty cases in half. Second, a replacement of the death penalty with sentences of life without possibility of parole would achieve substantial savings.<sup>67</sup>

The Commission took no official position on either of these alternatives. Although the Commission was unanimous in identifying the causes of dysfunction and the remedies needed to reduce delays in California at least to the national average of twelve years, many commissioners felt that the State of California would be better off saving the expenditures that would be required to fix the death penalty, and simply repealing the death penalty law. These positions emerged in the separate statements appended to the final report. Eight commissioners signed a separate statement concluding that the death penalty should be repealed because its process and administration are inherently flawed, and the costs of fixing it are too high.<sup>68</sup> Two of the commissioners who signed that statement joined two other commissioners in signing another statement suggesting the California death penalty law is "vastly overbroad," and should either be narrowed or eliminated.<sup>69</sup>

It currently appears that none of the Commission's recommendations with regard to the administration of California's death penalty law will be implemented. In the first ten months of 2009, 25 more individuals were sentenced to death in California, increasing the size of our death row population to more than 800. As noted in the separate statement of Commissioners Streeter, Ridolfi, Hersek, and Laurence:

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.<sup>70</sup>

Quoting the opinion of Justice White in *Furman v. Georgia*, they noted his conclusion that, "as the statutes before us are now administered, the

66. FINAL REPORT, *supra* note 1, at 116–17.

67. *Id.* at 137.

68. *Id.* at 168–74.

69. *Id.* at 174–81.

70. *Id.* at 180.

penalty is so infrequently imposed that the threat of execution is too attenuated to be of substantial service to criminal justice.”<sup>71</sup>

#### VI. NARROWING THE BREADTH OF THE DEATH PENALTY LAW

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 U.S. The Constitution Project achieved broad consensus on two key recommendations to reserve capital punishment for the most aggravated offenses and most culpable offenders:<sup>72</sup>

##### “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 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

71. *Id.* at 181 (quoting *Furman v. Georgia*, 408 U.S. 238, 313 (1972) (White, J., concurring)).

72. *Id.* at 138. Much of the information in Parts VI & VII has been adapted directly from the Commission’s Final Report. For a more in-depth discussion, see *id.* at 138–44.

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.”<sup>73</sup>

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 accurate—unanimously concluded that the Illinois death penalty law should be narrowed to the functional equivalent of the Constitution Project recommendation:<sup>74</sup>

[T]he 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 the murder.<sup>75</sup>

The Honorable Alex Kozinski, now presiding judge of the U.S. Court of Appeals for the Ninth Circuit, suggested fifteen years ago that narrowing

73. *Id.* at 138–39 (quoting THE CONSTITUTION PROJECT, MANDATORY JUSTICE: THE DEATH PENALTY REVISITED, at xxiv–xxv (2005)).

74. *Id.* at 139.

75. STATE OF ILL., REPORT OF THE GOVERNOR’S COMMISSION ON CAPITAL PUNISHMENT, at ii (2002).

death penalty laws was the most appropriate way to address the illusory nature of the death penalty.<sup>76</sup> Noting the growing gap between the number of people sentenced to death and the number 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.”<sup>77</sup> The goal of narrowing, then, is to limit the number of death row inmates to those whom we truly have the means and the will to execute.<sup>78</sup>

The California 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 been limited to the “worst of the worst” as identified by the Constitution Project and the Illinois Commission, there would be approximately 368 inmates 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 that were identified in the Constitution Project’s *Mandatory Justice* report:<sup>79</sup>

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.

76. Alex Kozinski & Sean Gallagher, *Death: The Ultimate Run-on Sentence*, 46 CASE W. RES. L. REV. 1, 3, 29–31 (1995).

77. *Id.* at 29–31.

78. FINAL REPORT, *supra* note 1, at 139.

79. *Id.*

California needs to determine how to eliminate these geographic disparities in the imposition of the death penalty.<sup>80</sup>

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.<sup>81</sup>

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 change only the location in which they will serve their sentence. But just that change could save the State of California \$27 million each year over the current cost of confining these prisoners on death row.<sup>82</sup>

With regard to the future growth of California's death row, the Kreitzberg study suggests that from 2003 to 2007, more than 70% of the new death judgments in California have included at least one of the recommended circumstances.<sup>83</sup> Thus, an average of eleven or twelve new death judgments each year 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 the reforms recommended by the Commission to fix the current system would be reduced by 30% to 40%.<sup>84</sup>

80. ELLEN KREITZBERG, A REVIEW OF SPECIAL CIRCUMSTANCES IN CALIFORNIA DEATH PENALTY CASES 10 (2008).

81. FINAL REPORT, *supra* note 1, at 140.

82. *Id.* at 141.

83. See KREITZBERG, *supra* note 80, at 38 tbl.d7 (calculating that four of the five special circumstances proposed by the *Mandatory Justice* report were present in 72.2% of new death judgments, or sixty out of eighty-three cases, from 2003 to 2007).

84. FINAL REPORT, *supra* note 1, at 142.

## VII. REPLACING THE DEATH PENALTY WITH LIFE WITHOUT PAROLE SENTENCES

After a comprehensive review of the costs and benefits of the death penalty, the New Jersey Death Penalty Commission concluded that:

(1) There is no compelling evidence that the . . . death penalty rationally serves a legitimate penological intent.

(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.

. . . .

(6) The penological interest in executing a small number of persons . . . is not sufficiently compelling to justify the risk of making an irreversible mistake.

(7) 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.

(8) Sufficient funds should be dedicated to ensure adequate services and advocacy for [victims'] families . . . .<sup>85</sup>

These considerations led the State of New Jersey to abolish the death penalty in 2007, in favor of the alternative of life imprisonment without parole (LWOP).<sup>86</sup> A similar step was taken by the State of New Mexico in 2008, for the same reasons. The same alternative is available in California, although in California this step would have to be approved by the voters.<sup>87</sup>

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 were 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. If the death penalty were replaced with LWOP sentences, not only would the costs of confinement be significantly reduced, but many of the costs of trial and appellate review for death cases would be eliminated as well.<sup>88</sup>

85. NEW JERSEY DEATH PENALTY STUDY COMMISSION REPORT 1 (2007), available at [http://www.njleg.state.nj.us/committees/dpsc\\_final.pdf](http://www.njleg.state.nj.us/committees/dpsc_final.pdf).

86. FINAL REPORT, *supra* note 1, at 142.

87. See *supra* note 3 and accompanying text.

88. FINAL REPORT, *supra* note 1, at 142.

At the trial level, substantial savings would result from the elimination of the necessity for death-qualified juries. In Los Angeles County, 800 potential jurors may be summoned for a death penalty case.<sup>89</sup> California jury commissioners rely solely upon voter registration and Department of Motor Vehicles lists to summon jurors, although state law permits expansion of source lists.<sup>90</sup> 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.<sup>91</sup> 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.<sup>92</sup>

While a jury is normally selected in one or two days in most felony cases, the selection of a death-qualified jury normally takes eight to ten 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 do not reflect a cross section of the community to the extent that non-death juries do.<sup>93</sup>

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 the jurors are unable to achieve unanimity, another jury must be impaneled to decide the penalty.<sup>94</sup>

89. *Id.* at 143.

90. CAL. CIV. PROC. CODE § 197(a) (West 2008). In contrast, New York uses five source lists, including lists of state income taxpayers and state unemployment and welfare recipients. FINAL REPORT, *supra* note 1, at 142 n.96 (citation omitted).

91. At least thirty-one states and the federal courts pay jurors more than California. In federal courts, jurors receive \$50 per day. *Id.* at 143 n.97 (citation omitted).

92. *Id.* at 143.

93. *Id.*

94. *Id.*; CAL. PENAL CODE § 190.4(b) (West 2008).

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 appeal. Between June 2005 and June 2006, the California Courts of Appeal decided 100 LWOP appeals after an average delay of 18.6 months.<sup>95</sup> 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 because 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.<sup>96</sup>

If the New Jersey/New Mexico 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. Forty death penalty trials each year would simply be added to the existing schedule of LWOP cases; instead of 120 LWOP cases per year, there would be 160.<sup>97</sup>

With a dysfunctional death penalty law, the reality is that most California death sentences are actually sentences of lifetime incarceration. The defendant is more likely to die in prison rather than by execution. The same result can be achieved at a savings of well over \$100 million by sentencing the defendant to lifetime incarceration without possibility of parole.<sup>98</sup>

#### VIII. CONCLUSION

California's death penalty law is completely dysfunctional. It offers the families of crime victims only the unrelenting cruelty of endless delays. It quadruples the cost to California taxpayers for the confinement of offenders for what are actually life sentences. The vast majority of those sentenced to death in California will die in prison before they are ever executed. The system is also unfair to defendants with plausible claims of prejudicial error in their trials or sentencing proceedings. Of the fifty-four California death cases that have been resolved with finality in the federal courts, thirty-eight of them,

95. FINAL REPORT, *supra* note 1, at 143 (citing Alarcón, *supra* note 62, at 731).

96. *Id.* at 143.

97. *Id.* at 143–44.

98. *Id.* at 144.

or 70%, have resulted in the grant of some relief despite the rulings of the California Supreme Court upholding the convictions and sentences.<sup>99</sup> Twenty-four of them have been sent back to the California courts for penalty retrials, to be followed by another round of direct appeal and habeas proceedings. Fourteen of them had their underlying convictions set aside. The delays in reaching these conclusions often impose serious prejudice upon the defendant.

No one wins when a state's dispensation of justice becomes dysfunctional. Respect for the justice system is only diminished. California Chief Justice Ronald M. George warned the California Commission on the Fair Administration of Justice that if nothing is done, the backlogs in postconviction proceedings will continue to grow "until the system falls of its own weight."<sup>100</sup> The Commission itself warned the legislature that doing nothing would be the worst possible course. Both warnings have gone unheeded. While some opponents of the death penalty might welcome the collapse of the machinery of death, the consequences of such a collapse would reach far beyond the fate of those on California's death row. The failure of California's death penalty law will create cynicism and disrespect for the rule of law, produce even greater havoc in the correctional system, and undermine public respect for judges, legislators, and police.

99. *See id.* at 136.

100. Testimony Before the Comm'n on the Fair Admin. of Justice 38 (2008) (statement of Ronald M. George, Chief Justice, Supreme Court of California), *available at* <http://www.ccfaj.org.documents/reports/dp/expert/Chief's%20Testimony.pdf>.