CALIFORNIA COMMISSION ON THE FAIR ADMINISTRATION OF JUSTICE


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To view streaming video of this hearing, please click here (requires Windows Media Player).
Commission Chair John Van de Kamp convened the meeting at 9:30 a.m. at Room 4203 in the State Capitol at Sacramento.

Those present included Vice-Chair Jon Streeter, Executive Director Gerald F. Uelmen, Commissioners Harold Boscovich, Ward Campbell (representing Janet Gaard representing Attorney General Jerry Brown), Ron Cottingham, Glen Craig, Chief Pete Dunbar, Jim Fox, Michael Hersek, Sheriff Curtis Hill, Bill Hing, Michael Judge, George Kennedy, Michael Laurence, Alejandro Mayorkas, Judge John Moulds, Cookie Ridolfi, and Greg Totten.

Commissioners not present were Diane Bellas, Gerry Chaleff (for Chief William Bratton), Rabbi Allen Freehling, and Doug Ring.

John Van de Kamp (JVD) welcomed the group.

I. Introductory Comments
   A. Purpose of Commission in Charge from Senate Resolution
   B. Examination of Selected Issues Around Wrongful Conviction
   C. Today, we are looking at the fair administration of the death penalty in California.
   D. Introduction of Commissioners

II. Hon. Ron George, Chief Justice of CA Supreme Court
   A. Introductory Remarks
      i. Thank you for inviting me to address Commission
      ii. My remarks focus on issues arising out of the CA Court handling of appeals and habeas cases.
      iii. Thoughtful individuals agree: existing system for handling capital appeals is dysfunctional and needs reform. 650 inmates on death row and backlog is growing. Some are not inclined to remedy the delay in the current system, which results both from State and Federal Court proceedings.
   B. Context
      i. Chief serves in several capacities.
         1. Chief Justice of Supreme Court—presides over administrative conferences. His vote is one of seven on administrative matters as it is on cases before the Court.
            a. Proposal today has been adopted unanimously by Sup. Ct.
b. It does not reflect view of justices for or against the
death penalty. That lies with the people. Justices
don’t propose anything to alter scope, not appropriate.

2. Statewide Administration of Justice in Judicial Branch
   a. Recently assigned team to Riverside County to
      address critical backlog in criminal cases
   b. In any given year, he uses the Art. VI authority
      consistently to increase efficiency and justice of
      Courts

ii. Justices have become disturbed about pending appeals and habeas
    claims.
    1. Concern arises from increasing pressure undermining
       Court’s essential role in the administration of civil and
       criminal justice in the State.
    2. The concern is not about the quality of cases.

iii. Size of judiciary is a contributing factor.
    1. Largest in nation, exceeding federal court.
    2. More than 2000 judges, referees, working in courts and 105
       in six courts of appeal; seven on Supreme Court

iv. History
    1. automatic death penalty appeals constituted 5-10% of Sup.
       Ct. docket, in past 10 years, this has risen to 20-25%.
       Petitions have doubled to more than 9,000 annually.
    2. In recent years, Sup. Ct. issued 110-120 opinions (70% more
       than Supreme Court of the United States with 9 justices).
    3. 20% in death penalty and related habeas corpus petitions
       a. Reviews of these cases take more time than other
          opinions of Court
       b. Additional number of opinions does not reflect
          additional burden of lengthy and complex habeas
          litigation most of which do not result in written
          opinions but give rise to lengthy internal memoranda,
          which take substantial resources
       c. Issue a final determination on 30+ habeas petitions
          per year
    4. Demands on Court from every source increased after 1977
       re-institution of death penalty. In response, Court has taken
       measures to handle death penalty matters more efficiently:
       a. In early 90s, staff attorneys added to each Justice’s
          chamber staff
b. In 2002, a central staff dedicated to Death Penalty cases, motions, appeals, and habeas proceedings was created and recently increased to 10 persons.

5. Court has focused on attracting and appointing qualified counsel and insuring that once appointed, counsel proceed in a timely and effective manner
   a. Court staff has held on-going meetings with defense community doing appeals and habeas petitions.
   b. As a result of meetings, Court insured speedier payments, expedited oversight of record correction, supervision of briefing process, adopted payment schedules, etc.
   c. Met with some success in attempts to recruit more attorneys in these cases and aided by fewer death judgments being sent up.

6. Changing Dynamics
   a. Number of inmates w/o counsel is at 79, from a high of 170 a few years ago. Additional 201 inmates have appellate, but no habeas counsel.
   b. Backlog of 80 automatic capital appeals, fully briefed ready for calendar, bench memo and oral argument demonstrates progress; but reduction in backlog of unrepresented defendants illustrates old caution—be careful what you wish for. Greater success in appointing counsel means backlog grows of briefed capital cases will grow along with briefed civil and other cases awaiting hearing in the Court.

7. Eliminating intractable # of defendants lacking legal representation in habeas corpus proceeding. During last legislative session, obtained adoption of statutory amendment that doubles to $50,000 for statutory amount of investigation in habeas corpus matters prior to issuance of order to show cause

v. I’ve been describing two relevant and related backlogs that cause delay:
1. # of death row inmates who lack representation at either appellate level or habeas corpus proceeding or who have counsel only on appeal

2. Backlog of cases fully-briefed, ready for oral argument and decision

vi. Proposal under consideration today is aimed at 2nd backlog—cases ready for consideration by the Court.

1. Court advocates alleviating problem of insufficient counsel

2. Limits on what Court alone can accomplish

   a. Fundamental factor is money. Court, and entire judicial branch, looks to legislative and executive branches to provide appropriate and sufficient resources, difficult in this budget year.

   b. System has been affected by cutbacks which limit number of lawyers participating in system. State Public Defender and HCRC labor under limited caps on funding.

   c. Although we have received increased funding for CA Appellate Project and funds to pay private counsel, we need further augmentation of these fees as well as habeas investigation funds.

3. Every year, I meet personally with Governor and Legislative leadership on subject of judicial branch budget.

   a. I stress the need for adequate funding for these defense agencies and the attorney general’s office.

   b. Death penalty process will continue to suffer dysfunction as long as any part of the system—Court, Defense, or Prosecution counsel—remains inadequately funded or staffed.

C. Proposal recently made by Court on 2nd backlog—cases ready for consideration by Court

   i. Sup. Ct has steadily issued 20-25 opinions in death penalty cases per year for a number year; it no longer can keep up with the increasing number of fully briefed appeals in capital cases while performing its core function of resolving questions of statewide importance in civil and criminal matters

   ii. Another 100 fully briefed habeas petitions before Court

      1. Habeas corpus petitions are filed based on claims not contained in the appellate record.
2. Typical claims include a variety of claims of IAC from failure to investigate an alibi to mental capacity defense to failure to investigate available mitigating evidence during penalty phase of trial.

3. Other issues arise from *Brady* claims or the use of an in-custody informant as a prosecution witness during trial.

iii. Although Court does not issue written opinion in most of these habeas matters, 50-100 page memoranda are prepared, circulated, and considered internally.

1. Delay in processing these matters is an issue of substantial concern.
2. Some federal courts have raised constitutional concerns about this delay between completion of briefing and automatic appeals and habeas matters and our Court’s disposition of individual cases.
3. Problem is urgent.

iv. Basic statistics: even if Supreme Court became solely a death penalty court, it probably would take a minimum of 3-4 years to process existing backlog of death penalty appeals and habeas petitions.

1. During that time, other cases would be filed. And additional death cases would become fully briefed
2. The backlog would continue to grow. Systemic costs would be profound if we focused solely on the death penalty.
3. A Sup. Ct. focused solely on death penalty matters would place the orderly administration of justice in CA in peril
4. Sup. Ct. is highest Court in state and is ultimate arbiter of state law. If Court can’t perform this function, people of CA will suffer.

v. Proposed Changes designed to avoid placing Court in position to see cases languished un-reviewed after completion of briefing.

1. More staff cannot change Court’s structure
2. Ultimately 7 judges must decide each case.

D. Fundamental Question: What can be done to enable the Court to continue playing its essential role in deciding important issues while ensuring that death penalty appeals and related matters receive the appropriate, careful consideration they require?

i. Court’s proposal would diminish backlog of briefed cases and ensure comprehensive review in appellate court and Supreme Court.
ii. Judge Alarcon proposes that Courts of Appeal review death penalty in 1st instance.
   1. Fully support Alarcon call for more funding for counsel, the holding of more evidentiary hearings in State habeas proceedings, and providing continuity between State and Federal habeas corpus proceedings.
   2. Supreme Court approach is different from Alarcon’s approach—our proposal permits transfer of fully briefed appeals (no more than 30 cases in 1st years) instead of allowing case to be filed directly. Rationale:
      a. Sup. Ct has existing internal expertise among attorney and clerk’s office staff in handling of pre-briefing proceedings that occur in cases, including motions for preparation of record and request for extension of time. Keeping these preliminary matters at Sup. Ct means appellate courts won’t have to develop expertise in house and consistency of handling administrative issues is ensured.
      b. Permitting full-briefing will allow Sup. Ct to retain and decide cases in which there is an issue of statewide concern requiring immediate resolution by the highest Court
      c. Transfer of death penalty appeals to Courts of Appeal will not require Courts to understand vast new areas of previously unexplored legal territory. They already consider cases where special circumstances are alleged and not found and the prosecution has not sought death penalty or is unsuccessful in obtaining judgment resulting in LWOP. Novel issues to these courts would emanate solely from penalty phase.

iii. This is not to say that the briefing of all issues arising in a capital case is typically not more lengthy or complex than what transpired in cases in which death penalty was not imposed. Nevertheless, the fundamental issues and analyses arising out of the guilt phase and the special circumstance finding will be familiar ground for appellate justices.

iv. Courts of appeal will have 30 years of CA Sup. CT. and SCOTUS decisions to apply law to facts.
   1. Reference to settled law is not meant to imply that transfer of case to Court of Appeal implicitly suggests that
defendants claim lacks merit. Under settled case law, reversal may be required.

2. Decisions of Court of Appeal would not be final chapter. Under proposed plan, either side must file in Supreme Court a statement of grounds for reversal or a statement that no grounds exist. As explained in commentary to proposal, the precise outlines of the statement will be defined by rule. Such a statement would provide a roadmap to challenges to appellate court decisions that would assist the Sup. Ct. in deciding whether the appellate court should be affirmed.

v. Action taken by Sup. Ct will dramatically differ from normal petitions for review after court of appeal.
   1. Typically, Sup. Ct considers whether there is a conflict among courts of appeal or whether there is an issue of statewide concern.
   2. In reviewing decisions in death cases, plan contemplates that Sup. Ct will consider whether there is error affecting judgment, including determining whether decision is legally correct, and that there is consistency amongst the Courts of Appeal in the disposition of harmless error issues and other capital case claims. Error in proceedings leading to death judgment should be reviewed by Court even if there is no conflict or it’s not an issue of statewide importance.

E. Response to Critiques of Proposal
   i. Critics say that Sup. Ct. will not apply serious review and that death penalty jurisprudence will be at mercy of six disparate Courts of Appeal
      1. To the contrary, the proposal provides two levels of rigorous review. Statements made at appellate level will help focus considerations of Supreme Court on significant issues. Despite second review, overall delay would be reduced.
      2. Court of Appeals written analysis would be available to Sup. Ct. in its non-capital appeals in which it grants review. These decisions are of assistance, even when Sup. Ct. is in disagreement about lower court’s approach and conclusion. There would be a similar benefit in death penalty matters as well as the relief from having to write an analysis of every issue from scratch, regardless of merit
   ii. Some critics raise geographic concerns
1. Sup. Ct. has not hesitated review to correct court practices, including de-publication of opinions, but that will not be available in death penalty opinions.
2. All death cases will be published. Proposal will grant review to ensure consistency.

iii. Concerns about defendant’s habeas rights under Federal Law may be jeopardized under transfer of appeal before habeas counsel has been appointed.
   1. Also may be concerns that can be dealt with by commentary to proposal.
   2. No need for constitutional amendment that would put this protection in place, but it can be dealt with by rules of court which can recognize shell petitions and provide for appointment of habeas counsel in transfer of cases.
   3. Legitimate concern will be dealt with by amendment to commentary.

iv. Variances among prosecutorial practices in trial courts may result in affirmance or reversal in one appellate district differently from others.
   1. This will not automatically merit review.
   2. This difference is inevitable just as it’s faced by Supreme Court under current system.

v. After consideration of lower court opinion and statement of grounds filed by losing party, Sup. Ct. has three options:
   1. Conclude that all or some of issues raised require Court consideration and therefore order briefing, set the case for oral argument, and ultimately issue a written opinion.
   2. Summarily affirm case if no legal error and Court of Appeal presents no important issue of law, conflict, or inconsistency among the Court’s of appeal.
   3. Summary affirmation order filed, but justice who disagrees may file dissenting or concurring opinion that will be published with order affirming judgment.

F. Some say only highest court should be given review. In contrast, high courts in other states with relatively low number of death cases are not overwhelmed like the CA Sup. Ct.
   i. Plan proposed offers significantly more Sup. Ct. review than the cases in the Federal system.
   ii. Cannot be overemphasized—no easy, one-step cure for dysfunctionality of death penalty appeals system so long as people
exercise their option to have death penalty available in certain cases

iii. Even so, some things are clear:
   1. sufficient funding must be provided for counsel.
   2. Lengthy periods where inmates are on death row and lack legal representation should not be tolerated.

iv. Increasing resources of State Public Defender office and Habeas Corpus Resource Center offer best hope for eliminating that part of delay emanating from lack of appointed counsel. Needs of AG’s office, Courts, and private counsel cannot be ignored.

v. Two backlog problems must not be looked at in isolation.
   1. If increased resources for counsel are made available and then we are able to appoint counsel, and no change takes place in appellate process, the result will be more and longer delays in resolution of death and other cases.
   2. On the other hand, if the process is changed but additional resources for counsel and the Courts are not provided, then delay will grow as well.
   3. Doing nothing at all will result in continuation of both backlogs until system falls of its own weight.

G. One final area…

i. CA Supreme Court has guaranteed appointment of counsel for purpose of filing habeas in death case for decades, even though US Sup. Ct. says that provision of counsel is not constitutionally required.

ii. Our Court’s inability to appoint habeas counsel in a timely fashion may have a number of consequences:
   1. Not only may petitions be delayed but as a result of Congressional enactments and changing Federal timetables, delays in appointing state counsel may have an adverse effect on ability of defendant to raise claims in federal court.
   2. We’ve alluded to ways to deal with that.

iii. Large number of petitions ready for determination to show whether an order to show cause should issue illustrate existing problem of delay in cases where counsel has been appointed and highlights added pressure on Court by habeas petitions.
   1. All courts have concurrent jurisdiction to entertain writs of habeas.
   2. Court decided 20 years ago that best way to ensure consistency in provision of resources and making of
decisions involving death penalty related habeas corpus petitions would be for Sup. Ct to pay for legal representation and related expenses only in cases where counsel was appointed by Supreme Court and petition was filed in that Court.

iv. In every other jurisdiction, habeas can be filed in trial court.
   1. Result of Sup. Ct. procedure is a paper-intensive process with extensive documentation prepared for each claim.
   2. This is so, even if claim would not warrant habeas relief.

v. After carefully reviewing lengthy extensive briefs and exhibits, Court rarely issues show for a cause. This is decried by defense bar and Federal Courts b/c this does not provide enough information for appropriate Courts to provide deference to our decision.
   1. We hope to develop a plan for this in the next several months.
   2. Any changes, which would not require a constitutional amendment, would require thoughtful reflection.
   3. A quick fix will adversely affect rights of defendant, friends and family of victims, and overall administration of justice.

H. Decisions must be made and expectations adjusted accordingly.
   i. I would prefer that changes to system be made with benefit of full vetting by legislature, rather than voter initiative.
   ii. Present system which places direct review of death cases in Suprem Court is not working.
   iii. Without substantial adjustment, we are faced with two possibilities:
      1. Court can put resources towards fully briefed capital case related matters solely. This will hamper Court’s ability to resolve statewide issues of law and settle conflicts at appellate level, which is its fundamental duty.
      2. Continue as we are and watch backlog grow beyond ability of Court to keep up, prolonging further the resolution of capital cases—this exacerbates frustrations families and friends awaiting finality and defendants seeking vindication.
   iv. Either path weakens the ability of supreme court’s ability to provide judgment in all cases. A legal system that cannot produce finality undermines rule of law.

I. Court proposal takes a practical approach
i. Necessary resources to implement transfer should not be overwhelming, including additional staffs for Courts of Appeal. We’re evaluating those needs with the assistance of the presiding justices of the six Courts of Appeal. Those Courts have been supportive of this proposal.

ii. More funding must be made available to agencies handling these cases.

J. If California wants a functioning death penalty process, it must provide sufficient resources to that endeavor.

   i. Without more resources, we are left with backlog.
   ii. No part of capital post-judgment process can be changed without full consideration on impact on remainder.
   iii. The Supreme Court looks forward to hearing Commission’s recommendations.

K. Questions

   i. JVD

      1. In terms of appointment of counsel in direct appeals to Supreme Court, is the average time frame 4 years?
         a. That’s approximate.
         b. It can be as much as 4 years. Typically around 3 years.

      2. On habeas appointments?
         a. It can be more than that.
         b. We have had more success in finding counsel for appeal, which is first review of right, than for habeas matters.

      3. With respect to certification of record delay, is that issue conquered?
         a. Yes, legislation set up definite timelines for review of record within 120 days for completeness and correctness. Except for a handful of cases that precede legislation, cases have been on track since legislation.
         b. County Clerks have heard about improving processes. It’s a question about changing culture of trial counsel.

      4. To be appointed counsel, you have to be eligible…and there are standards for eligibility. Information we’ve had is that the number on that list is getting older, declining, and fees are around $140/hour, less than fees from federal court and out of step with other fees charged—results in less interest
in handling these appeals. Your proposed changes will require money. Has anyone done a cost analysis?

a. Very hard to quantify. A lot has been done with regard to the fees. It went from $60-$145 under this Court. We are paying more than any other State, but yes, it’s still less than federal court. Judge Alarcon makes the point that we should have continuity between State and Federal habeas counsel.

b. We’ve also provided different fee arrangements where instead of hourly fee counsel can contract depending on complexity of case and length of record. We’ve added certain things that won’t come out of investigative fees (increased from $3,000-$50,000 prior of issuance to show cause). Amount of investigative fees is more important than compensation for counsel, some say. We need more resources.

c. Alarcon article suggests that Federal system should fund some of this with respect to habeas. Concerned that lawyers are going on to other things. We must train and motivate younger attorneys to handle these cases. HCRC puts on wonderful training session for new lawyers.

5. If I were Governor, I would want to know what this cost.

a. Cost should not be that prohibitive.

b. Not in a position to quantify exactly what it would cost to bring payment up to level to have more counsel and staffing at Court’s levels.

c. Savings would offset relatively minor cost of shifting appellate staff and augmenting Courts of Appeal. If Court of Appeal needed additional resources to back up permanent members to do death penalty cases, we can do that within existing resources.

d. This is a crisis that compels action. It’s important that we solve this so that the Sup. Ct. can perform its function in all cases.

6. Ohio experimented with this and it was found to slow things down. Did you analyze what happened in Ohio and how CA approach would be differentiated?
a. There is that potential. TN and AL provide full automatic review by Court of Appeal and by Sup. Ct. That clearly adds delay.

b. Advantage of Court’s proposal is that it doesn’t get Sup. Ct. out of the picture, but there would be hands on involvement in pre-briefing aspects including decision of whether to transfer and summary affirmance of final Court of Appeal review. There’s enough in there for Sup. Ct. review to ensure hands on review from Court.

c. Notwithstanding layer of review by Sup. Ct, overall delay would be reduced because cases fully briefed that are waiting 2-3 years can’t be adjudicated because of the backlog. There are 2000 bench officers feeding cases to 7 justices, same 7 since the 1870s. We could do a lot to reduce delay by having 105 Court of Appeal justices participate in resolution instead of just 7 Sup. Ct. justices.

ii. Uelmen: Two backlogs are interrelated. Which is the cart and which is the horse? If we adopt this proposal, it has the potential of deciding as many as 50 death cases per year. Those cases would then move to habeas. Then we have to come up with habeas lawyers for a huge number of cases every year. If we haven’t addressed where those lawyers will come from and how they will be funded, are we putting the cart before the horse?

1. We should move forward on this b/c it requires a constitutional amendment and this is an election year.

2. The habeas issue does not require constitutional amendment. Court can solve the habeas problem, facilitated by legislation. This is a self-imposed problem that the Sup. Ct. got into 20 years ago to ensure consistency and quality. It can be undone.

3. By time amendment was in place to handle appeals, we can get a good idea on how to solve habeas issue.

iii. JVD: don’t you need commitment from Governor on funding for habeas counsel?

1. Yes, more funding for sure.

2. We also need to consider the impact under Federal legislation, as Mr. Hersek has raised, of having appeals
decided with habeas trailing far behind. We can deal with that by rule and commentary to proposal.

iv. Uelmen: The figure of 30 cases per year is not embedded into proposal. It would be discretionary with Court as to how many cases they would transfer?
   1. We can put it into rules, not into constitution.
   2. This would involve each of 105 appellate justice writing a death opinion for himself and herself and two colleagues every 3-3.5 years.

v. Uelmen: If now Sup. Ct. will be looking at some of these appeals, will that take up more time and shift all cases to Court of Appeal and confining review of Sup. Ct. only to already reviewed cases?
   1. There would be careful review of cases before transfer to look for novel legal issues or issues that impact many other capital cases before the court. If so, the Court would want to retain those cases.
   2. On the other hand, it might be clear that there is clear *Batson* or other error, it’s just a question of application of settled law to different factual situation. No benefit to having high court retain that case.
   3. Safeguards for defense and prosecution outweigh added delay. Delay would not be that substantial. It’s different to analyze a court of appeal opinion than having 7 justices get together on lengthy opinion every time someone circulating the opinion. Everyone has to sign off or react on minor changes. It’s quite difficult to get all 7 together on every word of every opinion. That’s not the same methodology when you’re reviewing the appellate court opinions. This is much less time consuming than getting the Court together to decide every issue of whatever important in all cases.

vi. Streeter: couple of concerns.
   1. All recognize the problem of backlog in Sup. Ct. Intermediate Courts of Appeal generate a lot of the law that is made in the State. Most of the law on civil side is made in Courts of Appeal. Legitimate concern that to the extent we transfer cases to appellate courts, the same problem may happen at the appellate level. The backlog in appellate courts is over a year right now. How much consideration has been given to how much we would affect other types of
cases moving through system in appellate courts and effectuate a worse problem at the appellate level?

a. That’s legitimate. I spoke individually to six presiding justices of each appellate court and had meetings with them. We’re soliciting their input on how to do this.

b. Context: the Courts of Appeal issue about 17,000 opinions every year. This would add 30 cases, admittedly with longer records, to that increment. I don’t view this as a substantial increment to their workload. They agree to take this, provided they have additional appellate staff resources to help them. If it negatively affected workload, Chief Justice can assign appellate justices pro tem as we do in all workload situations. It doesn’t mean that pro tems would be doing death penalty cases, but as a backup.

2. People of State of CA voted for capital system in which there would be automatic appeal to Sup. Ct. To the extent we change the system to have Sup. Ct. review on summary basis, there are questions of whether that is adequate review. Is the question closed with the Supreme Court about its proposal?

a. This is a proposal to get dialogue going. The CCFAJ accelerated Court’s consideration of proposal. It’s time to do something about it.

b. Voters did put the death penalty in the Constitution. We’ve had this process since the 1850’s—automatic review to highest court. What the electorate put in the Constitution they can take out. We’re asking that the Legislature put before the people for their consideration a plan by which if the people choose to have a death penalty, it will be carried out in a functional and not dysfunctional way.

vii. Michael Judge: it appears that your proposal is still under consideration and in preliminary stages of looking at the impact on habeas, but it may have a substantial impact on public defender offices in local counties. Current pace of habeas for defender offices is manageable. If we increase the pace of habeas cases substantially b/c numerous habeas claims are considered simultaneously, and there are more claims of IAC, it’s important to
have lawyers involved in those cases thoroughly review and determine reasons for all decisions made in that trial. What will come out of that is important in determining what will happen in habeas b/c of IAC. It’s in no one’s interest to not have a thoroughly prepared trial lawyer in these cases. Have you looked at the impact on local trial offices?

1. That’s a legitimate concern.
2. Real focus has to be, without relegating habeas process to unimportant status, on initial review.
3. Just b/c there is an impact on habeas doesn’t mean we can’t approach appeals problem.
4. If we want to do anything about appeals, we need to act now or wait a few years until the next election cycle to place a constitutional amendment before the voters.
5. We need to go ahead on habeas. Judge Alarcon’s proposal for federal funding for appointment of habeas counsel would do a lot to alleviate concerns raised. We can’t hold off.
6. For years, our process of automatic review was satisfactory. But the population and caseload have changed. Before, this did not impede the workload of the Court, containing about 10% of our workload. Now it’s closer to 25% of cases we consider. In terms of amount of time and resources, it’s probably even more than that.

viii. Judge: Ability of local public defender to handle caseload is directly impacted by additional habeas claims, especially regarding IAC. We would have to take those public defenders who have more IAC claims off line to prepare for responses. There could be a ripple effect on other offices.

1. It may be most realistic to follow the HCRC method to train cadres of people from the private sector.
2. Given the funding situation of government entities, it would be unrealistic to expect an expansion of public defender officers.
3. [for benefit of reader, IAC is incompetent assistance of counsel].

ix. JVD: Certain things can be done to alleviate problem and they need to be thought through carefully. Thanks to the Chief for your presentation and thoughtfulness of work. This moves the ball forward. We appreciate the openness expressed on this issue

1. Court is open to suggestions.
III. Hon. Arthur Alarcon, Senior Circuit Judge on 9th Circuit Court of Appeals (see USC Law Review article)
A. Introductory Comments
   i. Disclaimer: USC article expresses personal views, not those of the 9th Circuit. Other judges on the 9th circuit did not have input. Work is mine as a Californian and adjunct academician.
   ii. In conclusion to article, I state that it is my profound hope that as a messenger of alarming statistics regarding decades of delay in reviewing death penalty cases, that I will stimulate the CA Legislature and experts in criminal procedure to step forward with their own solutions.
   iii. I thank Commission for invitation and urge you to carry out your responsibility to suggest improvements in the administration of criminal justice and to advise legislature to provide adequate funding to lawyers to represent condemned inmates in order that they can conduct a thorough investigation of any alleged constitutional violations and compensate them for their service in an emotionally-draining representation.
   iv. I also hope that you will support the Supreme Court’s proposals for constitutional amendment in whatever final form it takes. It’s critically necessary to involve CA courts of appeal to get rid of horrible backlog for automatic appeals and state habeas corpus review.
   v. Procedures recommended earlier by Chief Justice Ron George closely parallel procedures affirmed by SCOTUS for reviewing death penalty cases reviewed under federal law. George proposals are a giant step in reducing the delay to automatic appeal.
B. Nature of Research Project
   i. Reviewing Fed. Habeas Corpus petitions by CA inmates in federal district courts who had received state court judgments entered many years ago.
   ii. Many commentators blamed state and federal courts for intolerable delay in resolving death penalty cases.
   iii. Question to answer: Is that fair to blame CA Supreme Court and Federal Court system for delay? Or should we look to other branches gov’t to solve delay?
   iv. Motivated by Chief Justice George’s comments on dysfunction of death penalty system—CA Legislature has failed to “adequately fund” capital punishment.
C. Contents of Article
i. Identified each procedural step where delay is occurring in reviewing capital cases.
ii. Recommendations to reduce delay and resolve challenges to death penalty judgments
iii. Listed 20 steps that cause delay in processing death penalty judgment before CA Supreme Court and in habeas review in federal system.

D. Today’s Presentation
i. Focus on problems involved in appointment of counsel in state and federal habeas corpus proceedings.
ii. Also address urgent need to reduce CA Supreme Court backlog of hundreds of cases by authorizing appellate courts to review automatic appeals from a death penalty judgment and to require petitions for habeas corpus be filed in trial court, not in Sup. Ct.
iii. Review of denial of habeas corpus petition filed in Superior Court should be by appeal to Appellate Court.
iv. Sup. Ct should have discretionary review affirming judgment of death or denial of habeas relief by trial court.
v. Unusual procedure in CA is that writ of habeas corpus can be filed in any court as initial proceeding, trial court, appellate court, or Supreme Court.
vi. At present, CA Sup. Ct. pays for funding of counsel on habeas and investigation only if it is filed in Sup. Ct.
vii. Hopeful that CA Sup. Ct will reconsider and propose to have habeas petitions filed in trial court.
viii. Trial Courts every day decide evidentiary and other issues. Sup. Ct not equipped to do habeas review.

E. Statistical analysis as of Jan. 19, 2006
i. Avg. delay in appointment of counsel is 3.3 years.
ii. In announcing proposal to seek amendment to CA constitution, Chief Justice George cited 80 cases fully briefed and awaiting calendar for oral argument.
iii. I have studied the 80 cases and have done an analysis of these cases.
iv. Avg. time for appointment of counsel in these 80 fully-briefed cases is 4.2 years. That’s almost 1 year more than the 3.3 years back in 2006.

F. Challenges
i. Chief says it’s difficult to find qualified lawyers to represent death row inmates.
1. I suspect that if hourly rate were increased to avg. hourly compensation for lawyers paid in private sector with similar skill and knowledge to handle complex Federal constitutional questions, who understand rules of evidence, and the relevant SCOTUS decisions.

2. Recommend that CA Legislature fund clinics in law schools to train law students and lawyers to specialize in direct and collateral review in death cases.

   ii. Avg. length of time between judgment entered by CA trial court and date automatic appeal is fully briefed in 80 cases is now 10.4 years.

   iii. If you consider 6.2 years that elapse between consideration of state and federal habeas corpus applications, delay in finally resolving death penalty appeals and habeas petitions in 80 cases will remain approximately 17 years.


      a. If they deny Ramirez’s pending state habeas, review of his case will take another 8 years.

      b. If Ramirez’s attempts to overturn his conviction fail or succeed, he will spend approximately 25 years on death row.

   2. Clarence Allen last to be executed in CA on Jan. 17, 2006. He was on death row for 23 years.

   iv. As of date I finished research...

      1. 30 persons have been on death row for more than 25 years.

      2. 119 have been more than 20 years.

      3. 240 have been more than 15 years.

      4. 408 more than 10 years.

      5. These alarming statistics support Chief Justice George’s statement in LA Times that “7 justices of CA Supreme Court no longer can handle the State’s death penalty workload. We need a change to empower Courts of Appeal to review automatic appeals in death penalty cases.”

G. Contrast time involved in CA death penalty review system with a high profile death case in a different part of the country—Oklahoma City bombing case.

   i. Timothy McVeigh charged in Fed Court with 8 counts of 1st degree murder.
ii. Trial commenced on April 24, 1997.
iv. Jury returned verdict on June 2, 1997 and penalty phase started on
June 4 and concluded on June 12, 1997.
vii. McVeigh filed direct appeal same day. This is a federal crime
filed in federal district court of appeal. Notice of appeal filed in
US Court for 10th Circuit, same day sentence was pronounced.
viii. Motion for appointment of counsel on Aug. 29, 2007. Court
allowed appointment 7 days later.
ix. Transcript of trial filed Aug. 28, 1997—fourteen days after filing
of notice of appeal.
x. On Sept. 26, 2007, Ct. of Appeal granted motion to appoint 2nd
counsel.
xi. Record on appeal, consisting of 359 volumes, filed on Oct. 20,
1997, slightly more than 2 months after notice of appeal was filed.
xii. McVeigh opening brief filed on January 16, 1998 and appellees’
brief filed on February 6, 1998.
xiii. Reply brief filed on Feb. 23, 1998, slightly more than 6 months
after notice of appeal filed.

1. Contrast that with 11 years in fully briefing an appeal in
CA Sup. Ct.
xiv. McVeigh case argued and submitted on April, 28, 1998 in 10th
Circuit, slightly more than 10 months after notice of appeal filed.
xv. 10th Circuit Court filed decision on Sept. 9, 1998, less than 14
months after notice of appeal filed.
xvii. SCOTUS denied cert. under discretionary review on Mar. 8, 1999,
less than 2 years after judgment of death pronounced.
xviii. McVeigh filed motion to vacate conviction and sentence pursuant
to 28 USC 2255, Federal habeas corpus.
xix. Motion for new trial in front of trial judge began on March 6,
2000.
xx. Motions denied Oct. 12, 2000, seven months later.

1. Avg. time at same time in CA for disposition of habeas
corpus petitions would have been 6.2 years.
xxi. McVeigh elected not to appeal denial of §2255 motion to Court of
Appeals.
He was executed June 11, 2001 after spending less than 4 years on death row.

H. Returning to CA System
   i. Avg. time for disposition on automatic appeal of case that is fully briefed, in the 80 cases mentioned by Chief George, is 10.4 years.
   ii. If you take 6.2 year avg. that will elapse between consideration of state and federal habeas proceedings, there is a delay of at least 17 years.
   iii. Petitions for HC relief should be filed in Superior Court, rather than before CA Sup. Ct. This court is not equipped to conduct trials to resolve disputed questions of facts regarding whether condemned prisoner’s federal constitutional rights have been violated.

I. Recommendations for changes in CA law
   i. Petition for HC relief must be filed in Superior Court where person convicted.
   ii. Superior Court required to file opinion summarizing credible facts and statement of reasons supporting order.
   iii. Appeal from Superior Court decision should be filed in CA Appellate Court.
   iv. Appellate Court required to publish opinion setting forth basis for its decision
   v. CA Sup. Ct empowered to grant discretionary review of decisions of CA appellate courts.

J. Cause of more than 6 year delay in review of habeas corpus applications by CA condemned prisoners that are filed in the Federal District Court.
   i. Condemned prisoner has right to challenge his conviction in state or federal court based on alleged constitutional violations.
   ii. Counsel appointed to represent condemned prisoners are paid $145/hour and must investigate facts not brought out at trial with limited amount of money.
   iii. If state habeas petition denied in State Court, then condemned prisoner may file petition for habeas relief in Federal Court.
      1. In most cases, two lawyers are appointed by Fed Court who did not participate in State habeas proceedings.
      2. Fed lawyers must investigate every federal constitutional claim asserted by client.
      3. Federal District Court authorized to award funds to pay cost of investigating federal constitutional claims.
a. Amount paid to lawyers at federal courts are confidential.
b. On Defenders’ Services Committee of US Conference, one job was to review amounts paid to lawyers. In one of these cases, the amount to investigate one of these claims exceeded $1 million; many are close to $500,000.

4. If these claims were not exhausted before the CA Supreme Court, that are discovered by the lawyers appointed at Fed Court, the Fed Court must stay and abey consideration of the exhausted federal constitutional claims while the appellant returns to the CA Supreme Court to exhaust new claims.

a. 70% of cases filed in federal district court are sent back to CA court b/c of unexhausted Federal Constitutional claims.
b. Why are those claims unexhausted? In my view, it’s because of limited money going to State habeas counsel to investigate claims.
c. Time involved in the investigation of federal claims and the gathering of evidence to support exhausted claims is averaging more than 6 years in the federal court, and where the court claims are exhausted in 70% of the cases, you tack on two more years. It’s 8 years when there are unexhausted claims that sit in federal court.
d. Add this to the time that it took for the automatic appeal, that gets you well over 17 years.

iv. We can reduce delay in habeas proceedings by creating a new agency comparable to CA Attorney General’s Office.

1. Agency funded by Congress and State of CA and given sufficient funds to investigate and exhaust all federal constitutional claims in CA court system.
2. That would provide, if same lawyers can present same claims in State and Federal Court, the continuity of representation that Chief Justice was talking about.
3. Upon denial of relief by trial courts, appointed counsel under this suggestion could change the cover page of the petition and file an application in the federal district court asserting all the claims that had been thoroughly investigated.
K. Questions
   i. JVD: any idea of cost of recommendations?
      1. No exact amount.
      2. There isn’t a lot of information on the costs of the death penalty. In 1988, the Sacramento Bee looked at cost to house people on death row.
         a. According to Bee, it cost $140,000 per year to house people on death row.
         b. If you lopped off 10 years of this unconscionable delay, that’s a lot of money to pay counsel.
         c. It also costs a tremendous amount of money to separate inmates in prison system. Money can be saved there by shortening that time.
   ii. Hersek: Unconscionable delay sounds like a moral issue, which we are not covering. Confused by article—each of the 20 steps laid out in article are identified as a place of delay. You mention a six month delay in getting a reply brief. To file a reply brief in a capital case, where the opening brief is about 400 pages, six months does not sound like a delay. It sounds like the amount of time it should take to reply. How did you determine how long those steps should take as a matter of course?
      1. Reason I spent time talking about McVeigh case is to show that in a case with over 200 victims and 360 volumes of transcripts and clerk’s records given to court, it took the 10th Circuit 13 months to make sure that counsel filed their briefs on time. The briefs were lengthy and there were request to file more than the 100 page minimum the Court had suggested. And the Court granted those requests. Notwithstanding, it was done in 13 months.
      2. I use that example to point out that it can be done, even in one of the worst capital cases that occurred in the US
      3. Hersek: your view is that a six month period of time to file a reply brief in a death penalty case that has a several hundred page brief is delay that is inexcusable?
      4. There may be exceptions. If a lawyer wanted to have more time, he would file something to justify that. What I think has happened, because of the delay, there is no hurry if an attorney wants more time. If you look at the 80 cases that are fully briefed, and Chief Justice George says they’re hearing 20-25 cases per year, that’s 4 years from now before
they can handle the 80 cases under the present system. So no hurry to push the attorneys…

5. Hersek: Chief spoke in terms of administration of his court and what he believes is necessary for his Court. And your focus is on the delay in the system. I appreciate distinction. If we are talking about each of these steps in CA containing delay, Chief’s proposal would add an additional layer of litigation, that’s not present in the current death penalty system, after the review by Courts of Appeal, e.g. my office, with 130 death penalty cases, would have to, in each case we receive an unfavorable result, would have to file a petition for review, to preserve the issues for federal review, identifying the claims that we’ve made, how the court of appeal identified them, how the court of appeal addressed them, what factual and legal errors we were making. Under George’s proposal, there’s an additional layer of litigation. Under your proposal, there are two additional layers of litigation. Not only would one be litigating in the Superior Court, then there would be a new layer at the Court of Appeal plus the petition for review to the Supreme Court, in order to exhaust at the Federal level. So I can see in five more years, a new article pointing out that 24 steps, not the 20 you pointed out, where there is additional delay. That is a concern of mine.

   a. Not sure it would work that way. Take direct appeal that goes to CA Court of Appeal
   b. In my proposal, Court would have to issue an opinion in every case and would have to address each issue and state its reasons for denying the federal constitutional claim. Yes, there would have to be a petition filed pointing out where the CA Court of Appeal erred. One thing I need to talk to the Chief about is the distinction between petition for review and a review and summary reversal when there is no error—that sounds a lot like discretionary review to me. That’s the only place where we disagree, perhaps slightly. If I understand correctly what he is saying, I don’t really see much difference.
   c. In terms of habeas corpus, our system seems crazy to file originally in Supreme Court which is not capable
or have the time to hold a trial to determine credibility. Has to appoint a judge to take that role and then review report of referee.

d. It seems more sensible to have case go back to trial judge, who is experienced in credibility determination, and who knows the case because he presided over it.

iii. JVD: with delays enumerated, what kind of constitutional claims are defense counsel apt to make with respect to delays, cruel and unusual punishment? There’s been some argument, from Supreme Court members, that are not dealt with. Today, we’ve had 15 executed in CA, but 5 times have died by suicide or violence within the institution.

1. If you’re asking me about cruel and unusual punishment, because of length of time….
2. I point out in my article that Justice Stevens and Breyer have voted for cert on these cases, and these cases have taken far less than the cases are taking in CA.
3. SCOTUS is divided on this issue currently.
4. House of Lords in England says 7 years is cruel and unusual punishment to keep people on death row.
5. All I try to point out in my article is that it’s an issue that the Supreme Court may take up some day. When they see that 30 people have been on death row more than 25 years and over 100 for more than 20 years, they may well decide someday, unless we do something to decrease unnecessary delay below that.

iv. Laurence: Difference between the description of McVeigh case, what I see and what Michael Hersek was talking about is his defense counsel did nothing but McVeigh’s appeal during that time period?

1. Yes
2. Laurence: And a substantial amount of legal assistance was paid for, paralegal, etc.? The question that Hersek poses about the person in the AG’s office taking 6 months to reply is because that attorney has more than one case. If we had resources to do McVeigh type case, what would CA pay to have that type of justice system?
3. If AG doesn’t have enough deputies to file briefs in timely fashion, Governor and Legislature should address that, if
they want to have a death penalty. I would say the same thing for the State Public Defender’s Office. I know the budget has been cut, rather than augmented. Also in the HCRC. It’s difficult to understand—if you profess to believe in death penalty, you in effect create a de facto Life without possibility of parole (LWOP).

4. Primary concern for writing article is for those people in death row who think they have a federal constitutional claim, or think the evidence was insufficient to prove their guilt, or think they have mitigating circumstances that were not properly addressed, and to have that person sit for 17-25 years before final resolution is intolerable.

5. Others who seek to not have death imposed, but do not have a viable challenge on guilt, they have what they are looking for—a de facto LWOP. It’s the first group that troubles me greatly.

v. JVD: we had talked to Rand corporation about doing an in-depth study of cost of death penalty. We found it was difficult to get information b/c it’s not kept in useful ways. We have passed on Rand because they could not get that information. But you have compiled much of that information. Thank you very much.

IV. Hon Gerald Kogan, former Chief Justice, Florida Supreme Court, and Co-Chair, Death Penalty Initiative, the Constitution Project

A. Introductory Remarks—my experience with death penalty over 40 years as an attorney, judge at trial level, and justice on supreme court.

i. Early in career, I was assistant state attorney in Miami-Dade, Florida, assigned to the homicide and capital crimes division.

ii. One of the duties of prosecutor in those days was to go to scene of homicide. I’ve seen more than my share of dead bodies at homicide scene. I’ve had experience of talking to friends, victims, family about homicides; prosecuting cases in court, asking juries to return death penalty; in other cases, when I became chief prosecutor, to instruct prosecutors to ask juries to return death penalty

iii. When I went to private practice, I defended many people charged with capital crimes and sweated out many a jury deciding about conviction and the punishment of death.

iv. After that, I became a Circuit Court Judge in the Criminal Division and I presided as a trial judge over capital cases, making the
excruiciating decision in several cases, whether I would sentence accused to death.

v. I then served on Supreme Court in Florida. While we did not have as many capital cases at the CA Supreme Court, I can tell you that the capital cases made up about 3% of entire caseload, but most of the justices spent almost 50% of time dealing with these particular cases.

vi. So this is a situation that is not unique to the State of California. It is also prevalent in many other states throughout the US.

B. Issue: What is it going to cost us, in the State of California, to take care of the backlog?

i. You’re never going to have enough money to handle the cases the way they should be handled.

ii. Why?

1. Taxpayers don’t want to pay increased taxes
2. Public officials don’t want to raise taxes to pay for this.

C. Issue: How can we narrow the number of death penalty cases that come into the system?

D. Preparatory Comments

i. Fla. Supreme Court wrote 80 opinions a year dealing with capital punishment cases, on initial appeal, habeas, or other intermediate petition.

ii. We noticed that Florida, like California, is diverse, split up into distinct geographic regions. Same thing applies to capital cases.

1. If you are in Miami-Dade, a place with a high volume of cases, the death cases are minute compared to the overall case load.

   a. Why? The prosecutors, by seeing so many cases, are able to differentiate which cases ought to be death cases and which ought not.

   b. Only the worst of the worst are death cases.

2. If you are in Milton, Florida, population of 5,000, every case where a homicide takes place is 1st degree murder and prosecutor always asks jury to return death penalty.

iii. Proportionality: how do we make a uniform description of what cases ought to be capital cases and what cases ought not to be capital cases. This is the most important task of the Supreme Court, making that distinction between what is really a death case and what is not.
iv. We’ve been at it for many years and have been able to cut down on the number of cases we have.

1. Procedurally, immediately upon the trial court entering guilt judgment and death sentence, the trial judge immediately appoints an attorney to represent that defendant on appeal—no waiting. Either private counsel or public defender.

2. Initial appeal proceeds smoothly, within 6 months to a year it’s ready for oral argument.

3. After the oral argument takes place, if the court affirms conviction, then the State has set up an agency to deal with this.

4. Agency called Capital Collateral Representatives Office
   a. to represent people on death row in all post-conviction matters that they may have (after Sup. Ct. has entered affirmation of particular sentence).
   b. These lawyers, paid by State, become highly experienced. They range from young to old.
   c. They work out a system with Governor’s office. They work with Governor’s office to find out which death warrants will be signed. The Capital Collateral Representatives go to work on those cases first.

5. All of this takes much less time than here in California.
   a. Astounded after hearing two judges talk about delays.
   b. Once Governor indicates to Collateral Capital Representative that death warrant will be signed, they can be prepared in less than a year to argue that case in Sup. Ct. of Florida.
   c. Delay is not in briefing, but in whether Governor will sign death warrant or not.
   d. Machinery moves quickly as soon as warrant is threatened to be signed.
   e. Collateral Capital Representatives is similar to the savings of having in-house counsel vs. a corporation always hiring outside counsel.
   f. They even go so far as to represent these defendants in federal court.

6. We too have people sitting on death row for 25 years or more. It’s not because of briefing, but because Governor’s haven’t signed death warrants.
E. On capital situation as in any criminal case, there is a front-end and back end.
   i. Court is on back-end. The front-end is the law enforcement and prosecutors making decisions on which cases to try as death cases.
   ii. Special Circumstances—these determine who is death eligible.
       1. Then there are Aggravating and Mitigating Circumstances. These must be applied in considering whether or not a defendant will be sentenced to death or not.
       2. Special Circumstances deal with a person’s eligibility to receive the death penalty. There are over 33 special circumstances in California.
       3. That is unfathomable. The problem is in the front-end of the system. There are too many people eligible to receive the death penalty.

F. Death Penalty Initiative of the Constitution Project
   i. Initially started by Georgetown Law Center to prevent wrongful executions.
   ii. I am one of three co-chairs. The other two chairs are:
       1. Charlie Baird, former judge of Texas Court of Criminal Appeals. He has had plenty of experience on capital cases.
       2. Beth Wilkinson, one of the prosecutors from the McVeigh case. Beth, in closing argument to jury, asked to have him sentenced to death.
   iii. Others involved with Committee
       1. Bill Sessions, head of the FBI under both Reagan and George H.W. Bush and Chief Judge of Federal Court in Texas.
       2. Numerous prosecutors, public defenders, law professors, victims’ advocates.
   iv. All looking to make sense of capital crimes and death penalty in this country.
       1. Some people on Commission are morally opposed to death penalty.
       2. Others believe there is a moral justification to death penalty.
       3. All are looking for solution to quagmire of system that is the death penalty.

G. Statistics on Cost in Florida, from 10 years ago
   i. Butterworth, State of Florida AG, suggested that it cost State of Florida for each capital case where death penalty imposed, $5
million from arrest until execution. It costs us only $600,000 from arrest to incarceration for life w/o parole.

ii. Since those were the values 10 years ago, we must assume that these figures are increased due to inflation.

H. If you are going to have a death penalty system, the only way to meet tremendous financial demands and the aggravation that goes with it, is to do something about front end.

i. All Commissioners have been given a copy of the Mandatory Justice report.

ii. This is the second report we put out. The first report was put out prior to that time.

iii. Bottom Line Recommendation of Report: Reserve capital punishment for most heinous offenses and most culpable offenders.

1. On p. 10 of Mandatory Justice Report, there are five instances in limiting types of crimes and persons that ought to be the subject of the death penalty.

2. Once that happens, the backlog will be solved and the feeding process will be slowed at the front-end by not having as many cases.

I. While I left the Supreme Court of Florida, while I was on the Court, in 12 years, there were 28 people executed in Florida.

i. I believe CA has only had 13 people since capital cases have been re-instituted.

ii. The two systems differ as far as carrying out what the law requires. Florida has had over 60 or 70 cases.

iii. The great majority of the 28 executions while I was on the Court I voted to affirm.

iv. Since then, there’s been only a handful of people in the 10 years since he’s been off the Court.

1. Reason: the Governors have failed to sign death warrants.

2. Jeb Bush only signed 2-3 death warrants during those years.

J. Final Comments

i. Briefs

1. Limit these to 100 pages in Florida. On occasion, these can be increased 25-50 pages.

2. More writing in brief, less chance for appellate judge to absorb it all.

ii. Transfer of death cases to intermediate appellate courts.
1. This is a difficult thing to do. If you’re going to be the highest court in the State, you should have the final say on the most important decision on whether someone should live or die.

2. Six appellate courts in CA—situation will arise where conflicts will arise between decisions of various intermediate courts, not only conflicting with CA Sup. Ct. in other cases, but with each other.
   a. These cases will go to Sup. Ct.
   b. With six courts of appeal making decisions, you will not speed up, but slow down, the process.
   c. There will now be two layers of appeal.
   d. Not sure how SCOTUS will rule on this.

K. Questions
   i. JVD: why don’t Governors sign death warrants?
      1. Some disagree with death penalty, so they don’t sign.
      2. Since middle of 1990s, the advent of DNA makes Governor’s less likely to sign death warrants. DNA only applies to a small portion of death cases where biological evidence is found.
         a. Before we had DNA testing, we assumed everyone convicted was guilty.
         b. Now, we are starting to second guess earlier conviction, because DNA only applies to a small number of cases. What happened to all the people sitting on death row, who may have been innocent? Some of those people were executed.
         c. For people who were wrongfully convicted but still imprisoned, you can always acknowledge the mistake, release them and pay them. But when we execute, there is no recourse.
         d. The possibility that innocent people could be executed has weighed heavily on the minds of the Governors.
         e. NJ completely abolished death penalty.

3. Issue here is if you are going to have a death penalty, how are you going to provide safeguards to prevent innocent people from being convicted? And should you concentrate on the most heinous crimes and culpable people, cutting down the front-end?
ii. Streeter: One of the things that struck me in your remarks was the feature of having Executive sign a death warrant.
   1. In CA, Executive participates in Clemency process here, which is virtually non-existent in California.
   2. According to Judge Alarcon, a meaningful clemency process existed under Gov. Pat Brown.
   3. Could we have a structural reform that could provide meaningful participation by the Executive?
   4. What are the standards that Governors in Florida have applied? For example, do Governors with differing views on the death penalty come in and sign plenty of death warrants all at once?
   5. JVD: Death warrant process sounds like another way to use Clemency process
   6. Kogan: there really isn’t a system with the death warrant process. It’s not about who’s on death row the longest.
      a. Ted Bundy’s execution was expedited.
      b. The day he was executed, there were 51 people on death row who had been on death row longer than Ted Bundy.
      c. The Governor moved Bundy to the front of the line.

iii. Hersek: can you briefly explain the post-conviction proportionality review in Florida, how it operates, what its principles are?
   1. Generally raised by appellate attorney, that death penalty in this case is not proportional to other death penalty cases.
   2. They will cite, in their brief, cases under proportionality standard that were reversed as not rising to level of death.
   3. Every case is reviewed for proportionality. If not, you could have people committing heinous crimes in Dade County not being sentenced to death and people up in the panhandle getting into a drunken brawl in a bar in a small town, where someone falls and hits their head and dies of the punch. That person might get sentenced to death in the small county. That seems out of proportion.
   4. Proportionality ensures continuity among counties, so that very heinous offenders are not spared the death penalty and that less culpable do not receive the death penalty.
   5. See p. 41 of the Mandatory Justice report for the five examples of special circumstances
      a. Murder of Police Officer
b. Murder of any person at a correctional facility

c. Murder of two or more person, regardless of whether deaths are part of same act or several related or unrelated acts.

d. Intentional murder involving infliction of torture

e. Murder of a person who is under investigation for or who has been charged with or who has been convicted of a crime that is a felony, i.e. kill a witness—you get executed.

6. These are a threshold. If you meet these, then jury is instructed that they can consider death. If they don’t meet these, then the judge cannot let the jury consider death.

iv. JVD: would these be mandatory eligibility factors? Would judges have discretion, if none of these are present, to send it to the jury?

1. You can do whatever you want in the law.

2. We recommend that you make these, or some other factors, mandatory.

v. Uelmen:

1. What is historic reversal in Florida death cases?

   a. Higher than most Courts because of proportionality

2. Are Florida justices elected?

   a. No.

   b. Judicial nominating commission interviews applicants which are reviewed by Governor. Governor appoints, not subject to confirmation by State Legislature.

   c. One year later, they then go on a six year merit retention basis.

   d. Yes votes generate another six year term, until at 70 you are constitutionally senile.

   e. After 70, you can be appointed as a senior judge.

vi. Ridolfi: Post conviction delay in CA is connected to difficulty in accessing public records. How does Florida deal with this?

1. Public Records Act allows for that to happen.

2. Procedures that are followed will require public agencies to make information available.

3. Ridolfi: what about defense attorney inability to access files in possession of police and prosecutors?

   a. There is an open file system where defense can get hold of materials.
b. There are also depositions in criminal cases allowed in Florida. This is a way to get material.
c. Plus you have *Brady* case law.

V. Prof. Larry Marshall, Stanford University, founder of Center for Wrongful Conviction at Northwestern University. See “*Less is Better: Justice Stevens and the Narrowed Death Penalty*” in the Fordham Law Review.

A. Implicit in everything that’s been said today, there is a set of imperatives critical in administering a fair and just death penalty.

i. These are derived from central themes that flow from death penalty jurisprudence of US Supreme Court, CA Supreme Court, and basic shared values of morality and decency that we all share independent of our views of the morality of a death penalty.

ii. We all agree that if there is to be a death penalty, certain core principles and certain imperatives need to be valued and safeguarded.

iii. If we cannot provide those safeguards, if we cannot muster the funds necessary, if we are in a budgetary system where the headlines read that school funding is slashed, and the voters and Governor are unwilling to fund it, then we can’t have a death penalty when the option is a death penalty that can’t comply with these central imperatives.

B. Imperatives

i. Ensure accurate outcomes
   1. not only with respect to innocence/guilt
   2. but with respect to death worthiness and the sentencing function

ii. Ensure that death sentences are not impacted by the issue of race of defendant or victim

iii. Ensure that death sentences are not impacted by poverty of defendant and the quality of counsel or lack of such at various stages of proceedings.

iv. Death penalty not be imposed arbitrarily, not a strike of lightning based on geography, politics, or idiosyncrasies of individuals.

v. Must be administered effectively, sensibly, and in a reasonably timely manner.

vi. If that can’t be done because resources aren’t there to make it happen and protect all those other imperatives, we simply can’t have a death penalty.

C. A system such as ours that is committed to protecting against these vices needs (inaccuracy, race, arbitrariness, poverty, extended proceedings that
don’t benefit the victims, accused, or society) to maintain a robust set of safeguards:

i. Allocation of necessary resources—both for defense and prosecutorial function as well as investigation.

ii. Maintain a system at trial, appeal, and post-conviction in which cases receive robust and probing inquiry consistent with the magnitude of what is at stake: death. Death is different from any other sentence.

iii. Systemic safeguards against issues of race, poverty, inaccuracy, arbitrariness

D. All speakers agree that CA system is dysfunctional, choking under burden of the largest death row in history

i. Stems in large part from inadequate funding
   1. affecting quality of counsel and
   2. timeliness of proceedings

ii. Court system is overwhelmed leading to delays and inability to conduct proper inquiry.
   1. It would be one thing to have extended delays that resulted in full, meaningful assessment of the habeas record, where there had been evidentiary hearings and they went to federal court with findings of fact and the like.
   2. What’s ironic is that we have extended delays, unprecedented in any state, and yet the product is also unprecedented in how minimal it is, how we have post-card denials as opposed to full, complete, and thorough analyses.
   3. This means that we’re just pushing the delay further into Federal Court where those reviews have to happen.

iii. Notwithstanding these delays, our system has not succeeded in removing the vices of race, poverty, and arbitrariness
   1. Eg. Unlike Florida, meaningful proportionality review is not conducted in this state.
   2. Is this a product of the impact of race, poverty, and arbitrariness or not?
   3. One of the ways you get to that is through proportionality review, looking at all cases that are death eligible and determine why one case gets death and another death eligible case does not.

E. Three basic options for dealing with dysfunctional system

i. Abolish the death penalty
1. It is the position of this commission to tell the Governor and the people of CA that if they want this enormous penalty of magnitude, they need to put money into it.
2. If it can’t be funded, then it shouldn’t happen.
3. If we can’t afford it, Commission must say so.

ii. Put the massive resources, in the tens of millions of dollars, into the system that would be necessary for a fair administration of it.

iii. Narrow the scope of the death penalty to the point where the worst of the worst, the ones in which there is a public clamor for death, e.g. Timothy McVeigh, that those would still go forward, but we could protect against the above-mentioned vices. And this would reduce the numbers.

F. Narrowing function preserves death penalty
i. Solution of narrowing, as opposed to changing courts of review and adding tiers of review, will solve problem.

ii. Understand impetus for earlier proposals, but at some level they are re-arranging the furniture on the Titanic

1. It’s a question of who will do what, not how are we really going to tackle these problems and create safeguards for imperatives we spoke about
2. They would require massive additional funding
3. They don’t speak to quality of counsel and vices mentioned above.

4. Great fears about earlier proposals
   a. If Commission simply recommends Chief’s proposals, it would be looked at as a solution, which would be an easy fix and will not focus on real issues.
   b. With 105 judges, instead of 7 justices, the visceral sense of proportionality, which is at least done by the 7 justices, will be lost. These judges will see one case every couple of years.
   c. So much will turn on the random assignment of panels to a case. Unlike the 7 justices, we have more randomness in the assignment of judges and juries.

G. Chief says the Court will still review for error
i. Before we assign case to court of appeals
ii. And after Court of Appeals has case
iii. One of two things will happen:
   1. Review won’t be as robust as Chief suggested
iv. Or it will be that robust and we’ve just added another tier of review and added further delay.

H. Narrowing is attractive because it addresses the imperatives mentioned above
   i. With respect to risk of error, both in guilt/innocence and on sentencing, if number of cases are narrowed, there is more time and more energy to dedicate to smaller pool of cases.
      1. Judges don’t have to look at 600 cases
      2. they can look at a dozen or two dozen of the worst of the worst, and give those the timely review that is necessary.
   ii. Minimize possible racial discrimination.
      1. Studies of race discrimination have shown that when you look at death penalty cases across the board, you see a definitive impact from race, especially race of the victim.
      2. Those studies have also shown that when you isolate death penalty to worst of worst, when you don’t have a huge net of 33 special circumstances, race evaporates as a factor.
         a. Cases are so heinous that prosecutors will seek them across the board and juries will impose death across the board.
         b. That’s the Timothy McVeigh story. What does it look like when numbers are so small that attention really can be focused on individual cases where public cries out for death penalty?
   iii. The same is true with respect to issues of quality of counsel. If you have fewer cases, our problem of where do we get the lawyers evaporates.
   iv. The same is true of resources. We can take resources currently in place, not add to them at all, diminish the denominator, we can now afford to give the time of attention and investigation to these cases to make them fair.
   v. Timeliness issue also evaporates over time, when the backlog is transitioned.

I. When Commission studies this issue and considers narrowing statute, the backlog and breadth of statute goes hand in hand. Commission should, upon reflection, tell people of CA one of two things:
   i. There aren’t the resources in place to have a death penalty in this State, or
ii. More in terms of the breadth of the death penalty is in reality leading to less executions, less safeguards, ultimately leading to a symbolic sense of the death penalty.

VI. Prof. Steven Shatz, faculty at USF law school; area of teaching and writing is criminal law. Studied the issue of death eligibility for the last 10 years. Read in conjunction with testimony and attachment.

A. Death eligibility is focus. Two empirical studies of death eligibility in CA
   i. one a five year statewide sampling study of appellate murder conviction cases
   ii. The other, a 23 year trial court study of murder cases in Alameda county.

B. Results of research from both studies—putting numbers on earlier points by Kogan and Marshall
   i. SCOTUS—two constitutional principles limiting scope of death penalty statutes.
      1. Can’t define so broadly to create a substantial risk of arbitrariness
         a. Court held this in Furman.
         b. Principle that’s been repeated by Court—if you create too broad a death pool and take too few people out of that pool, it will inevitably lead to arbitrary results.
         c. Legislatures must genuinely narrow death eligibility so that juries impose death on substantial proportion of those who are death eligible.
      2. Death penalty is disproportionate punishment for average murder.
         a. Reserved for murders characterized by “a high degree of brutality or depravity,” according to Justice Scalia
         b. Or as characterized by Justice Souter as “reserved for the worst of the worst.”
   ii. Does CA genuinely narrow the death eligible class and reserve the death penalty for the worst of the worst? No and no.

C. Background on CA Death Penalty
   i. 1978 Briggs initiative, Proposition 7, created present death penalty law.
      1. It was explicitly not drafted to meet either of the SCOTUS concerns.
2. Proponents’ ballot proposition argument stated: “The Legislature’s weak death penalty law does not apply to every murderer. Proposition 7 would.”
3. Goal then was to apply the death penalty to every murderer.
4. Opponents stated that the law was intended to produce the toughest in the country, inflicting death on the most number of defendants.
5. This is at odds with the concerns of the Supreme Court.

ii. Breadth
1. Begins with breadth of 1st degree murder in California—there are 21 ways a killing can be 1st degree murder.
2. Attachment #1 lists the forms of 1st degree murder
3. Briggs Amendment listed 27 separately enumerated special circumstances.
4. Three subsequent initiatives have only broadened that statute.
   a. There are now 33 separately enumerated, special circumstances for 1st degree murderer to be death eligible.
   b. One, the “heinous, atrocious, and cruel” circumstance, has been held to be unconstitutional. It continues to appear in statute. AG’s office still thinks it’s valid.
5. CA scheme is certainly the broadest in country. That was intent of drafters and they have succeeded.

D. Comment on doing empirical research on death penalty in CA
i. It’s difficult. No agency collects information necessary to evaluate what is going on, even most basic information is unavailable, e.g.:
   1. Numbers of persons charged with special circumstance
   2. Numbers of person for whom the DA’s sought death penalty

ii. At the beginning of Alameda County study, we could not obtain an accurate list of whom they had charged with murder during the study period.
   1. Five computer runs came up with masses of data.
   2. Error rate was 10-15% in data given by prosecutor’s office.
   3. If you can’t start by finding out the names of the people charged with murder, there’s no way of finding out what happened to them afterward.

iii. Empirical studies draw on different data from different sources covering different time periods.
   1. They come to consistent results.
2. I’m not a statistician. Studies are not a sophisticated statistical analysis of CA death penalty.
3. Instead looked at more than 800 murder cases in each data set and counted the number of cases where defendant was death eligible and number where defendant was sentenced to death.
4. Findings are in two charts in attachment.

E. Findings—see chart in attachment
   i. One or more of special circumstances was found in more than 90% of cases where 1\textsuperscript{st} degree murder conviction occurred, excluding juvenile. In short, if you’re an adult convicted of 1\textsuperscript{st} degree murder, 9 out of 10 adults were death eligible and could have been charged with death penalty.
   ii. Using current death sentencing rate, looking at five year period 2002-2006, the percentage of convicted 1\textsuperscript{st} degree murderers sentenced to death is 4.1%.
      1. If 90% of adults are death eligible and only 4.1% are sentenced to death, then we are selecting roughly 4.8% convicted death-eligible 1\textsuperscript{st} degree murderers for the death penalty.
      2. We are selecting 1 in 21 death eligible convicted first degree murderers for the death penalty.
   iii. Conclusion: when 90% of adult convicted 1\textsuperscript{st} degree murderers are death eligible, it is clear that we are making death eligible the average murderer.
      1. There’s no way to have a penalty applied to 90% of the class and say we’re not capturing the average murderer.
      2. Where fewer than 1 in 20 death eligible defendants are now being sentenced to death, there is no escaping the fact that the death penalty, to use Justice Stewart’s phrase is being wantonly and freakishly imposed.
      3. Those numbers support Judge Kogan and Prof. Marshall’s comments.

F. Conclusion
   i. Must narrow death eligibility, not only because that will lead to more efficient use of resources and a better, faster, more effective death penalty, but because the present system to lead to more efficient use of resources, but b/c present system is too arbitrary, when 58 District Attorneys’ Offices and thousands are juror are picking 1 out of 21 people with no further guidance as to who
should get the death penalty, it has to be arbitrary. It’s not even-handed justice.

ii. Which of the special circumstances should go?
   1. General consensus among death penalty researchers that certain kinds of murders are worse than others.
   2. Constitution Project named 5 factors.
   3. Professor Baldis, who is the person who has done the most research on the death penalty over the longest time, came up with a list of six:
      a. Multiple Murder
      b. Murder with prior murder conviction
      c. Contract killing
      d. Police victim murders
      e. Extreme torture murders
      f. Sexual assault with particular violence
   4. Would anything in data show what CA prosecutors and juries think are the worst and most deserving of death?
      a. See last attachment for sketch of findings.
      b. Grouped most commonly occurring special circumstances with other similar special circumstances.
         i. You can’t look at 33 variables; it’s too difficult, so I reduced to four. You can disagree with groupings.
         ii. 18 of the specials are not included on the chart b/c they appear so infrequently in actual cases that it’s not statistically relevant to include them.
         iii. In my four groups, I have:
            1. People who committed multiple murders and prior murders
            2. People who also caused serious injury in the course of murder (torture, rape, and other sexual assaults)
            3. Ordinary theft-related felony murders (robbery, burglary, carjacking)
            4. Ordinary premeditated murders (lying in wait and murder from an automobile)
      iv. If you look at jury verdicts over the last twenty years:

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1. if you are in one of the first two groups (killed more than one person or inflicted serious injury in course of murder), you were four times as likely to get death penalty than if your murder involved a robbery or burglary.

2. You almost never get the death penalty if your murder involved lying in wait or murder from a car.

5. What does this say?
   a. First step in narrowing analysis would be to get rid of those 5 special circumstances. Those are not used.
   b. If you did eliminate those 5 special circumstances, you would reduce death-eligible pool by 60-65%, allowing for benefits of Prof. Marshall enumerated.

iii. In addition to reducing number of special circumstances, there are two more narrowing options for the death penalty:
   1. Restrict, as 1977 Death Penalty Act did, to persons who intentionally killed.
      a. CA is in minority of death penalty states in applying to people who did not intentionally kill.
      b. CA is one of only 6 states to impose death penalty for negligent or accidental killings.
   2. Restrict to actual killers.
      a. Number of accomplice/non-triggerman people who are sentenced to death is very small.
      b. During the 23 year period of the Alameda County study, there were 48 death penalty cases and only two were non-triggermen and those two were involved in contract killing, people who hired someone else to kill.

G. Narrowing death eligibility is not a panacea for the problems with the death penalty.
   i. There are other problems. Narrowing might not even reduce the risk of arbitrariness.
   ii. It’s a necessary first step. As long as we’re making 90% of our murderers death eligible, it will inevitably lead to arbitrariness.

H. Questions:
   i. Laurence: on your last page where you look at the 5 that were most frequently imposed, would your recommendation not to delete
only the 5 but also the 18 special circumstances that so rarely come up in cases?
   1. The 18 rarely came up in the cases.
   2. Don’t just eliminate the 5. Those 5, at a minimum ought to go.
   3. This is not a fully-fleshed out solution. It’s just something I’ve studied and an obvious first step.

ii. JVD: what about Constitution Project listing?
   1. I ran their factors against CA cases, by using parallel special circumstances. The specials are not exactly the same; theirs are more narrow.
   2. If you look at our cases for parallel factors, the Constitution Project factors would reduce death-eligible pool by 80%. That would really shrink the death-eligible pool.

iii. JVD: if you require an intent to kill where they have an “actual” killer option, changing in that simple way, what would that do?
   1. It would reduce the death-eligible pool.
   2. I don’t know by how much.
   3. In doing the counting and looking at cases and asking whether the case was death eligible or not, the nice thing about the CA statute is that the specials are clear. It’s easy to make that determination.
   4. When you look case by case as to whether the killer intended or not, that’s more subjective.

iv. Judge: in your research with respect to killing of police officers, were you able to distinguish between the new and old law where a 2nd can get you LWOP? If a jury knows that the person can get LWOP even with a 2nd, is there a change in dynamic?
   1. No. I was drawing data in the end from 1st degree cases.
   2. 2nd degrees that become LWOP are off the chart.

VII. Prof. Mike Radelet, Professor and Chair of the Dept. of Sociology at University of Colorado. Read with testimony to Commission and article from Santa Clara Law Review on The Impact of Legally Inappropriate Factors on Death Sentencing for California Homicides, 1990-1999
A. Introductory Comments
   i. Joined faculty in 2001 after 22 years at the University of Florida.
   ii. Included among publications is a study done on race and death sentencing for the Racial and Ethnic Bias Commission of the Florida Supreme Court in 1991.
iii. Also did a study for Governor George Ryan and the Ryan Commission in IL in 2003 on race and death sentencing in IL.
iv. Done studies in 4 different states for the ABA Death Penalty Moratorium Project
v. All work, including today’s presentation, is done with Glenn Pierce at Northeastern University.
vi. On a board of directors of a group in Colorado of families of homicide victims where murder has not been solved.

B. Study in Santa Clara Law Review examined death sentencing in California in 1990s.
   i. 60% of CA population is white, 12.5% Asian, 6.7% African American. Hispanics can be either black or white, as Hispanic is an ethnic term. They are about one-third of the population.
   ii. California leads the nation in the number of homicides with about 2500 in 2005. During the 1990’s, they averaged 3400 annually.
   iii. Race of homicide victims in CA: 38% of victims Hispanic, 29% African American, 28% non-Hispanic/White.
   iv. Per capita victimization rates for homicides in CA also differ significantly by race.
      1. During 90s, homicide rate was 8 times higher for African Americans than whites, and
      2. About 3 times higher for Hispanics.
   v. There have been 13 executions in CA since 1972
      1. 10 inmates were convicted for killing whites
      2. 1 for killing Latinos
      3. 2 for killing Asians
      4. No one has been executed for killing an African American and no white person in history of CA has been convicted for killing an African American.
   vi. Basic mystery
      1. Whites are 28% of homicide victims
      2. 77% of those convicted were convicted for killing whites.
      3. We focused on who was sentenced to death.
   vii. Setup of Study
      1. Identify all defendants sentenced to death in CA from 1990-1999.
      2. Difficult to collect this data.
         a. For last 30 years I’ve collected information on every Florida death penalty case.
i. In Florida, there have been more death penalty cases than in CA—about 1200 in Florida, 400 hundred on death row.

ii. In Florida, the probability of having death sentence thrown out by Supreme Court is higher than it is in CA. We also track Florida cases where death cases are thrown out and then it’s remanded to new jury in new court.

iii. Collect information on defendant, victim, and sentencing memo where aggravating and mitigating circumstances are found in these 1200 Florida capital cases. They’re stored in a computerized file cabinet in Tallahasee.

iv. At the touch of the button, we can tell you how many cases had what aggravator and how many cases had what mitigator.

v. On my web page, there is a 200 page document listing every mitigator ever found in a Florida capital case.

b. We don’t have this in California.

i. First six months to find out who had been sentenced to death in California was difficult.

ii. CA Dept. of Corrections publishes a little bit of information on each homicide case, but not much—and no information about each victim.

iii. California Appellate Project has private files about who was sentenced to death and characteristics of crime, information about people sentenced to death who are no longer on death row, and some information on race/ethnicity of victims.

iv. We ended up buying death certificates for victims to double-check what the ethnicity and race was.

c. One of my suggestions is about collecting more data.

3. Assembled a set of homicide to compare to

a. Primary source was data FBI published called supplemental homicide reports with information on gender, sex, ethnicity of defendant and victim, and
characteristics about homicide, such as multiple victim homicide, accompanying felonies, etc.

b. Data incomplete, with 2% error rate. Cross-checked with Office of Vital Statistics in CA. Every death due to homicide in that Office, although defined slightly differently, is a great source for this data.

viii. Results

1. Overall, 302 death sentences handed down for homicides committed during this 10 year period.

2. Death sentencing rates varied considerably by race/ethnicity.
   a. 1.75% of those suspected of killing whites were sentenced to death, followed by .47% of those who killed blacks and .37% of those who killed Hispanics.
   b. In other words, during 1990s in CA, those who killed white were 3.7 times more likely than those who killed blacks and 4.7 times more likely than those who killed Hispanics to be sentenced to death.

3. How can that be?
   a. One possibility is some kind of subtle bias or racism. Nobody is arguing that prosecutors intentionally “Nifong-ed” innocent defendants—not arguing intentional racial bias by prosecutors.
   b. One possibility is that homicides against white victims are more aggravated than homicides against black or Hispanic victims.

4. To answer question, we divided homicides in CA into three groups
   a. homicide a multiple victim or in conjunction with other felony
   b. If both aggravators were present
   c. Neither of those circumstances present?

5. Analysis at each level of aggravation to look at race/ethnic effects
   a. When neither of the aggravators were present, the odds of a death sentence for those who killed whites were 7.6 times higher than the odds of death sentence for those who killed blacks
   b. The odds of a death sentence were 11 times higher for those who killed whites than those who killed Hispanics.
c. At lowest levels of aggravation, the racial disparities were the largest.
   i. When one aggravator was present, either the multiple murder or the accompanying felony, the odds of a death sentence were 2.3 times higher for those who killed whites than those who killed blacks, 2.9 times higher for those who killed whites than those who killed Hispanics.
   ii. When both aggravators were present, the odds were still 2 times higher for those who killed whites than those who killed blacks and 1.6 times higher for those who killed whites than those who killed Hispanics.
   iii. Overall, strongest racial and ethnic differences in death sentencing were observed among the least aggravated homicide cases.

   a. Half counties have no death sentences.
   b. Some counties like San Diego and Los Angeles had very low death sentencing rates, even though LA puts a lot of people on death row. The proportion of number of homicides to number of death sentences is still pretty low.
   c. Riverside, Santa Clara, and Orange had higher rates than state average.
   d. Rates can vary considerably with new prosecutors in the office. What may have been true in the 90s might not have been true in the 80s or today.

7. We’re left with challenge of figuring out why regional disparities exist.
   a. We could not examine potential impact of differences in county prosecutorial offices.
      i. In Florida, we looked at race of decision-makers in death penalty cases.
      ii. Some counties in Florida have more Hispanics and blacks involved; others tend to involve all whites.
      iii. We were not able to analyze this in CA.
iv. For homicides in 90s, death sentencing rates are highest in rural counties with low population densities and conversely lower in urban areas with high population densities.

b. Examine racial and ethnic make-up of county
   i. For each of the 58 counties according to 2000 census, what proportion of county population is white?
   ii. Some counties are pretty white and others are diverse.
   iii. We rank-ordered that and compared to death sentencing rates for counties.
   iv. Counties with highest proportions of whites had highest death sentencing rates.

c. In explaining these geographic variances, race matters.

8. Finally, we combined all these variables into one statistical model called Logistic Regression—examines simultaneous effect of all these predictor variables, which ones are strongest and which ones drop out.
   a. Odds of death sentence reduce greatly with fewer aggravators present.
   b. With similar levels of aggravation, the odds are 67% lower of death sentence for killing a Hispanic and 59% lower for killing blacks than for killing white victims.
   c. Odds of receiving a death sentence are 40% lower in racially diverse counties than in counties where population is more white.

9. Study supports the argument that both race and ethnicity of victims in California do play an important role of who gets sentenced to death, even doing some rough controls for the level of aggravation.
   a. This doesn’t tell us the reason why that disparity might exist.
   b. Could be that people are bigots.
   c. Could be more political pressure on prosecutors offices for certain types of homicides than others.

C. What does all this mean? Mandate of Commission is to find out if death sentencing is equitable.
i. Something needs to be done about Data Collection

1. There should be systematic collection of data of all homicides and all death sentencing. Different ways to do it:
   a. Cheap Model—basic information about victim: race, ethnicity, social class, heinousness of offense, description of homicide
      i. In Florida, it’s been useful to collect info on racial make-up of jury or racial make-up of prosecutor’s office.
      ii. Not done in CA
   b. Broader death penalty database would also include factors such as:
      i. Aggravators in a given case
      ii. Special Circumstances found
      iii. Information about change of venue

2. Get information about how much death penalty costs!

3. Information about where disparities enter system
   a. In mid 70s when CA re-enacted death penalty, 79% of homicides were cleared by arrest.
   b. By 2005, the clearance rate dropped to 62%.
   c. These are national statistics.
   d. A much stronger deterrent would be increasing the probability that a perp would be apprehended for committing the offense.
   e. In Colorado, families of murder victims want to abolish death penalty and use funds to further cold case investigations. It went through Committee, but did not make it through full Legislature.
   f. Don’t know if racial disparities in death sentencing are caused by prosecutorial charging patterns or by race differences in the probability that a suspect will be identified.
      i. To the degree that police need cooperation of community in solving a crime, it could be that homicides with black and Hispanic victims are less likely to be solved than homicides with white victims because family and friends of the former are less likely to comply with police.
   g. Interesting to look at racial composition of jurors and amount of publicity devoted to this topic.
D. Questions

i. Craig: Is there a comparison of race of the perp with race of victim in coming to conclusions?
   1. It’s on the last page of the appendix, which has tallies where we breakdown the race of the defendant and race of the victim.
   2. The data shows that where white person is killed, there’s 1.9 death sentences per 100 white suspects, 3.4 death sentences per every 100 black suspects, and 1.9 for every 100 Hispanic suspects.
   3. Given the race of the victim, the odds of a death sentence increase with every black and Hispanic offender over white offenders.
   4. We put that in the appendix to reduce the number of numbers in the text.
   5. Overall, the race of the victim is the big story.

ii. Uelmen: when we examined causes of wrongful convictions, the number one factor was misidentification, and it’s more of a risk in cross-racial situations. If in fact cross-racial cases is where there is the most prevalent use of the death penalty, does it follow that the risk of wrongful conviction based on misidentification would be higher in death penalty cases than it would be in other types of cases?
   1. No. I’ve been doing research on wrongful conviction for 20 years.
   2. We published a list in the Stanford Law Review. In those cases, we did not find the major cause to be erroneous identification in homicide cases because the best witness is dead.
   3. Number one cause of error in homicide cases is perjury by prosecution witness.
   4. Reasons why that might be, especially if person was involved in case. There’s also a sub-set of jailhouse informants.

iii. Moulds: could the disparity in race of the deceased be explained by the fact that rural counties in CA are populated heavily by white people?
   1. Most of the death sentences don’t come from rural areas.

iv. Streeter: Could you provide a wish list, as a sociologist, of data we ought to collect?
1. Collect all data you have money to collect.
   a. Even with no money at all, you can collect basic minimal information about each death penalty case, e.g. special circumstance, aggravators, supplemented with questionnaire to attorney about whether they are public defender, court appointed, or private counsel, the racial make-up of jury, and whether plea bargain was offered.
   b. Given LWOP, which went into Florida in 1993, more people plead guilty, waive mitigation, ask for death, and waive death appeal in Florida. In US, 12% of those executed ask for death; would rather be dead than have LWOP.
   c. Send questionnaire to defendant and get information about family background, what person’s life was like before, and priors. This is double-checked. I do this for free.

2. A better model would be to get info on race/ethnicity of victim.
   a. We did it through death certificates that were purchased in CA.

3. For true proportionality review, it’s not only looking at within the death penalty cases, it’s looking at equally aggravated cases where death was not pursued or they plea-bargained it out.
   a. So if you have a little money, I recommend all 1st degree murder cases.
   b. If you have a lot of money, you could go back and get information on all homicide cases. Sometimes they settle out for 2nd degree murder.

v. JVD: Clearance rate dropped from 79% to 62% in 2005. One of the strongest bits of deterrence is apprehension. What do you associate with this drop?
   1. Over-pressured police departments have many crimes to investigate
   2. Victim cooperation—issue of police-community relations to break the “do not snitch” culture.
   3. In 1960, clearance rate was 92%. It went down significantly.
4. Changing nature of homicides makes investigations more difficult to solve.
   a. Talking to homicide victims, they are frustrated when their phone calls are not even returned.
   b. Victims have problems getting information from police. This is because the police are over-taxed.

VIII. Prof. Ellen Kreitzberg, Director, Death Penalty College, Santa Clara University School of Law,
A. Issued report and appendices to Commission on a review of special circumstances in CA Death Penalty cases.
B. Introductory Comments
   i. Been at SCU since 1988, had contact with first death penalty case in 1982.
   ii. Seen progression in different parts of country with death penalty cases.
   iii. Trained lawyers at the trial level on handling death penalty cases.
C. Research
   i. On behalf of Commission, I examined specific aspect of CA death system: use of special circumstances
   ii. Three issues:
      1. What kind of data are available in CA?
      2. How have special circumstances been imposed on a statewide basis in death penalty cases?
      3. Initial look as to whether or not the special circumstances provision in the death penalty statute performs the narrowing function that you’ve heard about from other speakers, the narrowing function that makes the statute constitutional and that the Supreme Court said was necessary under Furman, Gregg, and other cases.
D. Summary of How Special Circumstances Work
   i. Three decisions made in death cases:
      1. The question of guilt or innocence, at the first trial
      2. Whether or not a special circumstance is present.
         a. In report, there is the list of 33 that exist in CA.
         b. If finding is made that special circumstance is present, that case is then eligible for the death penalty.
      3. In CA, the case proceeds to a second trial, where the selection decision is made—the jury evaluates the mitigating and aggravating circumstances to decide whether the death penalty is warranted in this case for this offender.
ii. This study looks at stage 2
   1. there’s already been a conviction for 1st degree murder.
   2. Whether or not a special circumstance is present

E. Scope of Research
   i. Overview of death penalty statute from 1977-2007
   ii. In 1977, a law was passed by Legislature initiating a death penalty statute.
   iii. A year later, in 1978, the Briggs Initiative went before the voters and changed dramatically the death penalty statute.
   iv. We took the data from 1977, but those cases have been decided under a different statute.
   v. Our current death penalty statute is the growth and reincarnation of the 1978 statute with initiatives that have broadened it along the way.
   vi. Although we have a statewide death penalty system, and a lot of our assessment and evaluation of proportionality and fairness within the system, we really have a county by county system.
      1. Individual district attorney offices are responsible for coming up with criteria to decide, of all the 1st degree murder cases, which cases they will file special circumstances in and proceed with the death penalty.
      2. In Shatz data, most 1st degree murder cases will fall within one of the 33 special circumstances. Difficult to find a 1st degree murder outside of those 33 special circumstances.
      3. Huge discretion at level of DA to make decision on which of those 1st degree murder cases to file special circumstances in.
         a. Guidelines for making decisions are policies of DA’s offices.
         b. No law requiring them to be made public.
         c. Most times they are not made public.
         d. Some individual DAs offices have gone public with them.
         e. Any decisions made by DAs offices are not reviewable by Court, except on broad constitutional grounds.
         f. Essentially we have 58 decision makers, one in each county. Within each office, they may decide to use a group to handle these cases, but that’s the prerogative of the District Attorney.
vii. Since 1977, a sentence of death has been imposed in 44 of 58 counties. On pgs. 27-28 of my full report, as well as on a map on p.29, I list the counties and how many sentences of death from each county.
1. We started out looking for sentences of death imposed that were imposed based on the Office of Corrections listing of capital sentences that were imposed.
2. The CDC lists defendants based on county in which death sentence was imposed.
3. Crime may occur in one county but be tried in another county, e.g. San Mateo has a large number of these cases.
4. The list reflects the sentences of death that were imposed in that county and does not reflect all of the sentences of death that originated in that county.

F. Data Collection
i. To collect the data, we needed to find who has actually been sentenced to death.
ii. Given the enormity of the procedure we’re engaging in, I was astounded by dearth of data to evaluate what is happening in system.
iii. If we talk about implementing a system that will be both accountable to the public, because it’s the citizens of CA in whose name this exercise is being done, and a system that is transparent so that citizens can see and review what’s happening, the death penalty system in CA is neither transparent nor accountable to the public.
iv. It’s very difficult to collect data, even that is part of the public record.
   1. We were trying to seek data about names of defendants sentenced to death, the special circumstances that were imposed in cases in which sentences of death were filed. This should be publicly available information in the court file….IF you can get a hold of that court file.
   2. We’re not looking for personal or subjective evaluations of DAs.
   3. No state agency systematically collects or maintains the data. And we don’t have a professor Radelet to collect this information like he does elsewhere.
v. We went through three different efforts to collect data:
1. In person efforts, where we went to the courthouse—not in every county
2. telephone communication
3. on-line searches

vi. We started by trying to find all the cases where special circumstances had ever been filed and then be able to trace those cases along the way to see where the cases fell out whether by plea, special circumstances withdrawn by the DA’s office, whether the case was dismissed or reduced to 2\textsuperscript{nd} degree murder, all the way through sentences of death.
   1. It became clear fairly early that there was no humanly possible way to track the cases where special circumstances were filed and later dropped out along the way.
   2. Shatz didn’t go into detail, but you can see the number of students it took just to sit at the Alameda courthouse to collect information in one county over a limited period of time.
   3. We quickly moved away from that into just trying to track the cases in which sentences of death were actually imposed.
   4. Just finding the name of every individual sentenced to death in CA became a difficult task
      a. The CDC list was missing names
      b. The California Appellate Project had names
      c. We went to private attorneys and habeas counsel

vii. We came up with a total number of people sentenced to death, but it may be missing one or two.

viii. Spoke with public defenders and prosecutors about death information
   1. Most offices on either side had not kept systematic records of number of people who had received death sentences since 1977.
   2. Some offices had kept informal lists.
   3. Some were starting to track information.
   4. No sense of keeping track of info in a systematic way.
   5. Many offices are trying to move in that direction, but we’ve lost a lot of information from over the years.

ix. When we compiled names and compiled the special circumstances, we decided to look at which special circumstances are most frequently imposed.
   1. I have a list of special circumstances in full report.
2. If we look overall in the 30 year period, we find that Felony-murder robbery was found as one special circumstance in 58% of the 796 cases.
   a. 796 cases became our number of cases in which we could locate special circumstances. There’s over 800 sentences of death total.
3. The second most frequently found was 41% for multiple murder.
   a. No specific data on circumstances of cases, background, or aggravating factors like Radelet did for his smaller sample.
   b. One thing we should note is that of both of the special circumstances that were found most frequently, neither require a showing of intent to kill in order to satisfy special circumstance.
   c. That’s not to say that in many of those cases an intent to kill wasn’t present or proven by extraordinary evidence.
   d. Problem with special circumstances in CA is that there is no way to differentiate those felony-murders which were egregious cases where there was an intent to fill from those that were really not much more than an accidental killing
4. The next three special circumstances with greatest frequency were also within the felony-murder provision—felony murder rape, burglary, and kidnapping. These were present in 22, 16, and 12% respectively.
5. Looking at Mandatory Justice factors of the Constitution Project
   a. They recommended a hypothetical statute that presumed to narrow those cases eligible for the death penalty to a set of 5 special circumstances.
   b. We tried to figure out which of the CA special circumstances would fit into the Constitution Project’s 5 mandatory factors.
   c. There isn’t a one-for-one correlation.
   d. If there was any doubt whether a CA special circumstance might fit into a Constitution Project mandatory special circumstance, we put it in.
i. E.g. we took CA’s two special circumstances of multiple murder and prior murder and included them in the Constitution Project’s multiple murder special circumstance.

ii. We were over-inclusive because the Mandatory Justice report also says that in any multiple murder provision, there must be a showing of a defendant’s intent to kill.

iii. CA does not require that, so some of those cases would not have been included in the Mandatory Justice factors.

iv. Therefore, our numbers of which CA cases actually satisfy the Mandatory Justice factors is over-inclusive.

e. If we just use mandatory justice figures and look at 796 sentences of death, 42% of those cases would have been eliminated from the death penalty.

i. This ties into our question about “what do we do about backlog?”

ii. This gives a sense of what our numbers in CA would be like in the future if we used the Constitution Project’s mandatory special circumstances.

iii. 42% of our current death cases would not be included as death eligible.

f. This is on a statewide level. We then broke it down, county by county (p. 54-55 in report)

i. If the Mandatory Justice factors applied in San Mateo, it would only decrease those cases by 22%.

ii. Were they to apply in Sacramento, 60% of their death penalty cases would no longer be death penalty cases.

g. There does appear to be a trend in CA—the percentage of cases falling outside the mandatory justice figures are decreasing.

i. It appears statewide that the sentences of death that are being imposed are tending more to fall into the Mandatory Justice factors (see p.53 and 56 of report)
ii. We looked at 14 counties that had the largest sentences of death.
   1. Contra Costa, in the last 5 years, have 60% of cases outside the Mandatory Justice Factors.
   2. Orange County = 60%, in the last five years.
   3. San Diego = 56%, in the last five years.
   4. Ventura = 100%, in the last five years.

x. Like Professors Radelet and Shatz, I admit that there are limitations on this data. But I will make some recommendations based on what we’ve got.

G. Observations

i. We need more data—a centralized data collection of cases, not limited to just cases where sentences of death are imposed.
   1. True proportionality review of death penalty cases means you review all 1st degree murder cases relative to the cases in which defendants are eligible for death to the cases where sentences of death are actually imposed.
   2. You need the full panoply of cases to do a true proportionality of review to determine whether we are imposing sentence of death based on the aggravation of the murder or if we are imposing death based on constitutionally impermissible factors mentioned earlier.

ii. Examination of death penalty statute because of unfathomable breadth of special circumstances
   1. Assess the manner in which the breadth of the statute increases the risk of arbitrary inflictions of sentences of death and breadth of statute going to risk of convicting an innocent, that race will play a factor, and other inappropriate factors.
   2. Broad statute may lead to conviction of innocents.
   3. Assess statutes for disparities between counties. While we will probably not move away from a county by county system, the death penalty is imposed by the State and we ought not tolerate major disparities between the counties.

iii. Examination and elimination of felony murder as a death eligible criteria.
   1. At a minimum, follow the Constitution Project requirement that an intent to kill must be shown.
2. That was part of the 1977 statute when Legislature carefully considered it. The Briggs Initiative took that out.
3. Felony-murder is one of the ways in which the statute becomes extraordinarily broad.
4. Currently the death penalty includes unintentional killings.

H. Conclusion
i. Imposing and carrying out sentences of death is the most serious business a state can conduct.
ii. We cannot pass the buck from prosecutors to juries to judges to the Legislature and so on. Each one of us in the State needs to be accountable.
iii. For accountability and transparency and to be responsible in how we’re applying the death penalty system, we need to collect data and fund research to evaluate how the system is being administered.

I. Questions
i. Uelmen: if we had adopted a death penalty statute that had the 5 “worst of the worst” Mandatory Justice Report factors, about 42% of the death penalty sentences we currently have in death system would no longer be in the system?
1. Correct, probably more.
2. We were over-inclusive.
3. Instead of having 670 people on death row, we would have about 390.
4. Uelmen: If we change our statute and narrow it to the Mandatory Justice factors, would that have to be applied retroactively?
   a. No research on this.
   b. There has not been a decision made that the death penalty statute in CA is unconstitutional and therefore the death sentences were unconstitutional.
   c. As I understand this approach, CA is looking at, for a variety of reasons including logistical, practical, and fundamental reasons, our ability to administer a fair death penalty and to change the approach to seeking sentences of death.
   d. On that basis, I don’t see specific correlation to these recommendations and prior sentences of death.
5. Uelmen: what about simple justice? Would we continue to execute people who would no longer be eligible for the death penalty?
   a. Whether we would choose to deal with the earlier sentences of death is a second issue.
   b. There are many questions to evaluate as matters of simple justice. These are barely the beginning questions.
   c. As a constitutional matter, I don’t think my recommendations will invalidate earlier death sentences, although someone needs to take a look at that.
   d. As a fairness matter, this Commission is charged with the looking at the “fair administration of the death penalty” and they may want to take up your question separately.

ii. Campbell: there was a period of time, 1983-1987, when felony-murder specials and multiple murder specials did require an intent to kill, didn’t they?
   1. Yes.
   2. In the 1977 statute, it did. Then there was a brief period of time where intent was returned.
   3. That’s why I was over-inclusive in my calculations.
   4. Out of the 58% still within the Mandatory Justice Factors, there are some more that might come out.

iii. Streeter: One of ways in which the phrase “proportionality review” is not often used is in the context of charging decisions. What about involving AGs office in screening process at the front-end and charging it with the kinds of collection of data that you describe?
   1. Two questions: the collection of data and whether the AG ought to have some type of screening role in deciding on a statewide basis that the charging decisions made by the 58 DAs are consistent in some respect.
   2. This suggestion is not all that different from the system employed by the Federal system. There is an existing model that can be looked to and modified in terms of statewide oversight.
   3. I suspect that would not be warmly embraced by District Attorneys.
4. JVD: Major difference is that US Attorneys are under the control of the Justice Department and county District Attorneys are all independently elected. It would be difficult to have that part of it. On the other hand, the data collection process is one of the principal functions of AG’s office. AG could work with local offices on data collection and that would fall in the purview of that office.

5. Because of issue of subjectiveness of discretion and because I suspect it unlikely that the District Attorney’s Office would support any centralized decision, the narrowing of statute becomes that much more important.
   a. Some counties are narrowing the statute by their own accord, other counties are not. As personnel change, the counties may switch their roles, who is and who isn’t.
   b. If you want statewide conformity, the first step is to create a statute that limits discretionary ability because it provides fewer choices for a DA to make.
   c. On data collection, I think AGs office could be helpful. Every time a 187 (code for a murder case) is filed, a file could be opened electronically. We could track these murder cases right through the line, when are special circumstances filed, when are they released, are they resulting in plea bargains, etc.
   d. Once they get into the Court, every time a case with special circumstances arise, a clerk could send a form to a centralized component. We don’t have time here to detail models, but David Baldis has created models in NJ, PA and other states for data collection, if the Commission were interested in some ideas on how this data collection could occur.
   e. Lawyers are generally the worst people to ask b/c they don’t understand it, but there are good models out there.

iv. Totten: On 42% that would not meet mandatory factors, absent evidence of torture, a person who murdered a child after molesting a child, or a person who murdered a rape victim after raping them, would not be included in the Mandatory Justice factors?
   1. Yes, felony-murder provisions would not be included. So if it’s rape-murder, it would not be included.
2. The point you raise is important; that’s why I was over-inclusive because I thought it would be offset by rape-murder if it was torture. Often the torture circumstance would be included in a provision in CA.

3. This is where under-reporting comes in, although I think it errs on the side of over-inclusiveness.

4. There are probably some felony-murders where they chose only to file felony-murder circumstance because it is easier to establish. They could have charged torture or some other special circumstance.

5. Bottom line is that the Mandatory Justice factors are one example, adopted in IL and MA, to try to find the most heinous. They did look at torture and examples like the ones you raised and found that they would still come within death penalty criteria.

v. Hersek: did you notice any difference during the 1983-1987 period where intent to kill was required?

1. See Table D3 on p.34 of report where we break down special circumstances and how they were found into 5 year increments.

2. If you look at primarily 1983-1987, you still see multiple murder showing up in 57 cases, which is by far the most frequently found special circumstance.

3. The pattern didn’t break dramatically in any of the five year increments.

4. We didn’t formally do any statistical analysis. We just provided you with the data to make decisions.

5. Hersek: If we had proportionality review in CA, we would want that done by the Courts that consider appeals from LWOPs because those courts deal with those cases. Have you thought about that in conjunction with the Chief’s plans, if we were to adopt proportionality?

   a. We’re still trying to assess and evaluate the Chief’s plan, which is bold in recognizing the dysfunctionality of the death penalty system.

   b. It’s not clear that his proposal will do enough to evaluate on any consistent level the cases on which death is imposed compared to the cases that are not.
c. Compounded with the study by Prof. Radelet, we have to ask if some of the districts involve some of the disparities discussed earlier.

IX. Public Comment
   A. Elizabeth Zitrin, JD, lawyer on behalf of Amnesty Int’l.
      i. Death penalty coordinator for CA with 50,000 members.
      ii. Amnesty is an Int’l human rights movement and a nobel peace prize recipient.
      iii. We’ve heard that the death penalty system is “dysfunctional,” “not working,” “overwhelmed,” “a quagmire,” “choking,” “arbitrary,” “wanton,” “freakish,” “unfathomable,” “unconscionable,” “intolerable,” and simply broken.
      iv. There are 58 secret sets of criteria, minus the criteria in San Francisco which doesn’t practice the death penalty.
      v. It costs an unknown and very large amount of money.
      vi. The proposed fixes are not agreed upon. To begin to fix the system, we would need another incalculable amount of money. To what end?
      vii. The many ways that the death penalty system is not working constitute human rights violations and abuses apart from the question of the death penalty itself. These are of concern to human rights watchers, particularly to Amnesty Int’l
      viii. Questions of human rights are raised when people are sentenced to death based on their poverty, race, or location.
      ix. Violations of greatest concern are the violations of the rights of the innocent.
      x. The Commission’s very sensible reforms have been vetoed by the Governor.
      xi. CA is looking at a $14 billion deficit. What are we doing here?
      xii. We have an unknown amount of money going into a system that the Chief Justice says doesn’t work.
      xiii. How can we safeguard human rights while punishing criminals appropriately without sacrificing public safety?
      xiv. The America and the California that I believe in can do better than this, particularly when LWOP is a possibility.

B. David Lockmiller—see submitted testimony.
C. Mr. and Mrs. Amanda and Nick Wilcox—California Crime Victims United
   i. Live in Penn Valley in Nevada county
ii. We are tough on violent crime, mother of murdered daughter, opposed to death penalty.

iii. We are members of CCV and MVFR.

iv. We choose to be here today, January 10, on the anniversary of our daughter’s death.

v. 7 years ago, our daughter Laura at age 19 was killed in a rampage shooting by a severely deranged gunman. She was shot 4 times at point blank range and died instantly. She had tremendous kindness, capability, motivation, and spirit. She was a valedictorian, a sophomore at Haverford College, and in the midst of a campaign for the student body presidency. Our daughter had the brightest of prospects and was on a path to make a positive difference in the world.

vi. Message is simple: as parents of murdered child, we do not want or need the death penalty for our closure or healing.

vii. The rampage shooting was a crime that qualified for the death penalty under CA Law. We met with our DA and thankfully he agreed not to pursue death penalty. We feel that the long drawn out criminal justice process associated with the death penalty would only compound our anguish.

viii. We believe LWOP is an appropriate, non-violent alternative for holding murderers accountable and for keeping society safe.

ix. Our State cannot afford death penalty when it costs 3 times more than LWOP.

x. The money spent on implementing the death penalty should be redirected towards prevention, such as better mental health care in our case, and to victims’ services.

xi. The State Crime Victim Compensation Fund paid for our grief counseling, but funds ran out before we were ready to end our sessions.

xii. Death penalty is often justified in the name of victims. We know that our Laura would not want this broken, expensive, and violent practice sought in her name, nor do we want it in our name.

xiii. Nick Wilcox: I concur with wife in all her comments. Please take our message to heart in your deliberations.

D. Aundre Herron—member of California Crime Victims, California Appellate Project, and on national board of directors for Death Penalty Focus and ACLU.

i. Began my legal career as a DA.

iii. In 1994, my oldest brother was murdered. Despite my keen intellectual understanding of the dynamics which lead to homicide, I was unprepared for my own reaction to my brother’s death.

iv. I wanted to get a gun and roam the streets in search of his killer, although I didn’t know who it was or where I would look. Had I been able to exact the revenge I contemplated, perhaps I would be on death row myself rather than testifying before this august body.

v. It’s ironic that even with a $14 billion deficit, we can still find money to build a death chamber, to kill those who kill while claiming that killing is wrong. We can pay prison guards more than teachers and exalt state-sanctioned killing to a place of greater importance than health care and housing, than paying workers a living wage, than protecting our children, our seniors, the disabled, and the disadvantaged.

vi. Sadly, we’re getting what we paid for: more violence and less justice.

vii. The death penalty is not about justice; it’s about revenge.

viii. If we truly care about victims of violent crime, their survivors would be far better served by using public funds to pay for funeral expenses, replace lost income, obtain grief counseling, relocation, or other resources that will do far more to help them heal than offering up the corpse of the perpetrator on the altar of capital punishment.

ix. As someone who has served as prosecutor and defender, who has lost more than one family member to homicide, who has comforted surviving family members and counseled convicted murders alike, it is clear to me based on all we heard today that there is nothing that we can do which will make the death penalty fiscally tenable or jurisprudentially sound public policy.

x. If we cannot execute the death penalty with absolute perfection and fairness, and it is undeniably clear that we cannot, then we are unqualified to execute anyone at all.

xi. JVD: your first reaction was revenge. Why did you change your mind?

1. To do so would forever tie the memory of my brother to an act that was decidedly antithetical to who he was.
2. The real point here is that I understand that the sense of revenge is a legitimate emotion, but it is not a legitimate basis for public policy.

3. We denigrate our own ideals when we use revenge and we use the public fisc for the purpose of killing our fellow human beings when that will not solve the problem or bring back the loved ones that people have lost.

E. Lorrain Taylor—Founder of 1,000 Mothers to Prevent Violence
   i. Our organization provides direct services to crime victims and their families, with special emphasis on children left behind. MSW student at Cal State University.
   ii. Put an end to the death penalty and help us find better alternatives. There has to be a better way.
   iii. I Love God with all my heart and I love people.
   iv. My twin sons, Obade and Abadiah Taylor (see p. 13 on link for their story), were victims of gun violence in Oakland. While working on their car, someone drove by and shot them. Both were in college and employed. They were 22 years young, gifted children, first-born. I have one other son who is doing well.
   v. My twin sons would not want any mothers to feel the pain that their mother felt, as well as the families left behind.
   vi. I know that revenge is not justice. At my boys’ funeral, I stood up to sing a song. One of the reasons I sang was to get the mic and tell the audience that there would be no revenge.
   vii. There is not enough support for families of victims. After I lost my twin sons, I could not function. And there are mothers who can’t function. It will be 8 years on February 8th and I just got well enough to go back to school. I had an education, but I could not work because of Post-traumatic stress.
   viii. Please help mothers and children left behind with the funds spent on the death penalty.
   ix. The guy who shot my boys, as a double-homicide, is more likely to get the death penalty. I have never wanted the death penalty for that person who murdered my sons or anyone.
   x. JVD: what happened to the killer?
      1. According to Oakland Police Dept, they arrested someone but did not have enough evidence to prosecute. They did not collect DNA at the scene.
      2. They think that he came up to Sacramento and killed someone else and that’s why he is now in jail.
F. Judy Kerr—victim liaison and spokesperson for CCV.
   i. We represent murder victim families across State of CA who have lost a loved one.
   ii. For past several months, I have opportunity to share my story and listened to other stories of survivors. The range of stories I have heard has been wrenching as it has been uplifting. The CCV booklet has snapshots of the victims which have led the families to oppose the death penalty. In CCV booklet, you will find snapshots of victims’ families and why they oppose the death penalty. I urge you to consider these stories and weigh whether the death penalty serves the victims of California.
   iii. My story is in your book, but here it is briefly summarized: when I answered the phone on July 23, 2003 to be told by the medical examiner that my brother had been murdered, I was shattered and horrified. The details of his murder that I was told that night paled in comparison to the horrific description of torture that I allowed myself to read in the autopsy report. Bob’s murder was the type of crime that death penalty proponents use to justify the death penalty.
   iv. For me, the horrific details confirmed that the death penalty was the wrong response to murder. One of my first fears after learning about my brother’s death was that I would have to sit through a capital punishment trial and possibly be witness to someone else’s brother’s death. The chance that Bob’s murder might be used to justify another killing really added to my sense of victimization.
   v. I’m also concerned about the cost of the death penalty. My brother’s killer has not been apprehended. When I hear that cold case units, like the one in Santa Clara County, are being closed down for lack of funds, or when I hear that it takes 8 months to run forensic evidence in crime labs in Los Angeles County and when I hear that there aren’t even labs in some counties. When I hear that I’m more convinced than ever that the millions being spent on the death penalty need to be spent somewhere else. They need to be spent on services that get killers off the street and make us safe.
   vi. Since becoming a spokesperson for CCV, I learned that many others share this perspective.
   vii. Please read these stories carefully, listen to the many voices of victims who say that additional killing does nothing to address their needs to heal or their pain. I commend you for your efforts and thank you for all you are doing.
G. Janis Gay—Murder Victims Families for Reconciliation (MVFR)
   i. Taught middle school in St. Helena in Napa County for over 25 years, retired as a receptionist at accounting firm. On national board for MVFR and member of Death Penalty Focus.
   ii. MVFR is victim-founded, victim-led organization that represents murder victims’ families who oppose the death penalty. We have over 2000 members nationwide and 100 members in CA.
   iii. I’ve taken the day off to share with you the story of how LWOP is the answer for CA.
   iv. Several years ago, two beautiful Napa women were murdered in their home. The perp was caught and the DA was going for the death penalty. Mother of one victim did want death penalty; the other did not. Through negotiations, the man received LWOP.
   v. The mother who wanted the death penalty use to work at my firm. People around me were in favor of death penalty and knew of my work in abolition, so I didn’t say anything out of respect to people’s feelings.
   vi. When LWOP was announced however, even the strongest death penalty advocates expressed relief that there would be no more stories in the paper, that their friend did not have to see him again, that she could get along with her grieving, and that the perp was behind bars. That pro death penalty mother expressed relief to all who spoke to her.
   vii. The Commission should consider that LWOP takes the spotlight off perpetrator and frees families from suspension of death penalty trials and waiting for the execution that may not happen in their lifetimes.
   viii. LWOP allows families of victims to grieve properly and privately. It serves families and communities well.
   ix. Death penalty drains precious resources that can be used to solve crimes and fund victims’ services and for education.
   x. Replacing death penalty with LWOP would be right choice for CA.

H. Greg Wilhoit (exoneree)—survivor of death row.
   i. On May 31, 1985, wife was found brutally murdered in an apartment across from a home we owned in Tulsa. We had two infant daughters. 8 months later, police show up at my door, arrest me, and throw me in their jail in Tulsa, OK. The reason they waited 8 months to arrest me was because the perp who raped and murdered my wife had bitten her on the breast. That was the only
reason they said that indicated that I had anything to do with it at all. I hired multiple lawyers that didn’t work out. I hired another lawyer about 3 weeks before my trial. He turned out to be one of the worst falling-down drunks I’ve ever met in my life.

ii. At capital murder trial, the prosecution took 4-5 days to put on their case. Defense case took 1 day. Jury came back with guilty verdict and death penalty in same day. 30 days after this I go back for official sentencing and it’s just me, the judge, the prosecutor, and the court reporter lady. The judge says to me, “Mr. Wilhoit, you’ve been found guilty by a jury of your peers. You’ve been sentenced to death by lethal injection. If we can’t lethally inject you, we will electrocute you. If the power goes out, we’ll hang you. If the rope fails, well by God, son, we’ll just take you out back and shoot you. Well, I almost had a heart attack on the spot.

iii. The next day they sent me to McAlester penitentiary death row. Hadn’t been an execution in 32 years. But after 3 years, executions increased.

iv. One of my few friends on death row, Chuck Coleman, had 4 death sentences and that’s just the ones they could prove. I was an advocate and proponent of the death penalty my entire life. Just because I was on death row didn’t mean I was going to compromise my convictions. I didn’t think it would bother me when they executed Chuck. I thought he had it coming.

v. I was overwhelmed with grief when Chuck was executed on death row. I didn’t change the death penalty because of my situation; I changed it because of Chuck’s experience. No one was safer because Chuck was killed nor did the sun shine any brighter.

vi. I had a fine Appellate Public Defender who secured new trial on grounds of ineffective assistance of counsel. I had a new trial with a new judge, won on a directed verdict, and got out of OK. I moved to Sacramento.

vii. We as a people lack the authority to decide who lives and dies.

viii. JVD: article about Greg Wilhoit—was convicted originally on bite-mark evidence. Experts unanimously agreed later that Wilhoit did not make the bite mark. Wilhoit was on state disability for post-traumatic stress disorder, but the benefits were not enough. We’re looking at benefits for the exonerated. We hope to have recommendations out by the end of this month. There are those who are found to be factually innocent and those who are found
innocent due to procedural error, in all those cases, parolees are treated better than those who are released.

I. Barbara Hopkins—League of Women Voters of California, see testimony
   i. League of Women Voters commends CCFAJ for investigation of how death penalty is administered in California.
   ii. League supports abolition of death penalty. While we believe that it is inherently flawed and no amount of reform can make it an appropriate sentencing option, we welcome options that might mitigate some of the flaws towards its abolition.
   iii. We expect that your investigation will confirm that the death penalty is applied unfairly in CA.
   iv. Research shows that use of death penalty varies significantly in CA depending on race, county of victim, and socio-economic diversity of community.
   v. Growing number of wrongful convictions lends further urgency to find alternatives to the death penalty. These concerns led to moratorium in IL and abolition in NJ.
   vi. We believe that scarce public safety funds would be better used solving crimes and for violence prevention programs, rather than on exhaustive post-conviction appeals and carrying out of executions.
   vii. There is an alternative to death penalty—LWOP.

J. Rev. Howard Dotson—serve as associate minister at 1st Congregational Church of Los Angeles
   i. Los Angeles has, as a county, the highest number of death sentences rendered.
   ii. We have 73,000 homeless in our county. Every day in LA someone dies on the street. 50% of African-American and Latino students do not make it to graduation. 90,000 of our youth, aged 16-25, are not in school and not gainfully employed. We face a budget crisis and we look to fix a broken death system. Money could be better spent on preventative measures.
   iii. Serve on Rampart Clergy Council—15 homicides in 14 weeks.
   iv. I walked with many grieving Latino mothers. I hope that you will meet mothers of victims when you are in LA in February.
   v. They want meaning out of a tragedy. Execution of person who killed their child will not bring closure.
   vi. We have people on juries that are blinded by racism. Our system is broken. I don’t want anyone to die in my name as a California resident. I hope there is a possibility down the road that DAs are
not elected, that they don’t face pressure, and that the “tough on crime” posture is resolved.

vii. We are in company with 5 countries that still have death penalty. China executes people in the basement of hospitals. As Californians, this is the company we share. We must abolish death penalty.

K. Beth Weinberger—from Kehilla Community Synagogue in Alameda County.

i. We hope next Governor will past legislation next time through.

ii. Kehilla Community Synagogue is a congregation of 400 households in Alameda County. We oppose the death penalty for many reasons, both moral and practical.

iii. As a practical matter, as residents of Alameda County, we live everyday in communities that face rising tides of violence, including homicide, and other crimes. We lack resources for effective crime prevention.

iv. We would like to see the millions of dollars that Alameda county wastes toward over-zealous capital prosecution into investigation of crime, into looking at backlog of cold cases, and into violence prevention. We want criminals off our streets and we think LWOP is more than adequate to meet the needs of the entire community and still have funds left over to meet our other needs.

L. Frank Lideman—CA People of Faith Working Against Death Penalty, also a member of Death Penalty taskforce of Congregation Rodef Sholon.

i. CPF is statewide, inter-faith group.

ii. Most recent activity was a walk to stop executions that started in San Diego and came through San Francisco.

iii. Had an interfaith service at gates of San Quentin.

iv. Rodef Sholon is a congregation of 1500 families, approximately 4,000 members. This Commission is familiar with our groups as we have gone on record supporting CCFAJ bills.

v. On November 18, 2007, at gates of San Quentin, we had an interfaith service honoring the clergy ministering to death penalty victims and convicts on death row.

vi. Practical answer to death penalty: the Sanhedrin, the Jewish Rabinnic Court, was authorized by Torah to impose death penalty, but did not. They did not use it b/c it was subject to human error.

vii. Rabinnic Law of Sanhedrin created procedural requirements for imposition of death penalty. For reasons of underfunding and
other that CA confronts, they decided that death penalty could not
and would not be imposed.

viii. Death Penalty is not about executing murderers, it’s about who we
are who do the executing. We are not godly and we shall not
engage in godly activity. That’s the stance that many religious
groups find consensus on.

ix. Please ask yourself: can you guarantee that all procedures that
Rabinnic Sanhedrin would have required that you should require
can be met? Answer is no. John Curtain, former ABA President,
said, “A system that will take life must first give justice.”

x. This system cannot give justice. You’ve done your best. You’ve
recommended three bills twice that have been vetoed twice. Those
are fundamental reforms that need to be done and they are not.
We’re going backwards with a budget deficit. The system is broke
and we can’t fix it. The death penalty is a luxury we cannot afford.

xi. We’re making practical, not moral arguments.

M. Stella Levy—Sacramento Death Penalty Focus

i. Attorney who represents indigent juveniles in criminal appeals.
Currently the Co-director of Restorative School’s Vision Project.
We work to prevent school violence by teaching non-violent
conflict resolution through restorative justice curriculum.

ii. Curriculum elevates accountability for harmful acts. It elevates
accountability over punishment, which isn’t really true
accountability. How much does punishment require accountability
of perp?

iii. Research has shown that restorative justice and non-violent
conflict resolution reduces bullying and school violence. This
closes the gate on what is a pipeline from school to prison in this
State.

iv. Our project and similar ones have very little funding. It will be
even less, given the current budget crisis.

v. Every dollar spent on violent prevention teaching non-violence to
our youth is a dollar well spent. If we could have worked with the
young 16 year old who was arrested for the shooting of a
Sacramento police officer, that crime might have never been
committed.

vi. Compare that—the dearth spent on violence prevention—to the
amount of money spent on the death penalty.
vii. Everyone is in agreement that we are spending a heap of money on the death penalty. The Chief Justice said not only do we not know how much money we are spending, the money is not well spent.

viii. The Chief is saying we need to spend more money on it. To me, that’s just throwing good money after bad.

ix. Fair administration of justice is in conflict with the death penalty and it should be abolished.

N. Jim Lindberg—Friends Committee on Legislation (FCL).

i. FCL founded in 1952 in response to more egregious practices of McCarthyism. We have an aversion to lists.

ii. We do believe that the best way to reduce crime is to address the material, economic, and social conditions under which we live.

iii. Death Penalty expands the cycle of violence.

iv. Though we favor abolition, we do believe that violent crime must be vigorously prosecuted.

v. We are very concerned about how the survivors of murder victims are treated by the criminal justice system. Their pain and suffering is very real. We believe that needs to be validated; the state needs to do more to restore victims by providing counseling, services, and financial assistance, if needed.

vi. We do a real disservice to victims when we tell them that an execution will bring healing. To the contrary, a lengthy and contentious trial forces survivors to relive trauma over and over again. Yet, it would be a huge mistake to take shortcuts and deny defendants an opportunity to prove their innocence and receive a fair trial.

vii. The alternative of LWOP, although FCL is not enamored with it, would shorten legal proceedings and still allow defendants meaningful opportunities to prove innocence if new evidence was discovered.

viii. It’s often said that support for the death penalty is a mile wide and an inch deep.

ix. People who support the death penalty in principle have serious reservation when they begin to see how it is disproportionately applied to people of color and people with limited economic means.

x. 200+ DNA exonerations proves that the criminal justice system often gets it wrong. No reason to think that capital system is immune, especially when crime is particularly heinous and police are under enormous pressure to make an arrest.
xi. Twice we’ve seen very modest attempts to curb wrongful convictions by the Governor.

xii. We’re at a loss to see how the death penalty system can be fixed.

xiii. We spend more on corrections than we do on the California university and college system combined.

xiv. We should invest in local communities and crime prevention.

xv. LWOP is an alternative and far less costly.

xvi. We hope the Commission will recommend that the death penalty be abolished, if not on moral grounds, on practical grounds.

Conclusion of Public Hearing