# ARTICLES

# REMEDIES FOR CALIFORNIA'S DEATH ROW DEADLOCK

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## I. INTRODUCTION

The unconscionable delay in the disposition of appeals and habeas corpus proceedings filed on behalf of California's death row inmates continues to increase at an alarming rate. It is now almost double the national average. Procedural changes must be made to the manner in which death penalty judgments are reviewed to avoid imprisoning a death penalty inmate for decades before the condemned prisoner's constitutional claims are finally resolved.

This Article identifies the woeful inefficiencies of the current procedures that have led to inexcusable delays in arriving at just results in

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I would like to thank my former law clerks, Paula M. Mitchell, graduate of Loyola Law School, and Virginia F. Milstead, graduate of Pepperdine School of Law, for their energetic, thoughtful, and conscientious contributions to the research and preparation of this Article. Their work was outstanding. Any flaws in the recommendations set forth in this Article are mine.

death penalty cases and describes how California came to find itself in this untenable condition. It also recommends structural and procedural changes designed to reduce delay and promote fairness. These recommendations include: transferring exclusive jurisdiction over automatic appeals from judgments of death away from the California Supreme Court to the California Courts of Appeal; requiring that capital case state habeas corpus petitions be filed in the trial court with the right to appeal to the California Courts of Appeal, rather than filing the petitions with the Supreme Court in the first instance; providing adequate training and compensation for counsel appointed to represent indigent death row inmates; and providing continuity of counsel for state and federal habeas corpus proceedings. These changes would significantly reduce delay and promote a more just resolution for death penalty inmates and society.

## II. "JUSTICE DELAYED IS JUSTICE DENIED"[1]

In a recent interview with the Associated Press, California Chief Justice Ronald M. George stated that California's death penalty has become "dysfunctional" because the California Legislature has failed "to adequately fund capital punishment" while "death row inmates languish[] for decades at San Quentin State Prison."[2] Eleven years earlier, my colleague, Ninth Circuit Judge Alex Kozinski, commented that "we have little more than an illusion of a death penalty in this country."[3] He also noted that "the number of executions compared to the number of people who have been sentenced to death is minuscule, and the gap is widening every year."[4] Relying on national statistics compiled in 1993, Judge Kozinski reported that "[t]en years is about the average" for a death penalty case to come to its conclusion from the date of the commission of the crime.[5]

1. William Gladstone, Prime Minister, Speech Addressed to British Parliament Regarding Disestablishment of Irish Church (Dec. 1868), *reprinted in* N.Y. TIMES, May 19, 1898, at 7 (reprinting excerpts from *Gladstone's Career: Fifty Years of Public Life as a Statesman and Political Leader*) ("[I]f we be just men, we shall go forward in the name of truth and right, bearing this in mind, that when the case is proved and the hour is come, justice delayed is justice denied.").

2. David Kravets, *Top Judge Calls Death Penalty "Dysfunctional": Legislature Blamed for Inadequate Funding*, SAN JOSE MERCURY NEWS, May 1, 2006, at B4.

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

4. *Id.* at 4.

5. *See id.* at 10 (citing JAMES J. STEPHAN & PETER BRIEN, U.S. DEP'T OF JUSTICE, CAPITAL PUNISHMENT 1993, at 11 tbl.12 (1993)).

Judge Kozinski suggested that the solution to the "impasse on the death penalty"[6] would be to decrease the number of crimes punishable by death and the circumstances under which death may be imposed so that we only convict "the number of people we truly have the means and the will to execute."[7] In the twelve years that have elapsed since Judge Kozinski's article was published, the California Legislature has not implemented his suggestion. In fact, the list of special circumstances accompanying first degree murder that qualify an individual for the death penalty has been *expanded* on several occasions.[8]

Concern over lengthy delays in the processing of death row appeals is not a recent phenomenon. In 1989, the Judicial Conference of the United States formed the Ad Hoc Committee on Federal Habeas Corpus in Capital Cases to make recommendations for legislation to address "piecemeal and repetitious litigation, and years of delay between sentencing and a judicial resolution as to whether the sentence was permissible under the law."[9] The Committee determined that the nationwide average delay at that time—eight years for federal habeas corpus proceedings—was not "required for the appropriate habeas review of state criminal proceedings."[10]

In 1972, the California Supreme Court held that the death penalty was unconstitutional.[11] It also commented that, at that time, the delays suffered by those on death row awaiting review of the judgment of death were so severe that they constituted cruel and unusual punishment in violation of the California Constitution.[12] The delays the court referred to were

6. *Id.* at 28.

7. *See id.* at 31.

8. *See, e.g.*, 1998 Cal. Stat. 92 (expanding the special circumstances relating to lying in wait, kidnapping, and arson); 1995 Cal. Stat. 3557 (adding murder committed during the course of a car jacking); Proposition 21, § 11 (2000), *available at* http://primary2000.ss.ca.gov/VoterGuide/Propositions/21text.htm (expanding first degree murder to include a homicide committed to further the activities of a street gang). Most recently, on February 22, 2005, Senate Bill No. 817 was introduced to add to the list of special circumstances a situation in which "[t]he defendant intentionally killed the victim, who was under 14 years of age and the defendant knew, or reasonably should have known that the victim was under 14 years of age." *See* S. 817, 2005–2006 Reg. Sess. § 1(a)(23) (Cal. 2005), *available at* http://www.leginfo.ca.gov/pub/05-06/bill/sen/sb_0801-0850/sb_817_bill_20050222_introduced.html.

9. AD HOC COMM. ON FED. HABEAS CORPUS IN CAPITAL CASES, JUDICIAL CONFERENCE OF THE U.S., COMMITTEE REPORT AND PROPOSAL 1 (1989) [hereinafter POWELL COMMITTEE REPORT].

10. *See id.* at 3.

11. *See* People v. Anderson, 493 P.2d 880 (Cal. 1972).

12. *See id.* at 894 ("The cruelty of capital punishment lies not only in the execution itself and the pain incident thereto, but also in the dehumanizing effects of the lengthy imprisonment prior to execution during which the judicial and administrative procedures essential to due process of law are carried out."). California later reinstated the death penalty by amending the constitution to state that the death penalty was not cruel and unusual punishment. *See* Steven F. Shatz & Nina Rivkind, *The*

substantially shorter than the time of imprisonment a death row inmate must now endure, awaiting a resolution of the challenges to the trial court's judgment. In 1972, the longest term a prisoner had spent on death row was eight years.[13] Currently, the average time an inmate spends awaiting execution is 17.2 years.[14] In some capital cases, as demonstrated most recently in the cases of Richard Ramirez and Clarence Allen, the delay is much longer.

Richard Ramirez was convicted on November 7, 1989, of committing thirteen murders, five attempted murders, eleven sexual assaults, and fourteen burglaries.[15] On June 6, 2006, nearly twenty-two years after Mr.

*California Death Penalty Scheme: Requiem for Furman?*, 72 N.Y.U. L. REV. 1283, 1343 (1997). In *People v. Hill*, the California Supreme Court noted that *Anderson* no longer had any "force or effect" due to the amendment of California's constitution. *See* People v. Hill, 839 P.2d 984, 1017 (Cal. 1992). It refused to rely on its reasoning in *Anderson* to conclude that long delays violated the *federal* constitution. *See id.* Whether long delays violate the federal constitution has not yet been determined by the United States Supreme Court. *See, e.g.*, Allen v. Ornoski, 126 S. Ct. 1139 (2006) (denying certiorari on the question of the constitutionality of delay).

13. According to the California Supreme Court:

> The median elapsed time prisoners now awaiting execution in California had been imprisoned as of the end of 1968 was 20.7 months. The national median elapsed time was then 33.3 months. The California figures do not take into account prisoners who were awaiting execution at that time but who have since had their sentences commuted, judgments reversed, or have been removed from death row for other reasons. As of December 31, 1968, the median elapsed time condemned prisoners then on death row had been awaiting execution was 23.7 months. There were a total of 104 persons under sentence of death in California as of December 31, 1971. Of these, two prisoners have been on death row since 1964, five since 1965, and seven since 1966. Eight were received there in 1967, fifteen in 1968, and thirteen in 1969. Thirty-four were received in 1970 and the remaining twenty in 1971.

*Anderson*, 493 P.2d at 894 n.37 (internal citation omitted).

14. This figure is based on a comprehensive review of each death row inmate's actual docket for cases pending in the California Supreme Court on automatic appeal and habeas corpus, and in the courts of the United States on habeas corpus and on appeal since the death penalty was reinstated in 1978. The information was confirmed with data received from the California Department of Corrections and Rehabilitation as well as the California Supreme Court. The data retrieved from the inmates' dockets has been compiled into a database [hereinafter Docket Database], which is on file with the author. Information is current as of January 19, 2006. The figure reflecting an average delay of 17.2 years among prisoners executed in California excludes the delay in the execution of David Mason. David Mason was condemned to death on January 27, 1984 and was executed on August 24, 1993. Because he waived his right to seek postconviction relief, the length of time he spent on death row is not indicative of the average length of the appellate process.

15. Docket, People v. Ramirez, No. S012944 (Cal. Nov. 7, 1989), *available at* http://appellatecases.courtinfo.ca.gov/. The docket reflects the following timeline concerning Mr. Ramirez's direct appeal:

November 7, 1989: Judgment of Death Entered.

3 years, November 25, 1992: The California Supreme Court appointed counsel for his automatic direct appeal.

9.8 years, October 4, 1999: After eleven requests for an extension of time to correct the record, the record on appeal was filed.

12.25 years, March 1, 2002:After eleven requests for an extension of time to file an opening brief, Mr. Ramirez's counsel filed a 413-page opening brief.

Ramirez's violent crime spree that began in 1984, Mr. Ramirez's direct appeal of his conviction was finally argued before the California Supreme Court.[16] On August 7, 2006, the California Supreme Court affirmed his conviction and sentence.[17] Mr. Ramirez will in all likelihood file a petition for a writ of certiorari to the United States Supreme Court. Mr. Ramirez has also filed a habeas corpus petition in the California Supreme Court, the merits of which have yet to be addressed by that court. Once Mr. Ramirez exhausts his habeas corpus claims in state court, he has the right to seek federal habeas corpus relief if his request is denied.[18] Assuming he pursues state and federal habeas review of his conviction and sentence, his postconviction procedures will take at least another eight and a half years, excluding the time for the petitions for writs of certiorari before the United States Supreme Court. Should Mr. Ramirez's attempts to overturn his judgment of death prove unsuccessful, he will spend approximately twenty-five years on death row before he is executed,[19] assuming the absence of any legislative change in the present procedures.

In another capital case, Clarence Ray Allen was charged with the murder of three people on September 5, 1980. He was sentenced to death on December 2, 1982.[20] He was executed on January 17, 2006, more than twenty-five years after committing his crimes. The lengthy delays

12.75 years, August 8, 2002: After three requests for an extension of time, the California Attorney General's Office filed a 338-page responsive brief.

14.1 years, December 31, 2003: After eight requests for an extension of time, Mr. Ramirez's counsel filed a 171-page reply brief.

16.5 years, June 6, 2006: Mr. Ramirez's direct appeal was argued and submitted.

16.6 years, August 7, 2006: The California Supreme Court affirmed Mr. Ramirez's conviction and sentence.

On June 21, 2004, Mr. Ramirez filed a related habeas corpus petition in the California Supreme Court. Docket, People v. Ramirez, No. S125755 (Cal. June 21, 2004), *available at* http://appellate cases.courtinfo.ca.gov/. The docket reflects the following timeline concerning Mr. Ramirez's direct appeal:

14.6 years, June 21, 2004: Mr. Ramirez filed a habeas corpus petition in the California Supreme Court.

15 years, November 22, 2004: After four requests for an extension of time, the attorney general filed an informal response.

16 years, November 30, 2005: After eleven requests for an extension of time, Mr. Ramirez's counsel filed a reply to the informal response.

16.7 years, as of July 24, 2006: The California Supreme Court had taken no further action on Mr. Ramirez's request for habeas corpus relief.

16. *See* Docket, *supra* note 15.

17. *See* Docket, *supra* note 15.

18. 28 U.S.C. § 2254(a) (2000).

19. *See* Docket Database, *supra* note 14.

20. *See* Cal. Dep't of Corrs. & Rehab., Inmates Executed, 1978 to Present, *at* http://www.cdc.state.ca.us/ReportsResearch/InmatesExecuted.html (last visited May 10, 2007) [hereinafter Inmates Executed List].

experienced by Mr. Allen in his pursuit of appellate and habeas relief are not uncommon among inmates on California's death row and illustrate the sad state of the current review procedures.

The California Supreme Court affirmed Mr. Allen's judgment of conviction and death sentence in a published opinion on December 31, 1986, four years after the entry of the judgment of conviction.[21] The United States Supreme Court denied Mr. Allen's petition for certiorari on October 5, 1987. (At that time there were fifty-eight prisoners on San Quentin's death row.)[22]

On December 10, 1987, the California Supreme Court appointed new counsel to represent Mr. Allen in his state habeas corpus proceedings.[23] Mr.

21. Docket, People v. Allen, No. S004483 (Cal. Nov. 22, 1982), *available at* http://appellatecases.courtinfo.ca.gov/. The docket reflects the following timeline concerning Mr. Allen's direct appeal process:
November 22, 1982: Judgment of Death Entered.
1 month, December 31, 1982: The California Supreme Court appointed counsel for Mr. Allen's automatic direct appeal.
1.6 years, July 6, 1984: The record of the trial was filed. A delay was caused by four requests by the court reporter for an extension of time to prepare the trial transcripts, and two requests by Mr. Allen's appellate counsel for an extension of time to correct the record on appeal.
2 years, December 19, 1984: Mr. Allen's appellate counsel filed the opening brief.
2.2 years, February 19, 1985: The Attorney General's Office filed its responsive brief.
2.3 years, April 15, 1985: Mr. Allen's counsel filed the reply brief and a supplemental brief.
2.7 years, August 9, 1985: The State filed a response to the supplemental brief.
3.1 years, January 7, 1986: Mr. Allen's automatic appeal was argued before the Supreme Court.
4 years, December 31, 1986: The Supreme Court affirmed the judgment of conviction and the death sentence in a published opinion.
4.8 years, October 5, 1987: The United States Supreme Court denied Mr. Allen's petition for certiorari. *See* Allen v. California, 484 U.S. 872 (1987).

22. Status of Automatic Appeals filed in the Supreme Court (Nov. 22, 2005) (on file with author).

23. Docket, People v. Allen, No. S003571 (Cal. Dec. 22, 1987), *available at* http://appellatecases.courtinfo.ca.gov/. The docket reflects the following timeline concerning Mr. Allen's first state habeas proceeding:
5 years, December 10, 1987: The California Supreme Court appointed new counsel to represent Mr. Allen in state habeas corpus proceedings.
5 years, December 22, 1987: Mr. Allen's counsel filed a petition for habeas corpus relief.
5 years, December 31, 1987: The Supreme Court directed the Attorney General's Office to file an informal response.
5.1 years, January 19, 1988: The State filed its informal response.
5.2 years, February 11, 1988: Mr. Allen's counsel filed a reply.
5.3 years, March 31, 1988: Mr. Allen's counsel filed an amended habeas corpus petition.
5.3 years, April 29, 1988: The State filed an opposition to the amended petition for a writ of habeas corpus.
5.4 years, May 20, 1988: Mr. Allen's counsel replied to the opposition.
5.5 years, June 23, 1988: The California Supreme Court denied a hearing on the merits.

Allen's counsel filed a petition for habeas corpus relief on December 22, 1987.[24] The California Supreme Court denied a hearing on the merits on June 23, 1988.[25] His execution was scheduled for September 9, 1988.[26] The United States Supreme Court denied Mr. Allen's petition for a writ of certiorari challenging the California Supreme Court's denial of his petition for a writ of habeas corpus and his request for a stay of execution on September 19, 1988.[27]

Mr. Allen's state habeas corpus counsel filed an application for a federal writ of habeas corpus pursuant to 28 U.S.C. § 2254 on August 31, 1988, in the District Court for the Eastern District of California.[28] That

5.8 years, September 9, 1988: Mr. Allen's execution was scheduled for this date. The California Supreme Court denied a stay of execution on August 10, 1988.

24. *See* Docket, *supra* note 23.

25. *See* Docket, *supra* note 23.

26. *See* Docket, *supra* note 23.

27. Allen v. California, 487 U.S. 1264 (1988).

28. Docket, Allen v. Vasquez, No. 2:88-cv-01123-FCD-JFM (E.D. Cal. Aug. 31, 1988), *available at* https://www.ecf.caed.uscourts.gov; Docket, Allen v. Woodford, No. 01-9901 (9th Cir. July 6, 2001) (on file with author). The dockets reflect the following timeline concerning Mr. Allen's federal habeas proceeding:

5.7 years, August 31, 1988: Mr. Allen's state habeas corpus counsel filed an application for a federal writ of habeas corpus application pursuant to 28 U.S.C. § 2254.

5.8 years, October 7, 1988: The State filed its answer.

6 years, December 29, 1988: The State filed a supplemental answer.

8.8 years, October 31, 1991: Mr. Allen's counsel filed an amended application.

10 years, December 14, 1992: The district court stayed the proceedings and ordered Mr. Allen to exhaust certain claims in state court.

10.5 years, June 29, 1993: The district court lifted the stay in Mr. Allen's federal habeas case. The district court ordered that Mr. Allen's counsel be permitted to conduct discovery.

11 years, January 21, 1994: The state filed a motion to dismiss Mr. Allen's alleged procedurally defaulted claims.

11.3 years, April 18, 1994: Mr. Allen's counsel filed his traverse to the State's answer.

11.8 years, September 30, 1994: The district court denied the State's motion to dismiss Mr. Allen's claims.

14.3 years, April 14, 1997: An evidentiary hearing was held in the district court between April 14, 1997 and April 21, 1997.

18.4 years, May 11, 2001: Mr. Allen's application for federal habeas corpus relief was denied twelve years and nine months after it was filed and over nineteen years after he was convicted and sentenced to death.

18.5 years, June 8, 2001: Mr. Allen's counsel filed a notice of appeal in the United States Court of Appeals for the Ninth Circuit.

19.5 years, June 21, 2002: Mr. Allen's opening brief was filed.

20 years, December 4, 2002: The State's responsive brief was filed.

20.3 years, April 21, 2003: Mr. Allen's reply brief was filed.

20.5 years, June 12, 2003: The matter was argued and submitted for a decision before a three-judge panel of the Ninth Circuit.

21.4 years, May 6, 2004: The three-judge panel affirmed the district court's denial of Mr. Allen's application for federal habeas corpus relief.

court granted a stay of execution on the same date.[29] The district court stayed the proceedings and ordered Mr. Allen to exhaust certain claims in state court.[30] Mr. Allen's application for habeas corpus relief was denied by the district court on May 11, 2001,[31] twelve years and nine months after it was filed and more than eighteen years after he was convicted and sentenced to death. Subsequent appeals to the United States Court of Appeals for the Ninth Circuit and the United States Supreme Court were denied.[32]

On December 23, 2005, Mr. Allen filed a third petition for habeas corpus relief in the California Supreme Court.[33] The California Supreme Court denied this petition for habeas corpus relief and his request for a stay of execution on January 10, 2006.[34] The United States Supreme Court denied Mr. Allen's petition for a writ of certiorari on January 16, 2006.[35]

Meanwhile, on January 12, 2006, Mr. Allen's counsel filed a second application for habeas corpus relief in the United States District Court for the Eastern District of California.[36] In this application, Mr. Allen alleged that he was seventy-six years old and suffering from blindness, hearing loss, advanced diabetes, heart disease, complications from a stroke, and complications from a heart attack that left him in a wheelchair.[37] He argued that his execution after his long stay on San Quentin's death row would be cruel and unusual punishment in violation of the Eighth Amendment.[38] The

22 years, January 24, 2005: His petition for panel rehearing was denied and his petition for rehearing en banc was rejected more than three years after the appeal was filed in the Ninth Circuit.

22.8 years, October 11, 2005: The United States Supreme Court denied Mr. Allen's petition for a writ of certiorari. Mr. Allen's execution was scheduled for January 17, 2006 by the trial court.

29. *See* Docket, *supra* note 28.

30. Docket, People v. Allen, No. S031165 (Cal. Feb. 10, 1993), *available at* http://appellatecases.courtinfo.ca.gov/. Mr. Allen's counsel filed a second state habeas corpus petition in the California Supreme Court on February 10, 1993. The State filed an informal response on March 18, 1993. Mr. Allen's counsel filed his reply on April 26, 1993. The California Supreme Court denied the second habeas corpus petition on the merits on June 2, 1993. *Id.*

31. *See* Docket, *supra* note 28.

32. *See* Docket, *supra* note 28.

33. Docket, People v. Allen, No. S139857 (Cal. Dec. 23, 2005), *available at* http://appellatecases.courtinfo.ca.gov/. The docket reflects that on December 27, 2005, the California Supreme Court requested that the California Attorney General file an informal response. On January 3, 2006, the State filed its informal response. Mr. Allen filed a reply on January 6, 2006. *Id.*

34. *See id.*

35. *See id.*

36. Docket, Allen v. Ornoski, No. 2:06-cv-00064-FCD-DAD (E.D. Cal. Jan. 12, 2006), *available at* https://www.ecf.caed.uscourts.gov.

37. *See* Allen v. Ornoski, 435 F.3d 946, 950 n.6 (9th Cir. 2006), *cert. denied*, 126 S. Ct. 1140 (2006).

38. *See* Docket at No. 13, Allen v. Ornoski, *supra* note 36.

district court denied his application the same day it was filed.[39] He filed a notice of appeal to the United States Court of Appeals for the Ninth Circuit on January 13, 2006.[40] He also requested a certificate of appealability and a stay of execution.[41] Both requests were denied on January 15, 2006.[42] The United States Supreme Court denied Mr. Allen's petition for certiorari on January 16, 2006.[43] He was executed the following day.[44]

The extraordinary delays in processing the *Ramirez* and *Allen* cases through the judicial system are not atypical.[45] Neither case involved

39. *See id.*

40. *See* Docket, Allen v. Ornoski, No. 06-99001 (9th Cir. Jan. 13, 2006), *available at* http://www.pacer.ca9.uscourts.gov.

41. *See id.*

42. *See id.*

43. *See id.*

44. Inmates Executed List, *supra* note 20.

45. Several recent rulings illustrate this point well. For example, on November 13, 2006, the United States Supreme Court issued a ruling in the case of Fernando Belmontes after he had been on California's death row for twenty-four years. *See* Ayers v. Belmontes, 127 S. Ct. 469 (2006). He was convicted in 1982 of first degree murder and sentenced to death. *See id.* at 472. Following the affirmance of his conviction and sentence on automatic appeal in 1988, Mr. Belmontes filed successive petitions in state and federal district court for a writ of habeas corpus. The California Supreme Court denied his state petition in 1992, and the federal district court denied his section 2254 application in 2001. Docket, Belmontes v. Superior Court, No. S012093 (Cal. Sept. 18, 1989), *available at* http://appellatecases.courtinfo.ca.gov/; Docket, Belmontes v. Vasquez, No. 2:89-CV-00736-DFL-JFM (E.D. Cal. May 25, 1989), *available at* https://ecf.cald.uscourts.gov. Mr. Belmontes appealed to the United States Court of Appeals for the Ninth Circuit. Docket, Belmontes v. Woodford, No. 01-99018 (9th Cir. Oct. 17, 2001). In 2003, it reversed the district court's decision invalidating Mr. Belmontes's sentence, twenty-one years after it had been imposed. *Id.* The United States Supreme Court granted certiorari on March 28, 2005. *Id.* It reversed and remanded the Ninth Circuit's decision. *Id.* Upon remand, the Ninth Circuit again invalidated Mr. Belmontes's sentence. *Id.* The United States Supreme Court again granted certiorari on May 1, 2006. Ornaski v. Belmontes, 126 S. Ct. 1909 (2006). On November 13, 2006, it reversed the Ninth Circuit's decision, and again remanded for further consideration. Ayers v. Belmontes, 127 S. Ct. 469 (2006).

On August 14, 2006, the California Supreme Court issued its opinion in the automatic appeal of Walter Joseph Cook, III. People v. Cook, 139 P.3d 492 (Cal. 2006). Mr. Cook was convicted of committing three murders in 1992. *Id.* at 500–02. He was sentenced to death in 1994. Docket, People v. Cook, No. S042223 (Cal. Sept. 2, 1994), *available at* http://appellatecases.courtinfo.ca.gov/. There was a twelve-year delay since the judgment of death and the California Supreme Court's ruling on his automatic appeal.

On August 21, 2006, the California Supreme Court issued its opinion in the automatic appeal of David Keith Rogers. People v. Rogers, 141 P.3d 135 (Cal. 2006). Mr. Rogers was convicted of two murders committed in 1987. *Id.* at 144. He was sentenced to death in 1988. Docket, People v. Rogers, No. S005502 (Cal. May 2, 1988), *available at* http://appellatecases.courtinfo.ca.gov/. Thus, there was an eighteen-year delay between the judgment of death and the California Supreme Court's ruling on his automatic appeal.

On August 24, 2006, the California Supreme Court issued its opinion in the automatic appeal of Albert Lewis. People v. Lewis, 140 P.3d 775 (Cal. 2006). Mr. Lewis was convicted of two counts of first degree murder and attempted murder of a third victim in 1989, and was sentenced to death in 1993.

anomalous events—such as vacated convictions or sentences followed by successive trials that create lengthy delays—beyond those inherent in the system.[46] These representative cases expose the procedural hurdles to a speedy determination of whether the judgment of death should be vacated or executed. These hurdles include the following events:

(1) Delay in the preparation of the reporter's transcripts of the trial court proceedings.

(2) Delay in the appointment of appellate counsel for the automatic appeal to the California Supreme Court.

(3) Delay in the certification of the record following the appointment of appellate counsel.

(4) Delay by appointed appellate counsel in filing an opening brief.

(5) Delay by the Attorney General's Office in filing its responsive brief.

(6) Delay in the filing of the condemned prisoner's reply brief.

(7) Delay in scheduling the matter for oral argument before the California Supreme Court.

(8) Delay in the filing of decisions by the California Supreme Court on the automatic appeal, vacating or affirming the trial court's judgment. (The average delay between 1978 and January 19, 2006, was 6.2 months. Since January 1, 1989, the California Supreme Court has filed its decisions in death penalty matters within ninety days of oral argument.)

(9) Delay by the United States Supreme Court in the issuance of its ruling in the condemned prisoner's petition for a writ of certiorari.

(10) Delay in the appointment of state habeas counsel.

(11) Delay in the issuance of an order granting or denying the state petition for a writ of habeas corpus.

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*See id.* at 843. Thus, there was a thirteen-year delay between the judgment of death and the California Supreme Court's ruling on his automatic appeal.

46. This point is well illustrated by the California Supreme Court's recently issued opinion in the second automatic appeal of Fermin Rodriguez Ledesma, twenty-eight years after the commission of his crimes. *See* People v. Ledesma, 140 P.3d 657 (Cal. 2006). Mr. Ledesma was charged with the 1978 murder of Gabriel Flores and was convicted and sentenced to death in 1980. *Id.* at 672. On the automatic appeal, the California Supreme Court vacated Mr. Ledesma's judgment of death and remanded the case to the superior court. People v. Ledesma, 729 P.2d 839 (Cal. 1987). On February 7, 1990, following a second trial, Mr. Ledesma was again found guilty on all charges and sentenced to death. Docket, People v. Ledesma, No. S014394 (Cal. Feb. 7, 1990), *available at* http://appellate cases.courtinfo.ca.gov/. Sixteen years later, on August 17, 2006, the California Supreme Court issued its opinion in his automatic appeal affirming his second judgment of death. *Id. See also* James S. Liebman, *Opting for Real Death Penalty Reform*, 63 OHIO ST. L.J. 315, 315–16 (2002) (arguing that delays during appeal and postconviction procedures are caused by mistakes at the trial level).

> (12) Delay by the United States Supreme Court in granting or denying a petition for a writ of certiorari challenging the denial of the state habeas corpus petition.
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> (13) Delay in the appointment of counsel for a death row inmate's application for a federal writ of habeas corpus.
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> (14) Delay in the filing of an application for a writ of habeas corpus by appointed or retained counsel in the federal district court.
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> (15) Delay in the determination by a federal district court of whether the application for a writ of habeas corpus contains claims that were not exhausted before the California Supreme Court.
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> (16) Delay resulting from the stay and abeyance of an applicant's exhausted claims while the condemned prisoner presents unexhausted claims to the California Supreme Court.
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> (17) Delay in the resolution of the fully exhausted federal constitutional claims by a federal district court.
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> (18) Delay in resolving the condemned prisoner's appeal to the United States Court of Appeals from the denial or dismissal of the application for a federal writ of habeas corpus.
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> (19) Delay in the resolution by the United States Supreme Court of a condemned prisoner's petition for a writ of certiorari challenging the Ninth Circuit's affirmance of the district court's denial or dismissal of an application for a federal writ of habeas corpus.
>
> (20) Delay in the resolution of a condemned prisoner's application for a second or successive petition for federal habeas corpus relief.

These delays in the present procedures under California and federal law have resulted in the imprisonment of death row inmates awaiting resolution of their requests for a reversal of their judgments of death for an inhumane—if not a cruel and unusual—period of time. While the average delay is currently 17.2 years, this figure is deceptive when you consider that, of the 662[47] prisoners currently on death row:

> Thirty persons have been on California's death row more than twenty-five years.[48]
>
> One hundred and nineteen persons have been on death row more than twenty years.[49]

47. Docket Database, *supra* note 14. *See also* Cal. Dep't of Corrs. & Rehab., Condemned Inmate Summary List (Dec. 13, 2005), http://www.cdc.state.ca.us/ReportsResearch/docs/Summary.pdf.

48. Cal. Dep't of Corrs. & Rehab., *supra* note 47.

49. *Id.*

> Two hundred and forty persons have been on death row more than fifteen years.[50]
>
> Four hundred and eight persons have been on death row more than ten years.[51]
>
> Five hundred and seventy-five persons have been on death row more than five years.[52]

## III. WHY THE COURTS, THE LEGISLATURE, AND THE PEOPLE SHOULD BE CONCERNED ABOUT DELAYS

Not everyone is troubled by lengthy delays. In fact, some argue that delays are an inevitable part of the death penalty process. Justice Thomas has commented that "[c]onsistency would seem to demand that those who accept our death penalty jurisprudence as a given also accept the lengthy delay between sentencing and execution as a necessary consequence."[53] That is, seeing delays simply as a natural outgrowth of the "arsenal of 'constitutional' claims" with which capital defendants are armed, Justice Thomas said that "executions are inevitably delayed."[54]

The extraordinary delays experienced by California's death row inmates, however, are unacceptable for several important reasons. First, prisoners who have had convictions set aside because of reversible trial court errors or who have meritorious habeas claims are spending decades on death row before their appeals or postconviction claims for relief are heard and their judgments or sentences are vacated. In cases where the judgment of guilt and/or sentence were vacated between 1978 and 1986, the average delay was 3.6 years.[55] During this time period, it was only on automatic appeal that each death row inmate's judgment of guilt or sentence was vacated.[56] In cases where the judgment of guilt and/or the sentence were vacated between 1987 and 2005, the average delay was 11 years.[57] During this time period, for those inmates whose judgments of guilt and/or sentences were vacated by the California Supreme Court on automatic appeal, the average delay was 7.6 years.[58] For those inmates

50. *Id.*
51. *Id.*
52. *Id.*
53. Knight v. Florida, 528 U.S. 990, 992 (1999) (Thomas, J., concurring in denial of certiorari).
54. *Id.*
55. Docket Database, *supra* note 14. This figure is based on an examination of the dockets of persons whose judgments of guilt or sentences were vacated and who were not retried or resentenced.
56. *Id.*
57. *Id.*
58. *Id.*

whose judgments of guilt and/or sentences were vacated by the California Supreme Court on a state petition for habeas corpus, the average delay was 11.4 years.[59] For those inmates whose sentences were vacated by a federal court upon an application for habeas corpus, the average delay was 16.75 years.[60] These delays undermine one of the very purposes of a review of a judgment of death, which is to uncover mistakes made at trial as efficiently and expeditiously as possible in order to protect the prisoner's right to a fair trial.[61]

Inordinate delays also undermine the stated purposes of having the death penalty, namely retribution and deterrence.[62] Some legal commentators have concluded that long delays diminish the deterrent value of the death penalty.[63] As for retribution, Justice Stevens suggested in *Lackey v. Texas* that the retributive purpose of the death penalty is fulfilled after a long period of imprisonment while waiting for a final disposition.[64]

Additionally, the costs to California taxpayers of trying death penalty cases and carrying out a death sentence are enormous. One oft-cited statistic, derived from a 1988 study conducted by the *Sacramento Bee*, is that the death penalty costs California $90 million per year beyond the ordinary costs of the justice system.[65] The *Sacramento Bee* study estimated

59. *Id.*

60. *Id.*

61. *See* Liebman, *supra* note 46, at 315 (contending that the "appellate system is forced to deal with large amounts of error, creating backlog and delays").

62. *See* Gregg v. Georgia, 428 U.S. 153, 183 (1976) (Stewart, Powell & Stevens, JJ.) (concluding that the death penalty serves two principle social purposes: retribution and deterrence).

63. Joanna M. Shepherd, *Murders of Passion, Execution Delays, and the Deterrence of Capital Punishment*, 33 J. LEGAL STUD. 283 (2004) (stating that delays decrease the deterrence factor). *See also* Justice Lewis F. Powell, Jr., *Capital Punishment*, 102 HARV. L. REV. 1035, 1035 (1989) ("This delay undermines the deterrent effect of capital punishment and reduces public confidence in the criminal justice system.").

64. *See* Lackey v. Texas, 514 U.S. 1045 (1995) (Stevens, J., respecting denial of certiorari) (stating that "after such an extended time, the acceptable state interest in retribution has arguably been satisfied by the severe punishment already inflicted").

65. *See, e.g.*, Stephen Magagnini, *Closing Death Row Would Save State $90 Million a Year*, SACRAMENTO BEE, Mar. 28, 1988, at A1 (original study); Kozinski & Gallagher, *supra* note 3, at 13 (citing the $90 million figure); Ashley Rupp, Note, *Death Penalty Prosecutorial Charging Decisions and County Budgetary Restrictions: Is the Death Penalty Arbitrarily Applied Based on County Funding?*, 71 FORDHAM L. REV. 2735, 2755 (2003) (same); Barbara L. Jones, *Some in Minnesota's Legal Community Express Concern About Re-introducing the Death Penalty*, MINN. LAW., Dec. 15, 2003, *available at* 2003 WLNR 5603758 (same); Editorial, *Slow Ride to Death Chamber*, L.A. TIMES, Dec. 15, 2004, at B12 (same); Death Penalty Focus of Cal., The Cost of the Death Penalty in California, *at* http://worldpolicy.org/globalrights/dp/dp-cost.html (last visited May 10, 2007) (same); RICHARD C. DIETER, MILLIONS MISSPENT: WHAT POLITICIANS DON'T SAY ABOUT THE HIGH COSTS OF THE DEATH PENALTY (1994), *at* http://www.deathpenaltyinfo.org/article.php?scid=45&did=385 (same).

that $78 million of that figure was incurred at the trial level.[66] Moreover, the postconviction costs were also substantial. The study estimated that the costs incurred by the state of California for prosecuting automatic appeals was $1.8 million per year.[67] In addition, the cost of counsel appointed to represent death row inmates on appeal was $7.6 million per year.[68] It costs an average of $124,150 per year to house a death row inmate.[69] This amount is $90,000 more per year than the cost of housing an inmate in the general population[70] and almost four times the annual undergraduate tuition of $31,200 at Stanford University.[71] On housing alone, California spends $57.5 million more per year on condemned prisoners than on the general prison population.[72]

Additional expenses are also incurred with regard to habeas corpus petitions brought by condemned prisoners in federal court. "Federal habeas corpus appeals in death cases are so expensive that the [Ninth] Circuit assigns a U.S. district judge just to review" the amount requested by counsel who represents a habeas corpus applicant and investigates the applicant's claims.[73] The amount requested is not made public.[74]

66. Magagnini, *supra* note 65. *See also* Ilyana Kuziemko, *Does the Threat of the Death Penalty Affect Plea Bargaining in Murder Cases? Evidence from New York's 1995 Reinstatement of Capital Punishment*, 8 AM. L. & ECON. REV. 116, 117 (2006) (noting that in California, a capital trial alone, excluding subsequent appeals, costs from $200,000 to $1.5 million).

67. *See* Magagnini, *supra* note 65.

68. *See id.* Since 1988, the postconviction costs have risen substantially. *See* Patrick Hoge, *Death-penalty Cases Involve Long, Laborious, Costly Process*, SACRAMENTO BEE, Feb. 25, 1996, at A1. In 1988, there were only 249 death penalty appeals pending. *See id.* Now, there are 662. *See* Cal. Dep't of Corrs. & Rehab., *supra* note 47 (stating that the number of prisoners on California's death row as of January 29, 2007, is 662). As of 2005, the California Supreme Court spent "$11.8 million annually for court-appointed defense counsel." Rone Tempest, *Death Row Often Means a Long Life; California Condemns Many Murderers, but Few Are Ever Executed*, L.A. TIMES, Mar. 6, 2005, at B1. California Attorney General Bill Lockyer's office spends $11 million annually in representing the state in death penalty appeals. *See id.*

69. *See* Tempest, *supra* note 68 (citing California Department of Corrections Spokesperson Margot Boch) (stating that the cost of housing a condemned prisoner is $90,000 more than the cost of housing a prisoner in the general population); Death Penalty Info. Ctr., Death Penalty in California Is Very Costly, *at* http://www.deathpenaltyinfo.org/article.php?did=2058 (last visited May 10, 2007) (stating that the average cost of housing a prisoner who is neither on death row nor serving a sentence of life-without-parole is $34,150).

70. *See* Tempest, *supra* note 68.

71. *See* Stanford Fin. Aid Office, Stanford Undergraduate Student Budget, *at* http://www.stanford.edu/dept/finaid/current/2_a_cost.html (last visited May 10, 2007).

72. *See* Tempest, *supra* note 68.

73. *See id.*

74. From November 23, 1992, until October 1, 1998, I served on the Committee on Defender Services of the Judicial Conference of the United States. During that time, I was privy to budgetary requests. In multiple cases, federal habeas corpus counsel's expenses exceeded $500,000. In at least one case, the expense claim exceeded $1 million.

Since the death penalty was reinstated in California in 1978, thirteen prisoners have been executed.[75] During the same time period, fifty death row inmates died because of natural causes, suicide, or other inmates' violence in the exercise yard.[76] The practical effect of the delays in the appellate process, thus, is to convert the vast majority of death sentences to sentences of life without parole. As illustrated in Figure 1 below, the backlog in processing death row appeals is now so severe that California would have to execute five prisoners per month for the next ten years just to carry out the sentences of those currently on death row.[77]

Extraordinary delays are indeed unacceptable. The United States Supreme Court may one day grant certiorari to determine whether such delays violate the Eighth Amendment's prohibition against cruel and unusual punishment. But they are not "inevitable," as suggested by Justice Thomas,[78] if the California Legislature will take action to change the present dysfunctional procedures. This Article addresses seriatim the delays inherent in the multiple stages of the appellate and postconviction relief process. Part IV sets forth the results of a statistical analysis of the delays that have occurred in disposing of the automatic appeals and presents recommendations for providing swifter justice. The parts that follow address the delay inherent in state and federal habeas procedures and propose implementing changes to reduce it.

75. Inmates Executed List, *supra* note 20.

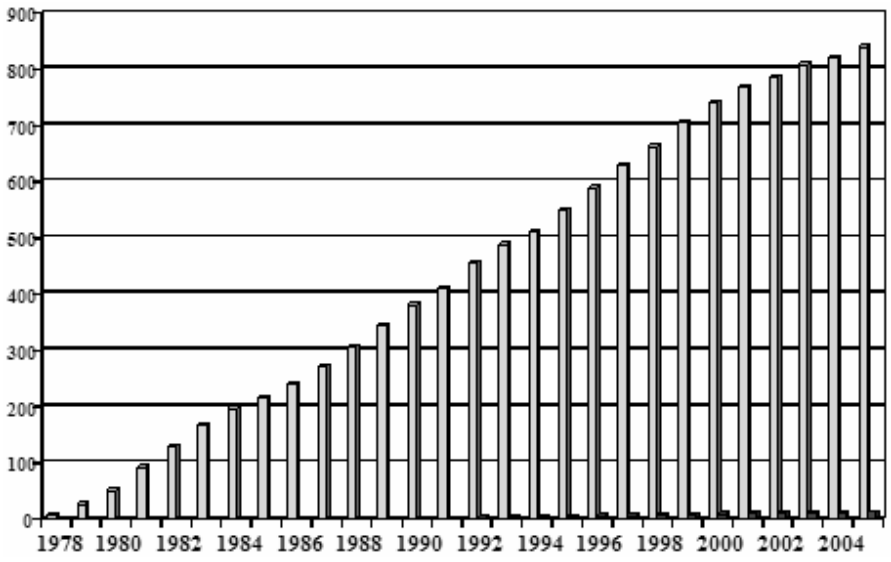
Robert Harris, Received: 03/06/1979, Executed: 04/21/1992, 13 years on death row.
David Mason, Received: 01/27/1984, Executed: 08/24/1993, 9 years on death row.
William Bonin, Received: 03/22/1982, Executed: 02/23/1996, 13 years on death row.
Keith Williams, Received: 04/13/1979, Executed: 05/31/1996, 17 years on death row.
Thomas Thompson, Received: 08/17/1984, Executed: 07/14/1998, 14 years on death row.
Jaturun Siripongs, Received: 05/02/1983, Executed: 02/09/1999, 15 years on death row.
Manuel Babbit, Received: 07/15/1982, Executed: 05/04/1999, 16 years on death row.
Darrell Rich, Received: 01/23/1981, Executed: 03/15/2000, 19 years on death row.
Robert Massie, Received: 05/28/1979, Executed: 03/27/2001, 21 years on death row.
Stephen Anderson, Received: 07/30/1981, Executed: 01/29/2002, 20 years on death row.
Donald Beardslee, Received: 03/14/1984, Executed: 01/19/2005, 20 years on death row.
Stanley Williams, Received: 04/20/1981, Executed: 12/13/2005, 24 years on death row.
Clarence Allen, Received: 12/02/1982, Executed: 01/17/2006, 23 years on death row.

76. *See* Cal. Dep't of Corrs. & Rehab., Condemned Inmates Who Have Died Since 1978, *at* http://www.cdc.state.ca.us/ReportsResearch/docs/CIWHD.pdf (last visited May 10, 2007). *See also* Kuziemko, *supra* note 66, at 117 ("Capital trials rarely reduce prison costs, as less than 10% of those sentenced to death are executed.").

77. This figure is based on the 646 prisoners on death row as of the creation of the Docket Database, *supra* note 14.

78. *See* Knight v. Florida, 528 U.S. 990, 992 (1999) (Thomas, J., concurring in denial of certiorari).

FIGURE 1: Judgments of death rendered v. Executions carried out in California 1978–2005




## IV. DELAYS INHERENT IN THE AUTOMATIC APPEALS PROCESS

One of the lengthiest delays in the administration of death sentences occurs during the automatic appeal. The California Supreme Court has had exclusive jurisdiction over direct appeals from judgments of death since California became a state in 1850.[79] When the California Constitution was adopted, the Supreme Court had jurisdiction over *all* appealable civil and criminal judgments,[80] because the California Courts of Appeal were not created until 1904.[81]

The 1849 California Constitution provided for a Supreme Court with only three members.[82] In its June term in 1850, the original California

79. CAL. CONST. of 1849, art. VI, § 4 (conferring jurisdiction over the California Supreme Court to hear "all criminal cases amounting to felony, on questions of law alone").

80. *Id.* ("The Supreme Court shall have appellate jurisdiction in all cases . . . .").

81. 1903 Cal. Stat. 738 (creating the California Courts of Appeal effective in 1904).

82. CAL. CONST. of 1849, art. VI, § 2 ("The supreme court shall consist of a chief justice and two associate justices, any two of whom shall constitute a quorum.").

Supreme Court published its first opinion in a death penalty case.[83] Mr. Daniels was indicted for the crime of murder on August 30, 1849.[84] The judgment of death was reversed on jurisdictional grounds by the California Supreme Court a mere ten months later.[85]

The size of the court was increased to five members in 1862.[86] In May of 1879, California voters adopted a new Constitution[87] that provided for a Supreme Court consisting of a chief justice and six associate justices.[88] It also required that all opinions be in writing.[89] By 1882, the newly expanded Supreme Court developed a backlog of pending cases. The average time that a case was pending before the Supreme Court was two years.[90] In 1885, the California Legislature authorized the appointment of three commissioners to help reduce the backlog.[91] Two additional commissioners were authorized in 1889.[92]

In 1904, the California Legislature created three Courts of Appeal and eliminated the position of Supreme Court commissioner.[93] The Courts of Appeal were given jurisdiction over civil and criminal matters *except* for

83. People v. Daniels, 1 Cal. 106 (1850).

84. *See id.* at 107.

85. *See id.*

86. CAL. CONST. of 1849, art. VI, § 2 (as amended 1862). *See also* JOSEPH R. GRODIN, CALVIN R. MASSEY & RICHARD B. CUNNINGHAM, THE CALIFORNIA STATE CONSTITUTION: A REFERENCE GUIDE 118 (1993) (describing the 1862 amendment).

87. CAL. CONST. of 1879. *See also* GRODIN ET AL., *supra* note 86, at 118 (describing the 1879 amendments).

88. CAL. CONST. of 1879, art. VI, § 2.

89. *Id.* ("In the determination of causes, all decisions of the court in bank or in departments shall be given in writing, and the grounds of the decision shall be stated.").

90. *See* Cal. Supreme Court Historical Soc'y, History of the California Supreme Court, *at* http://www.cschs.org/02_history/02_a.html (last visited May 9, 2007).

91. *See id.*

92. *See id.*

93. *See* 1903 Cal. Stat. 738 (amending article VI, section 4 of the California Constitution). The amended section 4 provided: "The state is hereby divided into three appellate districts, in each of which there shall be a district court of appeal consisting of three justices." *Id.*

death penalty appeals.[94] The Supreme Court retained its exclusive jurisdiction over appeals in death penalty cases.[95]

Since 1904, the number of Courts of Appeal has been increased periodically.[96] Currently there are six separate Courts of Appeal districts in California,[97] in which a total of 105 associate justices sit.[98] The size of the California Supreme Court, however, has remained at seven justices since 1879.

While the California Supreme Court has always had exclusive jurisdiction over an appeal from a judgment of death, such appeals have not always been automatic. Prior to 1935, an appellant in a capital case had to comply with the requirements of section 1240 of the California Penal Code for the filing and service of a notice of appeal in order "to confer upon . . . [the Supreme Court] jurisdiction to hear and determine the appeal."[99] In 1935, however, Rush Griffin was executed before the California Supreme Court heard his appeal from his death sentence.[100] His attorney had filed a notice of appeal in the trial court, but the clerk of the superior court did not inform the clerk of the Supreme Court that Mr. Griffin had appealed. Moreover, the clerk's transcript of the trial proceedings was not forwarded to the Supreme Court until three days after Mr. Griffin's execution.[101] At that time, it was customary for the clerk of the Supreme Court to notify the warden that an appeal was pending.[102] The warden was not notified

94. The new provision provided that the Courts of Appeal had jurisdiction

> in all cases at law in which the demand, exclusive of interest, or the value of the property in controversy, amounts to three hundred dollars, and does not amount to two thousand dollars; also, in all cases of forcible and unlawful entry and detainer . . . , in proceedings in insolvency, and in actions to prevent or abate a nuisance; in proceedings of mandamus, certiorari, and prohibition, usurpation of office, contesting elections and eminent domain, and in such other special proceedings as may be provided by law (excepting cases in which appellate jurisdiction is given to the supreme court); also, on questions of law alone, in all criminal cases prosecuted by indictment or information in a court of record, excepting criminal cases where judgment of death has been rendered.

*Id.* at 739.

95. *Id.* at 738.

96. *See* GRODIN ET AL., *supra* note 86, at 119.

97. *See id.*

98. California Courts of Appeal, Centennial Celebration, *at* http://www.courtinfo.ca.gov/courts/courtsofappeal (last visited May 10, 2007).

99. People v. Brown, 84 P. 204, 205 (Cal. 1906) ("Section 1240 of the Penal Code provides that in a criminal case 'appeal is taken by filing with the clerk of the court in which the judgment or order appealed from is entered or filed, a notice stating the appeal from the same, and serving a copy thereof upon the attorney of the adverse party.'"). The current version of section 1240 of the California Penal Code is unrelated to taking appeals. Instead, it relates to the appointment of the state public defender to represent indigent defendants. *See* CAL. PENAL CODE § 1240 (West 2004).

100. *See* People v. Massie, 967 P.2d 29, 40 (Cal. 1998).

101. *See id.*

102. *See id.*

because the clerk of the Supreme Court was unaware that Mr. Griffin had filed a notice of appeal.[103]

The California Legislature created a special committee to investigate the execution of Mr. Griffin.[104] This committee recommended that legislation be enacted providing for an automatic appeal in all cases where the trial court ordered a sentence of death.[105] As a result, section 1239 was amended to provide that "[w]hen . . . a judgment of death is rendered, an appeal is automatically taken by the defendant."[106]

The right to an automatic appeal "imposes a duty upon [the] court 'to make an examination of the complete record of the proceedings had in the trial court, to the end that it be ascertained whether defendant was given a fair trial.'"[107] The court "cannot avoid or abdicate this duty merely because defendant desires to waive the right provided for him."[108]

The number of prisoners on death row has grown steadily over the years,[109] but the constitutional duty of the seven justices on the California Supreme Court to consider every automatic appeal from a judgment of death has not changed. The California Supreme Court now spends "about 20% of its time and resources on death penalty cases alone."[110] The result: long delays at every stage of the automatic appeal process.

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103. *See id.*

104. *See id.*

105. *See id.*

106. *See* CAL. PENAL CODE § 1239 (West 2004). Section 1239 provides, in part: "When upon any plea a judgment of death is rendered, an appeal is automatically taken by the defendant without any action by him or her or his or her counsel." The Legislature has reenacted section 1239, *see* 1982 Cal. Stat. 3355, and has amended it, *see* 1988 Cal. Stat. 2013, but it has never altered the requirement that an appeal is automatic when a defendant is sentenced to death.

107. People v. Stanworth, 457 P.2d 889, 898 (Cal. 1969) (quoting People v. Perry, 94 P.2d 559, 561 (Cal. 1939)).

108. *Id. See also* People v. Sheldon, 875 P.2d 83, 85 (Cal. 1994) ("[T]his appeal is automatic (Pen. Code, § 1239, subd. (b)), and we have no authority to allow defendant to waive the appeal."). In *Massie*, the court noted that the Legislature had acquiesced in *Stanworth*'s holding that a condemned defendant cannot waive his automatic appeal. *See Massie*, 967 P.2d at 40 ("'When a statute has been construed by the courts, and the Legislature thereafter reenacts that statute without changing the interpretation put on that statute by the courts, the Legislature is presumed to have been aware of, and acquiesced in, the courts' construction of that statute.'" (quoting People v. Ledesma, 939 P.2d 1310, 1316 (Cal. 1997) (quoting People v. Bouzas, 807 P.2d 1076, 1081 (Cal. 1991)))).

109. An average of twenty-eight prisoners are sentenced to death each year. *See* JUDICIAL COUNCIL OF CAL., 2006 COURT STATISTICS REPORT: STATEWIDE CASELOAD TRENDS, 1995–1996 THROUGH 2004–2005, at 4 (providing statistics from which the average can be calculated) [hereinafter 2006 STATISTICS REPORT].

110. *See* Tempest, *supra* note 68.

### A. DELAYS IN APPOINTING COUNSEL FOR THE AUTOMATIC APPEAL

One major source of delay in the automatic appeal process is the appointment of counsel. Death row inmates are constitutionally entitled to counsel for their automatic appeal;[111] however, because counsel are compensated well below market rates, the California Supreme Court has encountered great difficulty in finding counsel who are willing to accept appointment to represent such inmates.

#### 1. Availability of Qualified Counsel

The California Rules of Court impose qualifications required of appellate counsel for capital defendants. Specifically, every attorney must demonstrate the "commitment, knowledge, and skills necessary to competently represent the defendant."[112]

There are two categories of attorneys eligible for appointment. First, lead or associate counsel must have had an "[a]ctive practice of law in California for at least four years."[113] The attorney must have either served "as counsel of record for a defendant in seven completed felony appeals, including one murder case" or "as counsel of record for a defendant in five completed felony appeals and as supervised counsel for a defendant in two death penalty appeals in which the opening brief has been filed."[114] Second, if an attorney has not practiced in California for four years or has not served as counsel in the requisite number of criminal cases, an attorney may be appointed if the attorney has substantially equivalent experience in "another jurisdiction or different type of practice (such as civil trials or appeals, academic work, or work for a court or prosecutor) for at least four years."[115]

All attorneys must be familiar with Supreme Court practices and procedures, including those specific to death penalty appeals.[116] Attorneys must be proficient "in issue identification, research, analysis, writing, and advocacy."[117] The Supreme Court may consider the following to determine whether the attorney is so qualified: two writing samples; evaluations from

111. *See* Douglas v. California, 372 U.S. 353, 356 (1963) (holding that there is a right to counsel on appeal); Powell v. Alabama, 287 U.S. 45, 68–69 (1932) (holding that defendants subject to the death penalty are entitled to counsel).

112. CAL. R. CT. 8.605(b).

113. *Id.* at 8.605(d)(1).

114. *Id.* at 8.605(d)(2)(A)–(B).

115. *Id.* at 8.605(f)(1).

116. *Id.* at 8.605(d)(3).

117. *Id.* at 8.605(d)(5).

assisting counsel if the attorney was previously appointed in a death penalty appeal or postconviction proceeding; recommendations from two other attorneys familiar with the attorney's qualifications; and an evaluation from the administrator responsible for appointing attorneys to represent indigent defendants, if the attorney is involved in such a program.[118]

2. Inadequate Compensation

Chief Justice Ronald George has commented that the delay in the appointment of counsel is caused by the necessity of finding lawyers who meet the qualifications set forth in the California Rules of Court.[119] I suggest that there is an even more compelling reason. The California Legislature has failed to provide adequate funds to compensate appointed counsel for the responsibility of representing clients who will die if their attorney's efforts are unsuccessful.[120] The inadequate hourly compensation surely must discourage lawyers who meet the four-year requirement in criminal trials or appeals, or who have four years of equivalent experience in civil trials or appeals, academic work, or work for a court or as a prosecutor.

The hourly rate an appointed attorney in a capital case receives to represent a death row inmate in an automatic appeal or in state postconviction proceedings is $140.[121] The issues presented in the automatic appeal or state habeas corpus petitions in capital cases are complex and constantly evolve based on the need to interpret the United States Supreme Court's most recent decisions (1) resolving challenges to judgments of death based on alleged violations of the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments of the U.S. Constitution, and (2) interpreting the Antiterrorism and Effective Death Penalty Act ("AEDPA")

118. *Id.*

119. Donna Domino, Linda Rapattoni & Peter Blumberg, *George Cites Death-case Gains: Justice Concedes Capital-appeals System is 'Dysfunctional,'* L.A. DAILY J., Dec. 15, 2004, at 1.

120. Chief Justice George also acknowledges the lack of adequate compensation as a reason why there is a shortage of lawyers. *See* Bob Egelko, *Effort to Speed Executions Stalls in Senate; Provision Unrelated to Security Had Been Added to Patriot Act*, S.F. CHRON., Dec. 25, 2005, at B1 (quoting Chief Justice George as saying, "If California wants to have a death penalty, California needs to provide a level of funds where we can attract counsel.").

121. *See* PAYMENT GUIDELINES FOR APPOINTED COUNSEL REPRESENTING INDIGENT CRIMINAL APPELLANTS IN THE CALIFORNIA SUPREME COURT 13 (1993) (as amended 2006). Counsel representing state capital defendants in federal habeas corpus proceedings receive $160 to $163 per hour. *See* COMM. ON DEFENDER SERVS., JUDICIAL CONFERENCE OF THE U.S., REPORT 2 (2006). This too is woefully inadequate.

and Patriot Act.[122] Competent appellate practitioners have the skills to research the relevant jurisprudence and case law that must be considered in resolving their clients' challenges to the bases underlying a trial court's judgment of death.

By contrast, in 2005 and 2006, the average hourly rate awarded by United States District Courts in California that use the Lodestar method was $287 in civil cases.[123] Paralegals in those same cases received an

122. *See*, *e.g.*, Kansas v. Marsh, 126 S. Ct. 2516 (2006) (considering an Eighth Amendment challenge to Kansas's death penalty scheme); House v. Bell, 126 S. Ct. 2064 (2006) (considering the applicability of AEDPA to a claim of actual innocence); Oregon v. Guzek, 546 U.S. 517 (2006) (considering a Fourteenth and Eighth Amendment argument related to the presentation of alibi evidence at a sentencing hearing); Brown v. Sanders, 546 U.S. 212 (2006) (considering a "constitutional" challenge to a jury's consideration of invalid "special circumstances" as aggravating evidence in favor of the death penalty); Hill v. McDonough, 126 S. Ct. 2096 (2006) (considering the applicability of AEDPA to an Eighth Amendment challenge to the method of execution brought pursuant to 42 U.S.C. § 1983).

123. In this section, three different approaches are used to determine what hourly rate civil attorneys can expect to receive for work at levels comparable to appointed capital counsel. No state court attorney's fees figures are discussed because the only available published figures pertain to federal court proceedings. A survey of twenty-eight cases from 2005 to 2006 in which attorneys fees were awarded to attorneys in civil cases by the United States District Courts situated in California revealed the average hourly rate for attorneys determined by the court using the Lodestar method was $287 per hour [hereinafter Survey]. *See* Fenberg v. Cowden Auto. Long Term Disability Plan, No. C-03-03898 SI, 2006 U.S. Dist. LEXIS 2575 (N.D. Cal. Jan. 11, 2006); Miller v. Vicorp Rests., Inc., No. C-03-00777 RMW, 2006 U.S. Dist. LEXIS 10112 (N.D. Cal. Feb. 23, 2006); Gunn v. Reliance Standard Life Ins, Co., 407 F. Supp. 2d 1162 (C.D. Cal. 2006); Gens v. Ferrell, No. C-05-2183 MHP, 2005 U.S. Dist. LEXIS 39115 (N.D. Cal. Dec. 21, 2005); Martinez v. Longs Drug Stores, Inc., No. S-03-1843 DFL CMK, 2005 U.S. Dist. LEXIS 30226 (E.D. Cal. Nov. 28, 2005); White v. Save Mart Supermarkets, No. S-03-2402 MCE KJM, 2005 U.S. Dist. LEXIS 24386 (E.D. Cal. Oct. 20, 2005); Velasquez v. Khan, No. S-01-0246 MCE DAD, 2005 U.S. Dist. LEXIS 28956 (E.D. Cal. Sept. 28, 2005); Navarro v. Gen. Nutrition Corp., No. C-03-0603 SBA, 2005 U.S. Dist. LEXIS 39726 (N.D. Cal. Sept. 20, 2005); Doran v. Vicorp Rests., Inc., 407 F. Supp. 2d 1120 (C.D. Cal. 2005); Foster Poultry, Inc. v. Suntrust Bank, No. 1:04-cv-05513-OWW-SMS, 2005 U.S. Dist. LEXIS 36491 (E.D. Cal. Aug. 20, 2005); Lopez v. S.F. Unified Sch. Dist., 385 F. Supp. 2d 981 (N.D. Cal. 2005); Johnson v. Credit Int'l, Inc., No. C-03-100 SC, 2005 U.S. Dist. LEXIS 21513 (N.D. Cal. July 28, 2005); Cancio v. Fin. Credit Network, Inc., No. C-04-03755 THE, 2005 U.S. Dist. LEXIS 13626 (N.D. Cal. July 6, 2005); Cortes v. Metro. Life Ins. Co., 380 F. Supp. 2d 1125 (C.D. Cal. 2005); Vedatech, Inc. v. St. Paul Fire & Marine Ins. Co., Nos. C 04-1249 VRW, 04-1818 VRW, 04-1403 VRW, 2005 WL 1490445 (E.D. Cal. June 17, 2005); Fleming v. Kemper Nat'l Serv., Inc., 373 F. Supp. 2d 1000 (N.D. Cal. 2005); Directv, Inc. v. Atwal, No. S-032499 WBS DAD, 2005 WL 1388649 (E.D. Cal. June 8, 2005); White v. Sutherland, Inc., No. S-03-2080 CMK, 2005 WL 1366487 (E.D. Cal. May 6, 2005); Baerthlein v. Elec. Data Sys. Corp., No. C 05-00196 VRW, 2005 WL 818381 (N.D. Cal. Apr. 7, 2005); May v. Metro. Life Ins. Co., No. C 03-5056CW, 2005 WL 839291 (N.D. Cal. Apr. 7, 2005); Hubbard v. Twin Oaks Health & Rehab. Ctr., 406 F. Supp. 2d 1096 (E.D. Cal. 2005); Favela v. Target Corp., No. C-04-00895WHA(JCS), 2005 WL 701606 (N.D. Cal. Mar. 28, 2005); Loera v. County of Los Angeles, No. CV 047508PA, 2005 WL 1225982 (C.D. Cal. Mar. 21, 2005); Doran v. Corte Madera Inn Best Western, 360 F. Supp. 2d 1057 (N.D. Cal. 2005); Eiden v. Thrifty Payless, Inc., 407 F. Supp. 2d 1165 (E.D. Cal. 2005); Bonilla v. Starwood Hotels & Resorts Worldwide, Inc., 407 F. Supp. 2d 1107 (C.D. Cal. 2005); Signatures Network, Inc. v. Estefan, No. C-03-4796 SBA(BZ), 2005 WL 151928 (N.D. Cal.

average rate of $78.75 per hour, and law students received an average of $90 per hour.[124] Thus, the average hourly rate for a civil attorney practicing in federal court is more than twice that awarded to counsel who attempts to save the life of a death row inmate in California.

Another indicator of the average compensation received by civil attorneys is the Laffey Matrix—a "matrix of hourly rates for attorneys of varying experience levels and paralegals/law clerks" prepared by the Civil Division of the United States Attorney's Office for the District of Columbia.[125] The matrix is used by courts in the District of Columbia to award fees to government attorneys under fee shifting statutes.[126] As of 2006 to 2007, an attorney with twenty years of experience receives $425 per hour, an attorney with one year receives $205 per hour, and a paralegal receives $120 per hour.[127] To qualify as lead appointed counsel in a capital case, an attorney must have at least four years of experience.[128] Under the Laffey Matrix, an attorney with four years of experience should receive $245 per hour—nearly twice the rate received by counsel appointed by the California Supreme Court in a capital case.[129] Using the Laffey Matrix as an indicator of average compensation, an attorney representing a capital defendant before the California Supreme Court is paid twenty dollars per hour more than a paralegal.

Finally, the United States District Courts in the Northern and Eastern Districts of California have made determinations as to the average compensation to be awarded to attorneys in civil actions in their geographical area. In *Yahoo!, Inc. v. Net Games, Inc.*,[130] the Northern District calculated the "average market rate in the local legal community as a whole using public data from the U.S. Census Bureau and Bureau of Labor Statistics."[131] Based on this information, the court determined the average rate to be $190 per hour.[132] Some courts that have followed the *Yahoo!* methodology have concluded that $200 per hour is the average

Jan. 24, 2005) (amended 2005 WL 1249522 (N.D. Cal. May 25, 2005)); Cambridge Elecs. Corp. v. MGA Elecs., Inc., No. CV02-8636MMM(PJWX), 2005 WL 927179 (C.D. Cal. Jan. 18, 2005).

124. *See* Survey, *supra* note 123.

125. United States Attorney's Office for the District of Columbia, Laffey Matrix 2003–2007, at Explanatory Note 1, *at* http://www.usdoj.gov/usao/dc/Divisions/Civil_Division/Laffey_Matrix_6.html (last visited May 10, 2007) [hereinafter Laffey Matrix 2003–2007].

126. *See* Laffey v. Nw. Airlines, Inc., 572 F. Supp. 354 (D.D.C. 1983).

127. *See* Laffey Matrix 2003–2007, *supra* note 125.

128. CAL. R. CT. 8.605(d)(1).

129. *See* Laffey Matrix 2003–2007, *supra* note 125.

130. Yahoo!, Inc. v. Net Games, Inc., 329 F. Supp. 2d 1179 (N.D. Cal. 2004).

131. *See id.* at 1189.

132. *See id.* at 1191.

market rate.[133] In the Eastern District, courts have "repeatedly found that reasonable rates . . . are $250 per hour for an experienced attorney, $150 for associates, and $75 for paralegals."[134] In both geographical areas, counsel in capital cases are paid substantially less than lawyers of similar qualifications in civil cases.

In a recent appeal to the Ninth Circuit filed on behalf of an insolvent corporation in an action to enjoin duplicate parallel proceedings in a foreign country, the corporation's attorney filed a declaration indicating that the hourly rate for an attorney with more than twenty-five years of experience was $540 per hour.[135] I would be hard-pressed to explain to a bartender or a nonlawyer acquaintance how it is appropriate that an appellate lawyer who is attempting to save a human being's life is compensated at the rate of $140 per hour, while the same lawyer could receive as much as $540 per hour to represent an insolvent corporation in bankruptcy proceedings. As the American Bar Association has noted:

> Unreasonably low fees not only deny the defendant the right to effective representation . . . . They also place an unfair burden on skilled criminal defense lawyers, especially those skilled in the highly specialized capital area. These attorneys are forced to work for next to nothing after assuming the responsibility of representing someone who faces a possible sentence of death. Failure to provide appropriate compensation discourages experienced criminal defense practitioners from accepting assignments in capital cases (which require counsel to expend substantial amounts of time and effort).[136]

There are ninety-four prisoners on death row for whom counsel has not yet been appointed.[137] For those prisoners currently on death row who have had counsel appointed, the average time between entry of the judgment of death and the appointment of counsel was approximately two years (twenty-five months).[138] These delays are increasing rapidly. Counsel has not been appointed for any death row prisoner sentenced since 2003.[139] Of the seventeen persons sentenced to death in 2002, counsel has been

133. *See* Baerthlein v. Elec. Data Sys. Corp., No. C 05-00196 VRW, 2005 WL 818381, at *5 (N.D. Cal. Apr. 7, 2005).

134. *See* Eiden v. Thrifty Payless, Inc., 407 F. Supp. 2d 1165, 1171 (E.D. Cal. 2005) (internal quotations omitted).

135. Declaration of Charles S. Donovan, Triton Container Int'l Ltd. v. Di Gregorio Navegaçao Ltda., No. 05-15535 (9th Cir. Apr. 12, 2006) (on file with author).

136. AM. BAR ASS'N, GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES 79 (1989).

137. Docket Database, *supra* note 14.

138. *Id.*

139. *Id.*

appointed in only two cases.[140] Of the twenty-three persons who were sentenced to death in the year 2001, counsel has been appointed in only one case.[141] Thus, the average delay in appointing counsel has increased to more than three years (3.3 years).[142]

### B. DELAYS IN CERTIFYING THE RECORD

Prior to the enactment of legislation in 1996 requiring that trial courts expedite the preparation of trial records for appeals in death cases, significant delays attributable to a trial court's failure to prepare the trial records in a timely manner impeded the appeals process.[143] A review of the Annual Reports of the Judicial Council of California for the period covering 1997 to 2005 indicates that the trial courts are making progress in expediting the preparation of the trial records in order to comply with section 190.8(d) of the California Penal Code.[144]

The most recent data for the certification of the record for completeness indicates that the trial courts are complying with the ninety-day rule approximately seventy-eight percent of the time.[145] Requiring the trial courts to prepare the record within ninety days, rather than waiting for

140. *Id.*

141. *Id.*

142. *Id.*

143. A note in the annual report for the Judicial Council of California Court Statistics Report for 1999 states:

> During the first year in which the provisions of Stats. 1996, ch. 1086 (AB 195) (concerning certification of the record in capital cases for completeness and accuracy) were in effect, compliance with the requirements of the applicable statutes and related rules proved to be inconsistent across the state. In many instances, the trial courts did not have sufficient resources or training to make effective use of the new provisions, and in others, were unaware of the new requirements because preparation of the appellate record in such cases traditionally had been deferred until the appointment of appellate counsel.

JUDICIAL COUNCIL OF CAL., 1999 COURT STATISTICS REPORT: STATEWIDE CASELOAD TRENDS, 1988–1989 THROUGH 1997–1998, at 13.

144. Section 190.8 provides in relevant part:

> (d) The trial court shall certify the record for completeness and for incorporation of all corrections, as provided by subdivision (c), no later than 90 days after entry of the imposition of the death sentence unless good cause is shown. However, this time period may be extended for proceedings in which the trial transcript exceeds 10,000 pages in accordance with the timetable set forth in, or for good cause pursuant to the procedures set forth in, the rules of court adopted by the Judicial Council.
>
> . . . .
>
> (g) The trial court shall certify the record for accuracy no later than 120 days after the record has been delivered to appellate counsel. However, this time may be extended pursuant to the timetable and procedures set forth in the rules of court adopted by the Judicial Council. The trial court may hold one or more status conferences for purposes of timely certification of the record for accuracy, as set forth in the rules of court adopted by the Judicial Council.

CAL. PENAL CODE § 190.8(d), (g) (West 1999).

145. *See* JUDICIAL COUNCIL OF CAL., COURT STATISTICS REPORT FOR FISCAL YEARS 1997–2005 (on file with author).

appointment of appellate counsel, means that the trial courts are no longer the cause of the delay where preparing the record is concerned.

The data for the trial courts' compliance with section 190.8(g) is less instructive because there are a few years for which no data are available.[146] In addition, because the record cannot be certified for accuracy until *after* appellate counsel is appointed, it does not appear that there is anything the trial courts can do to expedite the certification of the record for accuracy. As discussed above, the delays that result from a scarcity of experienced and willing appellate counsel are considerably greater than the time limits for certifying the reporter's transcript.

### C. DELAYS IN BRIEFING, ARGUING, AND REACHING A DECISION

The delay in the appointment of counsel creates a ripple effect of delays that reverberate throughout the remainder of the appellate process. For prisoners sentenced since 1978 whose automatic appeals have been decided, the average delay between the judgment of death and the filing of the California Supreme Court's opinion was 8.1 years.[147]

The overall delay in these cases is broken down as follows. The average delay between the appointment of counsel and the filing of the opening brief was 3.7 years.[148] Due to the dearth of available counsel, however, no opening briefs have been filed for prisoners condemned after June 2000.[149] The average delay between the filing of the opening brief and the filing of the responsive brief by the attorney general prior to June 2000 was 6 months.[150] The average delay between the filing of the responsive brief by the attorney general and the prisoner's reply brief was 6.5 months.[151] The average delay between the filing of the reply brief and oral argument before the California Supreme Court was 18.5 months.[152] The average delay between oral argument and the filing of the California Supreme Court's opinion between 1978 and January 19, 2004 was 6.2 months.[153] Since January 1, 1989, the California Supreme Court has filed

146. *Id.*
147. Docket Database, *supra* note 14.
148. *Id.*
149. In fact, only one inmate sentenced in 2000 has filed an opening brief. Lester Wilson, who was sentenced on June 29, 2000, filed his opening brief in his automatic appeal on July 19, 2004. *See id.*
150. *Id.*
151. *Id.*
152. *Id.*
153. *Id.*

its decisions in death penalty cases within ninety days of oral argument.[154] The average delay between the judgment of death and oral argument before the California Supreme Court was 7.6 years.[155]

It should be noted, however, that the average delay of eight years from the judgment of death to the California Supreme Court's decision understates the increasing length of delays in more recent cases. For example, the average delay between the judgment of death and the final disposition of the automatic appeal for condemned prisoners convicted between 1978 and 1989 was 6.6 years.[156] Death row inmates convicted between 1990 and 1996, however, have experienced an average delay of approximately 10.7 years between the judgment of death and the Supreme Court's decision disposing of the automatic appeal.[157]

The California Supreme Court has issued only one opinion disposing of an automatic appeal of a condemned prisoner convicted after 1997.[158] In that case, John George Brown was initially sentenced to death on June 15, 1982.[159] The California Supreme Court affirmed his judgment of death in his initial automatic appeal on August 25, 1988, after he had been on death row 6.2 years. In 1998, the California Supreme Court granted his state habeas corpus petition. Mr. Brown was retried, convicted, and again sentenced to death on March 31, 2000. The California Supreme Court affirmed the automatic appeal from his judgment of death on July 12, 2004.[160] Mr. Brown's state habeas corpus petition was denied September 28, 2005.[161] His federal habeas corpus petition, filed November 7, 2005, is currently pending.[162]

Between 1978 and 2005, 840 judgments of death were entered by California trial courts.[163] As illustrated by the chart below, during that same

154. Letter from the Honorable Ronald M. George, Chief Justice of the California Supreme Court, to author (Dec. 26, 2006) (on file with author) [hereinafter George Letter].

155. Docket Database, *supra* note 14.

156. *Id.*

157. *Id.*

158. *Id.* This figure is as of January 19, 2006.

159. People v. Brown, 93 P.3d 244 (Cal. 2004).

160. Docket, People v. Brown, No. S087243 (Cal. Mar. 31, 2000), *available at* http://appellatecases.courtinfo.ca.gov/.

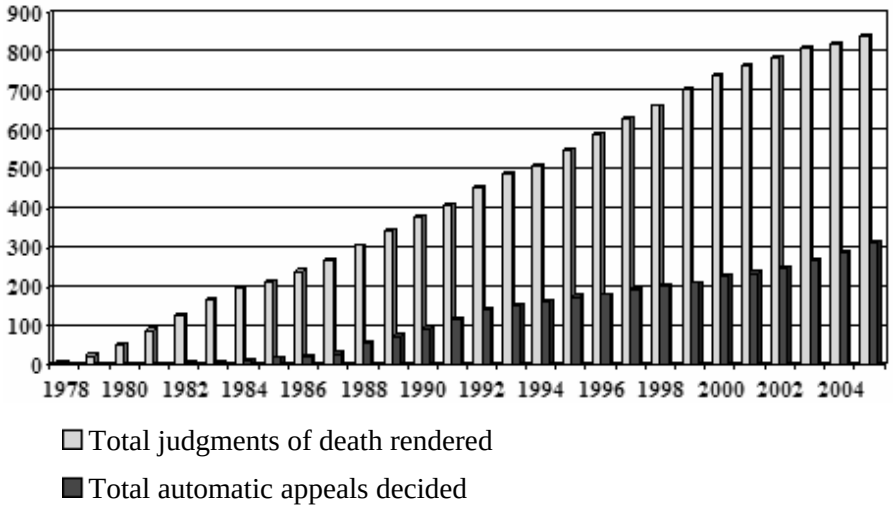
161. Docket, People v. Brown, No. S120253 (Cal. Nov. 4, 2003), *available at* http://appellatecases.courtinfo.ca.gov/.

162. Docket, Brown v. Ornoski, No. 2:05-cv-07964-AHM (E.D. Cal. Nov. 7, 2005), *available at* https://ecf.cacd.uscourts.gov.

163. Docket Database, *supra* note 14. This figure is larger than the current number of persons on death row because (1) some prisoners have had more than one judgment of death rendered against them,

period, the California Supreme Court decided 313 automatic appeals. Thus, the discrepancy between the number of judgments of death rendered and the number of direct appeals decided by the California Supreme Court as of the end of 2005 was 527 cases.[164]

FIGURE 2: California Supreme Court backlog in deciding automatic appeals of death row inmates 1978–2005




## D. RECOMMENDATIONS FOR REDUCING THE DELAY IN AUTOMATIC APPEALS

The California Legislature and the United States Congress hold the keys to reducing the delay in releasing persons who have been wrongfully convicted or in determining whether a person's trial and sentence were free of reversible error. The deterrent value of California's death penalty scheme is seriously called into question when one considers that since 1978, more than four times as many death row inmates have died of natural causes, suicide, or violence within prison walls than have been executed.[165]

(2) the judgments of death or sentences of some prisoners have been vacated, and (3) some prisoners have died by means other than execution while on death row.

164. *Id.*

165. *See* Cal. Dep't of Corrs. & Rehab., *supra* note 76.

An extraordinary delay in reaching a final disposition lends troubling support to the argument that death row prisoners are being subjected to cruel and unusual punishment in violation of the Eighth Amendment because of their prolonged imprisonment without any closure concerning their fate. Eleven years ago, in *Lackey v. Texas*, Justice Stevens noted that the "question whether executing a prisoner who has already spent some 17 years on death row violates the Eighth Amendment's prohibition against cruel and unusual punishment" is "importan[t]" and "novel" and "not without foundation."[166]

In his *Lackey* memorandum, Justice Stevens explained the Court's decision in *Gregg v. Georgia*[167] that the Eighth Amendment does not prohibit capital punishment "rested in large part on the grounds that (1) the death penalty was considered permissible by the Framers, and (2) the death penalty might serve 'two principal social purposes: retribution and deterrence.'"[168] Justice Stevens also wrote: "It is arguable that neither ground retains any force for prisoners who have spent some 17 years under a sentence of death."[169] As of January 2006, 198 prisoners had been on death row for more than seventeen years in California.[170]

Justice Stevens pointed out that "the Court's denial of certiorari does not constitute a ruling on the merits."[171] "Often, a denial of certiorari on a novel issue will permit the state and federal courts to 'serve as laboratories in which the issue receives further study before it is addressed by this Court.'"[172]

Justice Breyer agreed with Justice Stevens that "the issue is an important undecided one."[173] Justice Breyer has dissented from the denial of certiorari in four cases since he joined in Justice Stevens's memorandum in *Lackey*.[174] In his dissent from the denial of a writ of certiorari in *Elledge*

166. Lackey v. Texas, 514 U.S. 1045 (1995) (Stevens, J., respecting denial certiorari).

167. Gregg v. Georgia, 428 U.S. 153 (1976).

168. *Lackey*, 514 U.S. at 1045 (internal citations omitted) (quoting *Gregg*, 428 U.S. at 183 (Stewart, Powell & Stevens, JJ.)).

169. *Id.*

170. Docket Database, *supra* note 14.

171. *Lackey*, 514 U.S. at 1045.

172. *Id.* (quoting McCray v. New York, 461 U.S. 961, 963 (1983) (Stevens, Blackmun & Powell, JJ., respecting denial of certiorari)).

173. *Id.*

174. Allen v. Ornoski, 126 S. Ct. 1139 (2006) (Breyer, J., dissenting from denial of certiorari); Foster v. Florida, 537 U.S. 990 (2002) (Breyer, J., dissenting from same); Knight v. Florida, 528 U.S. 990, 993 (1999) (Breyer, J., dissenting from same); Elledge v. Florida, 525 U.S. 944 (1998) (Breyer, J., dissenting from same).

*v. Florida*,[175] Justice Breyer stated that imprisonment for more than twenty-three years under sentence of death was "unusual" and "especially 'cruel'" to a death row inmate because "he ha[d] experienced that delay because of the State's own faulty procedures and not because of frivolous appeals on his own part."[176]

On January 16, 2006, Justice Breyer again dissented from a denial of certiorari, this time in *Allen v. Ornoski*.[177] Justice Breyer wrote:

> Petitioner is 76 years old, blind, suffers from diabetes, is confined to a wheelchair, and has been on death row for 23 years. I believe that in the circumstances he raises a significant question as to whether his execution would constitute "cruel and unusual punishment." I would grant the application for stay of execution.[178]

The merits of the question of whether a delay of seventeen years (*Lackey*) or twenty-three years (*Allen*) is cruel and unusual punishment have not been decided by the United States Supreme Court. The fact that over 124 prisoners have been on California's death row for more than twenty years may well induce four members of the United States Supreme Court some day to grant a writ of certiorari to resolve the question of whether imprisonment for decades under sentence of death is itself cruel and unusual punishment.

As regrettably illustrated by the seventeen years it took to decide the automatic appeal in the *Ramirez* case, the California Legislature continues to ignore the increasing delay in finally determining the validity of death penalty judgments in California. The average time a death row inmate is imprisoned on death row in California will soon exceed twenty years in every case.[179]

In addition to raising concern over violating the Eighth Amendment's protection against cruel and unusual punishment, the delays in appointment of appellate counsel may also in the future raise due process concerns

175. *Elledge*, 525 U.S. at 944.

176. *Id.* In *Knight v. Florida*, Justice Breyer noted: "It is difficult to deny the suffering inherent in a prolonged wait for execution—a matter which courts and individual judges have long recognized." *Knight*, 528 U.S. at 994. Although Justice Breyer did not use the term, this suffering has come to be known as the "death row phenomenon." *See, e.g.*, Soering v. United Kingdom, 11 Eur. Ct. H.R. 439, 439 (1989) (coining term); Patrick Hudson, *Does the Death Row Phenomenon Violate a Prisoner's Human Rights Under International Law?*, 11 EUR. J. INT'L L. 833, 834 (2000) (discussing the meaning of the term).

177. *Allen*, 126 S. Ct. at 1139.

178. *Id.* (internal citations omitted) (quoting U.S. CONST. amend. VIII). The petitioner, Clarence Ray Allen, was executed at San Quentin Prison on January 17, 2006.

179. *See generally* Docket Database, *supra* note 14.

because only indigent prisoners must wait for counsel to be appointed. The doctrine undergirding the right to counsel on appeal is the right of indigent prisoners to be afforded the same Sixth Amendment right to counsel as prisoners who can afford to pay for their own counsel.[180]

1. California Courts of Appeal Should Review Automatic Appeals

The solution to the increasing delay between the entry of a judgment of death by the trial court and the ultimate grant or denial of relief from its execution is obvious. First, the California Legislature should amend the state constitution to provide that the California Courts of Appeal should have jurisdiction to review automatic appeals from death penalty judgments. It should not continue to blind itself to the fact that the seven members of the California Supreme Court are unable to keep up with the increasing backlog of automatic death penalty appeals awaiting disposition.

The California Legislature should take steps to amend article VI, section 11 of the California Constitution, which now provides: "The Supreme Court has appellate jurisdiction when judgment of death has been pronounced. With that exception courts of appeal have appellate jurisdiction when superior courts have original jurisdiction . . . ."[181] The automatic appeal of a judgment of death should be heard by the California Court of Appeal that reviews orders of the superior courts within its district. The Courts of Appeal should be required to publish their opinions in each death penalty case. The California Supreme Court should have the discretion to grant or deny a motion for a review of a California Court of Appeal's decision in an automatic appeal from a judgment of death. Discretionary review would permit the Supreme Court to resolve any conflicts in the decisions rendered by the various districts and divisions of the California Courts of Appeal or to consider novel questions of federal constitutional law.

This recommendation precisely parallels present federal law. A federal death row inmate convicted in federal court of a capital offense does not have the right to a direct appeal to the United States Supreme Court. The

180. *E.g.*, Douglas v. California, 372 U.S. 353, 357–58 (1963) ("There is lacking that equality demanded by the Fourteenth Amendment where the rich man, who appeals as of right, enjoys the benefit of counsel's examination into the record, research of the law, and marshalling of arguments on his behalf, while the indigent, already burdened by a preliminary determination that his case is without merit, is forced to shift for himself."); Griffin v. Illinois, 351 U.S. 12, 18 (1956) (addressing a state law that required all defendants to pay for a trial transcript in order to prepare an appeal, and stating that a state cannot grant appellate review "in a way that discriminates against some convicted defendants on account of their poverty").

181. CAL. CONST. art. VI, § 11.

Supreme Court has jurisdiction over cases reviewed by a United States Court of Appeals "[b]y writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree."[182] Thus, a writ of certiorari is "not a matter of right, but of judicial discretion."[183] As the federal system illustrates, just because "death is different" does not mean that intermediate appellate courts cannot provide the necessary level of review.[184]

The Timothy McVeigh case presents a prime example of the effectiveness of the federal system in reviewing appeals and applications for writs of habeas corpus from a conviction under federal law in a timely manner. Mr. McVeigh was indicted in the Western District of Oklahoma on August 10, 1995.[185] He was charged with eleven counts stemming from the bombing of the Alfred P. Murrah Federal Building that resulted in the deaths of 168 persons.[186]

The McVeigh trial commenced on April 24, 1997.[187] The jury returned guilty verdicts on all eleven counts on June 2, 1997. On June 14, 1997, the jury recommended that Mr. McVeigh be sentenced to death. On August 14, 1997, the district court sentenced him to death on each count. Mr. McVeigh filed a notice of appeal on that same date.[188]

The Tenth Circuit affirmed the conviction and sentence on September 8, 1998, less than thirteen months after entry of the judgment and sentence in the district court.[189] The United States Supreme Court denied Mr. McVeigh's petition for a writ of certiorari eight months later on March 8, 1999.[190]

182. 28 U.S.C. § 1254 (2000).

183. SUP. CT. R. 10.

184. Robert Weisberg has argued that allowing the California Courts of Appeal to review death sentences would threaten uniformity and increase arbitrariness. *See* Robert Weisberg, *Redistributing the Wealth of Capital Cases: Changing Death Penalty Appeals in California*, 28 SANTA CLARA L. REV. 243, 262–64 (1988). If the federal system is adopted in California, any lack of uniformity, arbitrariness, or conflicts between the Courts of Appeal would be resolved by the grant of review by the California Supreme Court. *See* Gerald F. Uelmen, *Crocodiles in the Bathtub: Maintaining the Independence of State Supreme Courts in an Era of Judicial Politicization*, 72 NOTRE DAME L. REV. 1133, 1138 (1997) (arguing that with regard to the California Courts of Appeal hearing death penalty cases, "the uniformity of ultimate judgment would be preserved in the process of considering applications for discretionary review").

185. Venue was subsequently transferred to the District of Colorado. United States v. McVeigh, 918 F. Supp. 1467 (W.D. Okla. 1996).

186. United States v. McVeigh, 153 F.3d 1166, 1176 (10th Cir. 1998).

187. *Id.* at 1177.

188. *Id.* at 1179.

189. *Id.* at 1222.

190. McVeigh v. United States, 526 U.S. 1007 (1999).

On March 6, 2000, Mr. McVeigh filed a motion to vacate his conviction and sentence pursuant to 28 U.S.C. § 2255 and a motion for a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure based on a claim of newly discovered evidence.[191] The motions were denied on October 12, 2000. On December 11, 2000, Mr. McVeigh filed a notice that he did not intend to appeal the denial of his § 2255 motion to vacate his conviction and sentence.[192]

The date for Mr. McVeigh's execution was set for May 16, 2001. On May 10, 2001, however, Attorney General John Ashcroft granted a thirty-day stay after discovering that the Federal Bureau of Investigation had failed to disclose thousands of pages of documents to Mr. McVeigh's defense team.[193]

On June 6, 2001, Mr. McVeigh filed a petition to stay his execution in the district court. It was denied the same day.[194] On June 7, 2001, the Tenth Circuit affirmed the denial of a stay of execution.[195] Mr. McVeigh was executed on June 11, 2001, after spending 3.8 years on death row.[196]

The time that elapsed from the entry of the district court's judgment to the affirmance of the conviction and sentence on direct appeal by the Tenth Circuit was one year and twenty-five days. The comparable average delay in California between the trial court's judgment and the affirmance on direct appeal in 1998 by the California Supreme Court would have been 8 years and 310 days.[197]

Timothy McVeigh's case is by no means an exception. Currently, there are forty-two persons on death row in the federal system.[198] Of those

191. United States v. McVeigh, 118 F. Supp. 2d 1137, 1139 (D. Colo. 2000).

192. Notice of Petitioner Timothy McVeigh Not to Appeal Re: Judgment, McVeigh v. United States, No. 1:-CV-00494-RPM (D. Colo. Dec. 11, 2000).

193. Mike Tharp, Chitra Ragavan & Angie Cannon, *A Notch in the Paranoia Belt: Timothy McVeigh Execution Delayed as Additional FBI Documents Are Discovered*, U.S. NEWS & WORLD REP., May 21, 2001, at 20.

194. United States v. McVeigh, No. 96-CR-68-M, 2001 WL 611163 (D. Colo. June 6, 2001).

195. United States v. McVeigh, 9 F. App'x 980 (10th Cir. 2001).

196. Two of the lawyers who were appointed to represent Mr. McVeigh at his trial acted as his appellate counsel before the Tenth Circuit. Thus, there was no delay in appointing appellate counsel.

197. For automatic appeals decided by the California Supreme Court in 1998 (the year the Tenth Circuit affirmed Timothy McVeigh's conviction and sentence), the average delay between entry of the judgment of death and the issuance of the California Supreme Court's opinion was 8.85 years. *See* Docket Database, *supra* note 14. No automatic appeals have yet been decided for prisoners convicted and sentenced in California in 1997 (the year Timothy McVeigh was convicted and sentenced), so it is not possible to calculate the delay in California for the resolution of the automatic appeals of prisoners convicted in 1997, except to say that it is already in excess of nine years.

198. *Id.*

forty-two, thirty-seven have had their direct appeal decided by a United States Court of Appeals.[199] The average delay in deciding that appeal is only two and a half years.[200] This figure includes the time it takes the Court of Appeals to decide whether to rehear the case en banc.[201] Some may argue that allowing the California Supreme Court to hear discretionary appeals from the California Courts of Appeal will only add another layer of lengthy review.[202] However, the average delay between the decision of the United States Court of Appeals and that of the United States Supreme Court with regard to an inmate's petition for a writ of certiorari is only nine months.[203] The comparable average delay in California between a trial court's judgment and affirmance on automatic appeal is currently eight years.[204]

With the exception of appeals from death penalty judgments, the California Courts of Appeal have had, since their inception, appellate jurisdiction over all criminal appeals from state trial court judgments. This includes appeals filed by defendants convicted of first degree murder with special circumstances who were sentenced to life in prison without the possibility of parole rather than death.[205] The only difference between the review undertaken by the Courts of Appeal in such cases and that of the California Supreme Court in automatic appeals from judgments of death is that the Supreme Court must consider whether the mitigating circumstances were properly considered by the jury in determining that the death penalty should be imposed.[206] Otherwise, the law and procedures are identical:

> At the initial phase of the trial, the trier of fact decides the issue of defendant's guilt or innocence of first degree murder. If the defendant is found guilty, a determination must be made as to the existence of any "special circumstances." If the trier of fact finds at least one alleged special circumstance to be true, the case proceeds to the "penalty" phase of the trial.[207]

A review of 100 appeals from first degree murder convictions with special circumstances decided by the California Courts of Appeal between

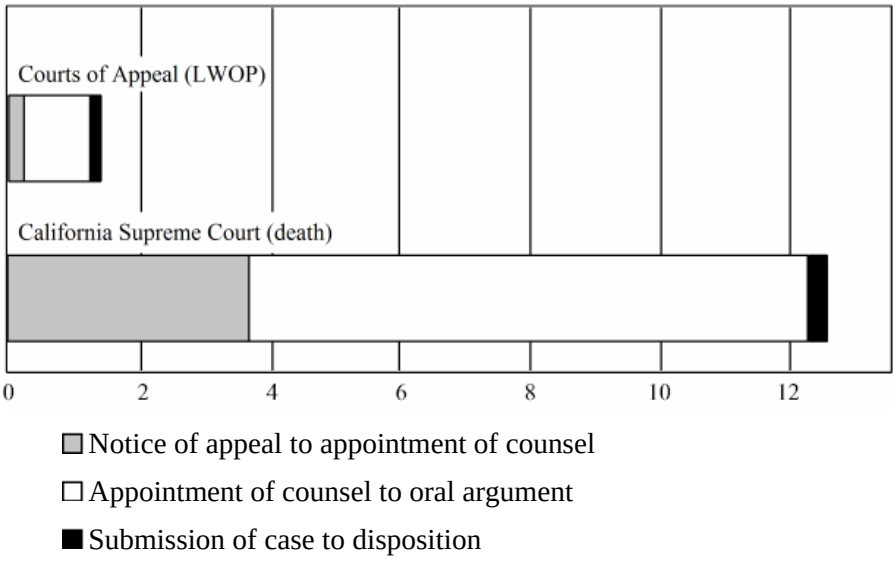
199. *Id.*
200. *Id.*
201. *Id.*
202. *See* Uelmen, *supra* note 184, at 1138–39.
203. Docket Database, *supra* note 14.
204. *Id.*
205. *See* CAL. CONST. art. VI, § 11; CAL. PENAL CODE § 1237 (West 2004).
206. *See, e.g.*, People v. Ramirez, 139 P.3d 64, 111–12 (Cal. 2006) (considering jury instructions with regard to mitigating evidence on an automatic appeal from judgment of death).
207. People v. Bacigalupo, 862 P.2d 808, 813 (Cal. 1993) (internal citations omitted).

June 2005 and June 2006 revealed the following statistics regarding the average delays in reaching a final decision:

> Notice of appeal to appointment of counsel: 1.9 months.
>
> Appointment of counsel to submission of case/oral argument: 15.1 months.
>
> Submission of the case/oral argument to final disposition: 24 days.
>
> Overall delay: 18.6 months.[208]

During that same one-year period, the California Supreme Court issued opinions in approximately thirty-one automatic appeals from convictions and sentences of death in first degree murder cases with special circumstances.[209] The average delay in those cases was over twelve years. The disparity in the delays currently experienced in the two courts is illustrated in the chart below.

FIGURE 3: First degree murder with special circumstances—Appeals decided 2005–2006. Filing of appeal to appellate court decision: Average delay in years.




208. Docket Database, *supra* note 14.
209. *Id.*

The 105 justices of the California Courts of Appeal disposed of 15,856 appeals in the fiscal year of 2004 to 2005.[210] In the same year, eighteen appeals from judgments of death were automatically filed in the California Supreme Court.[211] Had these appeals from judgments of death been automatically filed in the California Courts of Appeal, they would have increased the courts' caseload by only one tenth of one percent (0.0011). Similarly, between 1995 and 2005, the California Courts of Appeal disposed of, on average, 26,631 appeals per year.[212] During that same period, twenty-eight automatic appeals from judgments of death, on average, were filed in the California Supreme Court per year.[213] Based on these ten-year averages, transferring the automatic appeals from judgments of death to the California Courts of Appeal would increase their caseloads by only one and one half tenths of one percent (0.0015).

The increased caseload is even smaller if one takes into account that the work would be distributed among the six districts of the California Courts of Appeal. If the Courts of Appeal had jurisdiction over automatic appeals of the judgments of death entered since 1978, the distribution by Courts of Appeal Districts would have been as follows:[214]

14% in the First District[215]

34% in the Second District[216]

10% in the Third District[217]

26% in the Fourth District[218]

11% in the Fifth District[219]

210. *See* 2006 STATISTICS REPORT, *supra* note 109, at 20. The 2006 Statistics Report is based on information obtained from the California courts regarding appeals filed in 2004–2005. The report, however, assumes that the courts will decide approximately the same number of appeals in 2005–2006 as they did in 2004–2005. *Id.* at 15.

211. *Id.* at 4.

212. *See id.* at 25 (providing data from which the average can be calculated).

213. *See id.* at 4 (providing data from which the average can be calculated).

214. These percentages are equal to the percentage of automatic appeals from judgments of superior courts located in counties covered by each district. For instance, 14% of automatic appeals commenced since 1978 are from judgments of superior courts located in counties covered by the First District.

215. The First District includes Alameda, Contra Costa, Del Norte, Humboldt, Lake, Marin, Mendocino, Napa, San Francisco, San Mateo, Solano, and Sonoma counties.

216. The Second District includes Los Angeles, Ventura, San Luis Obispo, and Santa Barbara counties.

217. The Third District includes Alpine, Amador, Butte, Calaveras, Colusa, El Dorado, Glenn, Lassen, Modoc, Mono, Nevada, Placer, Plumas, Sacramento, San Joaquin, Shasta, Sierra, Siskiyou, Sutter, Tehama, Trinity, Yolo, and Yuba counties.

218. The Fourth District includes San Diego, Imperial, Riverside, Inyo, San Bernardino, and Orange counties.

5% in the Sixth District[220]

This means that for an average of twenty-eight new death penalty cases each year, the average annual increase in work load for the Courts of Appeal Districts would have been:

First District: Four cases

Second District: Nine cases

Third District: Three cases

Fourth District: Seven cases

Fifth District: Three cases

Sixth District: Two cases

These statistics demonstrate that shifting the jurisdiction over automatic appeals from death penalty judgments could be absorbed by the Courts of Appeal and would thereby relieve the California Supreme Court of an increasing backlog of capital cases.

The California Legislature should also consider amending the California Constitution to authorize the Supreme Court to transfer to the Courts of Appeal those pending cases that have not been calendared for oral argument.[221] This authority would relieve the Supreme Court of its seemingly impossible task of attempting to reduce its backlog of appeals from judgments of death and would also permit it to fulfill its responsibility to review civil and noncapital criminal appeals as well.

2. Cases Should Be Triaged for Early Appointment of Appellate Counsel

The process of appointing appellate counsel should be based on a determination by the California Supreme Court of the likelihood of a successful appeal on the question of guilt. Appointment of counsel should be made swiftly in those cases. Lengthy delays in appointing appellate counsel can be highly prejudicial to a prisoner's due process rights, particularly where the reviewing court concludes that the conviction must be set aside and the prisoner is entitled to a new trial on the issue of guilt. In such instances, a prolonged delay in retrying a case can result in the death of potential witnesses, the loss or impairment of their memory, or the destruction of evidence that may support a defense theory.

219. The Fifth District includes Fresno, Kern, Kings, Madera, Mariposa, Merced, Stanislaus, Tulare, and Tuolumne counties.

220. The Sixth District includes San Benito, Santa Clara, Santa Cruz, and Monterey counties.

221. Docket Database, *supra* note 14.

Conversely, where the sole claim on appeal is that the trial court erred in imposing the death penalty, and not that the error occurred in upholding the judgment of guilt, the effect of excessive delay is in some respects advantageous to appellants because it will prolong their lives before the judgment is executed.[222] Therefore, priority should be given to those automatic appeals wherein claims are made that attack a first degree murder conviction or the sufficiency of the evidence of guilt or special circumstances, rather than the sentence.

To facilitate a triage process, the California Legislature should require a condemned prisoner's trial counsel to file an appellate memorandum with the clerk of the superior court within thirty days of the entry of the judgment of death. This memorandum should set forth each of the alleged errors that should be considered on the automatic appeal. It could then be used to determine which cases should receive priority in the appointment of counsel in order to reduce the harmful effects of delay should a new trial on the issue of guilt be ordered.

3. Appointed Counsel Should Be Adequately Compensated; More Counsel Should Be Trained in Handling Capital Cases

The California Legislature must provide sufficient funds to compensate qualified lawyers who are willing to accept an appointment to represent death row inmates in their automatic appeals.[223] There is no justification for the Legislature's failure to address the longstanding shortage of qualified counsel. Private practitioners who can bear the financial sacrifice of accepting a court-appointment at the present hourly rates are scarce. Accepting an appointment to represent a death row inmate on direct appeals requires a lawyer to devote an average of more than eleven years to protecting the inmate's interests.[224]

In addition to increasing the hourly rate to induce lawyers to serve as counsel for death row inmates, the California Legislature should also provide funds to law schools to train students and lawyers who wish to specialize in the representation of condemned prisoners in automatic direct

222. *See* POWELL COMMITTEE REPORT, *supra* note 9, at 5 ("The inmate under capital sentence, whose guilt frequently is never in question, has every incentive to delay the proceedings that must take place before that sentence is carried out.").

223. *See infra* Part V.B.2. With regard to appointment of counsel in state habeas corpus proceedings, I recommend below that the current system be changed to provide continuity of counsel for all state and federal habeas corpus proceedings. The compensation for such counsel should be borne by the federal and state governments.

224. Docket Database, *supra* note 14.

appeals and in habeas corpus proceedings. The curriculum should include a review of the following: (1) the law concerning the sufficiency of the evidence required to prove first degree murder with special circumstances; (2) the type of evidence admissible in a death penalty sentencing hearing; and (3) the relevant decisions of the United States Supreme Court limiting the application of the death penalty.[225] The curriculum should also include classes on appellate brief writing and oral advocacy and the facts that must be alleged in a habeas corpus petition and presented if an evidentiary hearing is ordered. Special classes should also be presented regarding the limitations on federal habeas corpus jurisdiction including the exhaustion requirement, the bar from rearguing the merits because of adequate and independent state grounds, the special statutes of limitations for death penalty cases, and the restrictions against successive applications for relief.

The instructors at the capital case institutes should include members of the private bar who have served as appellate counsel on automatic appeals in capital cases, or who have represented death row inmates in state or federal habeas corpus proceedings. Members of the death penalty units in the Federal Public Defenders Offices in the Central and Eastern Districts of California could provide expert guidance to class participants.

As part of their class assignments, the lawyers and students training at such institutes could be required to assist counsel who are presently representing death row inmates. The trainees could assist counsel in their research for the preparation of pleadings and in the discovery of witnesses to support the allegations in habeas corpus petitions.[226]

225. *See, e.g.*, Roper v. Simmons, 543 U.S. 551 (2005) (concluding that the execution of an individual who committed murder as a juvenile was unconstitutional under the Eighth Amendment); Atkins v. Virginia, 536 U.S. 304 (2002) (concluding that the execution of an individual who is mentally disabled was unconstitutional under the Eighth Amendment).

226. A few programs, similar to the one I am advocating, exist throughout the nation. For example, Boalt Hall School of Law sponsors a one-year clinic in which "Boalt Hall faculty members . . . supervise law students in investigating cases, interviewing witnesses and launching death row appeals in state and federal court." Press Release, Janet Gilmore, UC Berkeley School of Law Announces Establishment of New Law Clinic, Program to Assist California Inmates on Death Row (Jan. 4, 2001), *available at* http://www.berkeley.edu/news/media/releases/2001/01/04_law.html; School of Law–Boalt Hall, Death Penalty Clinic, *at* http://www.law.berkeley.edu/clinics/dpclinic/ (last visited Mar. 1, 2007). In Boalt Hall's program, students do not work on automatic appeals; rather, they focus on petitions for writs of habeas corpus at the state and federal levels. *See* Press Release, *supra*. Similarly, New York University School of Law offers a year-long course that includes "working with clinic faculty and present and former staff attorneys of the NAACP Legal Defense Fund (LDF) on death cases as well as a variety of issues relating to capital punishment, habeas corpus, and the criminal justice system." NYU School of Law, Capital Defender Clinic–New York, *at* http://www.law.nyu.edu/clinics/year/capitalny/ (last visited Mar. 1, 2007). Students may work on actual cases, including cases from California. *Id.*

The funding of capital case institutes and increased compensation for attorneys could come from the money that would be saved by reducing the funds now expended to house death row inmates during the more than three-year delay caused by the difficulty of finding qualified counsel who are willing to serve at $140 per hour. Additionally, as set forth in greater detail in Part V, the same attorney should represent a death row inmate at the state and federal habeas level. Such continuity of counsel could reduce or eliminate the long delay attributable to the exhaustion of state remedies. The elimination of the average three-year delay now necessary to exhaust claims in seventy-four percent of the federal habeas corpus applications and the same delay in appointing counsel to represent death row inmates on automatic appeal could reduce the time spent on death row by an average of six years. This would save roughly $744,900 per prisoner ($124,150 per year multiplied by six years).[227]

## V. DELAYS INHERENT IN POSTCONVICTION REMEDIES

### A. STATE HABEAS CORPUS RELIEF

In addition to the right to an automatic appeal, California death row inmates may also file a petition for a writ of habeas corpus under state law based on alleged violations of their state or federal rights that were not presented during their trials and were not forfeited by the failure to object.[228] This collateral review process adds significant delays to the execution of a death sentence.

Article I of the California Constitution, adopted in 1849, provided in section 5 that "[t]he privilege of the writ of habeas corpus shall not be suspended, unless when, in cases of rebellion or invasion, the public safety may require its suspension."[229] Implicit in the language of article I, section 5 is a recognition that the common law right to habeas corpus was guaranteed to state prisoners. Section 10 of article VI of the California Constitution, adopted in 1966, provides as follows: "The Supreme Court,

227. *See* Tempest, *supra* note 68 (setting forth housing costs for death row inmates); Docket Database, *supra* note 14 (setting forth statistics regarding the length of the average delay in exhausting state remedies).

228. *See* CAL. PENAL CODE § 1473 (West 2000) ("Every person unlawfully imprisoned or restrained of his liberty, under any pretense whatever, may prosecute a writ of habeas corpus . . . .").

229. CAL. CONST. of 1849, art. I, § 5.

courts of appeal, superior courts, and their judges have original jurisdiction in habeas corpus proceedings."[230]

In 1972, the California Legislature enacted California Penal Code section 1473. Section 1473 reads as follows: "Every person unlawfully imprisoned or restrained of his liberty, under any pretense whatever, may prosecute a writ of habeas corpus . . . ."[231] State prisoners who file an application for habeas corpus do not have the right to appeal to the Courts of Appeal or the Supreme Court if their request for relief filed in the superior court is denied. They may, however, file an original petition for habeas corpus in a higher court.[232]

Notwithstanding a condemned prisoner's right pursuant to article I, section 10, to file a petition for a writ of habeas corpus in the superior courts, there is a strong financial incentive to file in the Supreme Court. If a death row inmate is indigent, the California Supreme Court will appoint counsel. The *Supreme Court Policies Arising from Judgments of Death*, Policy 3, however, provides:

> Absent prior authorization by this court, this court will not compensate counsel for the filing of any other motion, petition, or pleading in any other California or federal court or court of another state. Counsel who seek compensation for representation in another court should secure appointment by, and compensation from, that court.[233]

230. CAL. CONST. art. VI, § 10. Section 10 of article VI was derived from what was formerly section 4 of article VI, adopted in 1879. It provided, "The Court shall also have power to issue writs of mandamus, certiorari, prohibition, and habeas corpus, and all other writs necessary or proper to the complete exercise of its appellate jurisdiction." Former section 4 also granted each justice "power to issue writs of habeas corpus to any part of the State, upon petition by or on behalf of any person held in actual custody, and make such writs returnable before himself, or the Supreme Court, or before any Superior Court in the State, or before any Judge thereof." In 1904, when the Courts of Appeal were created, section 4 was amended to provide the same power to the courts of appeal. *See* 1903 Cal. Stat. 739.

231. CAL. PENAL CODE § 1473.

232. In *Carey v. Saffold*, the Supreme Court noted:

> California's collateral review system differs from that of other States in that it does not require, technically speaking, appellate review of a lower court determination. Instead, it contemplates that a prisoner will file a new "original" habeas petition. . . .
>
> . . . [A] prisoner who files that same petition in a higher, reviewing court will find that he can obtain the basic appellate review that he seeks, even though it is dubbed an "original" petition.

Carey v. Saffold, 536 U.S. 214, 221–22 (2002). *See also* People v. Gallardo, 92 Cal. Rptr. 2d 161, 169 (Ct. App. 2000) ("Although the People may appeal the granting of a writ of habeas corpus, the detainee has no right to appeal its denial and must instead file a new habeas corpus petition in the reviewing court.").

233. SUPREME COURT POLICIES ARISING FROM JUDGMENTS OF DEATH, at Policy 3, 2-1 (Cal. 1989) [hereinafter DEATH POLICY].

1. Appointment of Counsel in State Habeas Corpus Proceedings

The California Legislature has empowered the Supreme Court, but no other court, "to appoint counsel to represent all state prisoners subject to a capital sentence for purposes of state postconviction proceedings."[234] As a general rule, the California Supreme Court attempts to appoint state habeas corpus counsel at the same time automatic appeal counsel is appointed.[235] In practice, however, several factors impede the prompt appointment of counsel.

Similar to the situation concerning the scarcity of counsel available to represent death row inmates in an automatic appeal, there is also a shortage of qualified attorney applicants who are willing to file and prosecute petitions for writs of habeas corpus on behalf of death row inmates because of the inadequate compensation for such representation. Another factor impeding prompt appointment of counsel is that the amount of funding authorized for investigation services and expenses is only $25,000.[236] Habeas counsel is limited to the presentation of evidence of alleged state law or federal constitutional violations that do not appear in the trial record.[237] This means that counsel must conduct an investigation to discover facts and witnesses not presented at trial that will demonstrate that state habeas corpus relief should be granted.[238] As one commentator put it, "[i]n a habeas proceeding . . . attorneys try to sniff out information that was not in the record, such as the withholding of material evidence, ineffective representation by counsel or a client's mental retardation."[239]

The Legislature created the California Habeas Corpus Resource Center ("HCRC"), whose attorneys "may be appointed by the Supreme Court to represent any person convicted and sentenced to death in this state

234. CAL. GOV'T CODE § 68662 (West Supp. 2006). Section 68662 provides:

> The Supreme Court shall offer to appoint counsel to represent all state prisoners subject to a capital sentence for purposes of state postconviction proceedings, and shall enter an order containing one of the following:
>
> (a) The appointment of one or more counsel to represent the prisoner in postconviction state proceedings upon a finding that the person is indigent and has accepted the offer to appoint counsel or is unable to competently decide whether to accept or reject that offer.
>
> (b) A finding, after a hearing if necessary, that the prisoner rejected the offer to appoint counsel and made that decision with full understanding of the legal consequences of the decision.
>
> (c) The denial to appoint counsel upon a finding that the person is not indigent.

*Id.*

235. Information provided by Frederick K. Ohlrich, Court Administrator and Clerk of the California Supreme Court (Aug. 18, 2006) (on file with author).

236. DEATH POLICY, *supra* note 233, at Policy 3, 2-2.1.

237. *See* People v. Waidla, 996 P.2d 46, 52 (Cal. 2000).

238. DEATH POLICY, *supra* note 233, at Policy 3, 1-1.

239. *Habeas Center Needs Help for Death Row Inmates*, CAL. BAR J., Dec. 2004.

who is without counsel, and who is determined by a court . . . to be indigent, for the purpose of instituting and prosecuting postconviction actions in the state and federal courts."[240] The HCRC is also charged with the duty of assisting "the Supreme Court in recruiting members of the private bar to accept death penalty habeas case appointments"[241] and to "establish and periodically update a roster of attorneys qualified as counsel in postconviction proceedings in capital cases."[242]

While the HCRC is available to take appointments in capital habeas corpus proceedings, the number of cases the HCRC can accept is limited both by a statutory cap on the number of attorneys it may hire and by available fiscal resources.[243] The Office of the State Public Defender is available for no more than a very small number of habeas corpus appointments, also due to limited staffing.[244] As a result, the vast majority of habeas corpus appointments are filled by private counsel. The HCRC and the California Appellate Project ("CAP") have developed a training and assistance program designed to meet the needs of attorneys who take capital state habeas appointments.[245] The services provided include a "Habeas College" conducted by HCRC staff, as well as ongoing mentoring and assistance with case-planning and follow-up.[246]

2. Review of State Habeas Corpus Petitions

The California Supreme Court has adopted the following procedure in reviewing a condemned prisoner's petition for habeas corpus relief. The court determines whether the petition would be entitled to relief assuming the allegations in the petition are true. "The petition 'must allege unlawful restraint, name the person by whom the petitioner is so restrained, and specify the facts on which [the petitioner] bases his [or her] claim that the restraint is unlawful.'"[247]

240. CAL. GOV'T CODE § 68661(a) (West Supp. 2006).

241. *Id.* § 68661(c).

242. *Id.* § 68661(d).

243. *See id.* § 68661(a).

244. Ohlrich, *supra* note 235.

245. *See* Habeas Corpus Res. Ctr., Memorandum Regarding Law Firm Appointments in Capital State Habeas Corpus Proceedings (Mar. 6, 2006).

246. *See id.*

247. *See* People v. Romero, 883 P.2d 388, 391 (Cal. 1994) (alteration in original) (quoting *In re* Lawler, 588 P.2d 1257, 1259 (Cal. 1979)). *See also* People v. Duvall, 886 P.2d 1252, 1258 (Cal. 1995) ("An appellate court receiving such a petition evaluates it by asking whether, assuming the petition's factual allegations are true, the petitioner would be entitled to relief.").

"If the court determines that the petition does not state a prima facie case for relief or that the claims are all procedurally barred, the court will deny the petition outright, such dispositions being commonly referred to as 'summary denials.'"[248] For example, a petitioner may not obtain habeas corpus relief based on alleged errors that were not objected to at trial.[249]

Pursuant to Rule 8.380(c) of the California Rules of Court, if a petition for a writ of habeas corpus is filed by a person who is not represented by counsel,

> [t]he court may request an informal written response from the respondent, the real party in interest, or an interested person. . . . If a response is filed, the court must notify the petitioner that a reply may be served and filed within 15 days or as the court specifies. The court may not deny the petition until that time has expired.[250]

If the court determines that the petition is sufficient on its face, "the court is obligated by statute to issue a writ of habeas corpus."[251] Furthermore,

> [t]he role that the writ of habeas corpus plays is largely procedural. It "does not decide the issues and cannot itself require the final release of the petitioner." Rather, the writ commands the person having custody of the petitioner to bring the petitioner "before the court or judge before whom the writ is returnable."[252]

The court in *People v. Romero* noted that:

> Judicial practice and decisions of . . . [the California Supreme Court] have authorized one deviation from the procedure specified in the Penal Code. Because "appellate courts are not equipped to have prisoners brought before them . . . [the Supreme Court] and the Courts of Appeal developed the practice of ordering the custodian to show cause why the relief sought should not be granted." When used as a substitute for the writ of habeas corpus, the order to show cause "directs the respondent custodian to serve and file a written return."[253]

The court may not substitute the informal response for a writ of habeas corpus or an order to show cause.[254]

248. *Romero*, 883 P.2d at 391.

249. *In re* Seaton, 95 P.3d 896, 899 (Cal. 2004).

250. CAL. R. CT. 8.380(c).

251. *Romero*, 883 P.2d at 391 (citing CAL. PENAL CODE § 1476 (West 1994)).

252. *Id.* (internal citations omitted) (quoting People v. Getty, 123 Cal. Rptr. 704, 709 (Ct. App. 1975); CAL. PENAL CODE § 1477 (West 1975)).

253. *Id.* (internal citations omitted) (quoting *In re* Hochberg, 471 P.2d 1, 4 n.2 (Cal. 1970)).

254. *See id.* at 393.

The written return must allege facts establishing the legality of the petitioner's custody, and it "becomes the principal pleading."[255] Further, "[u]pon the submission of the written return, the petitioner 'may deny or controvert any of the material facts or matters set forth in the return.'"[256] This response is known as a traverse[257] and it "is through the return and the traverse that the issues are joined in a habeas corpus proceeding."[258]

At this point, the court

> must determine whether an evidentiary hearing is needed. If the written return admits allegations in the petition that, if true, justify the relief sought, the court may grant relief without an evidentiary hearing. Conversely, consideration of the written return and matters of record may persuade the court that the contentions advanced in the petition lack merit, in which event the court may deny the petition without an evidentiary hearing. Finally, if the return and traverse reveal that petitioner's entitlement to relief hinges on the resolution of factual disputes, then the court should order an evidentiary hearing. Because appellate courts are ill-suited to conduct evidentiary hearings, it is customary for appellate courts to appoint a referee to take evidence and make recommendations as to the resolution of disputed factual issues. Alternatively, an appellate court may specify in the order to show cause that the return is to be filed in the superior court. This effectively transfers the proceeding to superior court, and that court will conduct any evidentiary hearing that may be required. After the evidentiary hearing, the court in which the return has been filed will then either grant or deny relief based upon the law and the facts as so determined.[259]

The average delay between the filing of a state petition for a writ of habeas corpus and the filing of the California Supreme Court's decision is twenty-two months.[260] This delay occurs because, in the vast majority of cases, the California Supreme Court decides the case on the basis of the informal response alone. Out of 689 state habeas corpus proceedings filed since 1978,[261] the California Supreme Court has issued orders to show cause in fifty-seven cases.[262] In the same time period, it has held evidentiary hearings only thirty-one times.[263] In over 200 cases filed since

255. *Id.* at 392.
256. *Id.* (quoting CAL. PENAL CODE § 1484 (West 1994)).
257. *Id.*
258. *Id.*
259. *Id.* at 392–93 (internal citations omitted).
260. Docket Database, *supra* note 14.
261. Many prisoners file more than one petition for habeas corpus.
262. Docket Database, *supra* note 14.
263. *Id.*

1978, the California Supreme Court issued decisions without a request for an informal response, an order to show cause, or an evidentiary hearing.[264] This research illustrates that relatively few resources are devoted to investigating a petitioner's habeas corpus claims at the state court level. This is due to both time and budgetary constraints. Attorneys representing death row inmates in state habeas corpus proceedings have only three years from the date of their appointment, and $25,000 in expenses, to investigate claims and file a petition.[265] As a result, many claims are not fully explored. And as frequently happens in such cases, the California Supreme Court does not issue a written opinion explaining its reasoning.[266]

The absence of a developed factual record and an articulated analysis from the California Supreme Court regarding the reasons for denying relief can contribute to lengthier delays when the prisoner seeks relief in federal court or in subsequent state habeas proceedings.[267] As a result of its overwhelming backlog of death penalty cases and its duty to review civil and other criminal cases on appeal, the Supreme Court has been forced to reject the requests from federal judges in the Ninth Circuit asking that orders denying a petition for a writ of state habeas corpus spell out the reasons for the denial.[268] Chief Justice Ronald George explained in response to an inquiry from U.S. Senator Diane Feinstein "that drafting and reviewing an order containing more information than the basic ground for denying relief consumes far more time on the part of both staff and the justices, to the detriment of the court's performance of its responsibilities in noncapital cases."[269] After receiving Chief Justice George's response, Senator Feinstein wrote to Governor Arnold Schwarzenegger requesting his assistance in addressing the problem of the "lengthy and unnecessary delays" in processing death penalty cases in California because of inadequate funding.[270] Senator Feinstein concluded that "[t]he absence of a

264. *Id.* Supreme Court staff has indicated that "[f]or the past 12 or so years . . . we have ordered informal response briefing in almost every 'initial' petition, and in the vast majority of 'successive' petitions as well." *See* George Letter, *supra* note 154.

265. DEATH POLICY, *supra* note 233, at Policy 3, 1-1.1, 1-1.2.

266. Docket Database, *supra* note 14.

267. Kenneth Williams, *The Antiterrorism and Effective Death Penalty Act: What's Wrong with It and How to Fix It*, 33 CONN. L. REV. 919, 927–28 (2001) (suggesting that the efficacy of AEDPA is undermined because "state courts [do not] accept their . . . responsibility seriously and provide death row inmates with a thorough, meaningful review of their claims. . . . [I]n too many states, the state habeas process is merely perfunctory.").

268. Letter from the Honorable Ronald M. George, Chief Justice of the California Supreme Court, to Diane Feinstein, U.S. Senator (Nov. 29, 2005) (on file with author).

269. *Id.*

270. Letter from Diane Feinstein, U.S. Senator, to Arnold Schwarzenegger, Governor of California (Dec. 8, 2005), *available at* http://feinstein.senate.gov/05releases/r-habeas.htm.

thorough explanation of the [California Supreme] Court's reasons for its habeas decisions often requires federal courts to essentially start each federal habeas death penalty appeal from scratch, wasting enormous time and resources."[271]

## B. RECOMMENDATIONS FOR REDUCING DELAY IN STATE HABEAS PROCEDURE

### 1. Review of Original State Habeas Corpus Petitions by the Superior Court

The California Constitution should be amended to require that original petitions for a writ of habeas corpus be filed in the superior court where the judgment of death was entered. This change would radically reduce the Supreme Court's backlog. Despite the fact that the superior courts currently have jurisdiction over original habeas corpus petitions, such petitions are filed in the Supreme Court because the Supreme Court is the only court authorized to compensate appointed counsel. Accordingly, the California Legislature should amend the law to provide compensation for appointed counsel when state habeas corpus petitions are filed in the superior court where the condemned prisoner was sentenced to death.

The potential for reducing the delay of finally adjudicating a sentence of death by having the original habeas corpus petition filed in the superior court is tremendous. There are 1499 superior court judges in California.[272] An average of thirty-eight state habeas corpus petitions in death penalty cases are filed each year in the California Supreme Court.[273] Spreading these state habeas corpus petitions among the trial courts would dramatically reduce the Supreme Court's caseload while having a minimal impact on the superior courts. Trial court judges are uniquely qualified to hear original habeas corpus claims because they are already familiar with the evidence presented at trial. And in order to facilitate appellate review, the superior court judge hearing the petition should be required to issue a written order explaining the reasons for granting or denying habeas corpus relief.

The Legislature should also revise the law to provide for the right of appeal from the denial of a petition for state habeas corpus relief in a

271. *Id.*

272. California Judicial Selection, *at* http://www.ajs.org/js/CA_methods.htm (last visited May 10, 2007).

273. *See* 2006 STATISTICS REPORT, *supra* note 109, at 4 (providing data from which the average can be calculated).

capital case to the California Courts of Appeal with jurisdiction over that superior court. The California Courts of Appeal should be required to file an opinion setting forth the reasons, and the case law, that support its decision to affirm or deny a superior court's order in a petition for habeas corpus relief in capital cases. California law should also be amended to permit the Supreme Court to exercise its discretion whether to review the opinion of a California Court of Appeal in affirming or denying a superior court's judgment in a state habeas corpus proceeding. If the petition for review is granted, the California Supreme Court should be required to publish an opinion setting forth the rationale for its decision.

Requiring written orders from the superior courts and the California Courts of Appeal that address the merits of a petitioner's state habeas corpus claims will decrease delays incurred later in the process when the inmate files a federal habeas corpus petition. Under the existing system, federal courts do not have the benefit, in most cases, of a written order from the California Supreme Court explaining the reasons for its decision. This current practice places the burden on federal district courts to determine whether the death row inmate's federal constitutional claims have merit.

2. Continuity of Habeas Counsel and Investigation of Habeas Claims

The California Legislature and Congress should jointly fund a state/federal Capital Habeas Agency to represent death row inmates convicted in California. Such an agency would provide continuity of representation in the state and federal court systems.[274] Financial resources should be funded by both the state and federal governments to permit an exhaustive investigation of a death row inmate's claims. The practical effect of underfunding the investigations that must occur in developing an inmate's habeas corpus claims at the state level is that the federal government ultimately pays for the investigation years later when the inmate files a federal habeas corpus petition. The district courts must allow time for proper investigations to be completed. If properly funded, a joint state/federal Capital Habeas Agency would permit a complete investigation of the facts that support allegations of federal constitutional violations in a state habeas corpus proceeding. If habeas corpus relief were denied in a state court, the same counsel could file an application for a writ of habeas corpus in federal court pursuant to 28 U.S.C. § 2254. With continuity of counsel, all federal constitutional claims would have been investigated and

274. *See* POWELL COMMITTEE REPORT, *supra* note 9, at 4.

exhausted before the state's highest court, thereby avoiding delays that now occur because viable federal constitutional claims were not investigated or exhausted in the California court system.

### C. STATE PRISONER FEDERAL HABEAS CORPUS PROCEEDINGS

Pursuant to 28 U.S.C. § 2254(a), a state prisoner may file an application for a writ of habeas corpus in federal court "on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."[275] If the death row inmate does not have counsel, a federal district court has the jurisdiction to grant the inmate's request for the appointment of counsel to prepare an application for a writ of habeas corpus.[276] The application shall not be granted "unless it appears that . . . the applicant has exhausted the remedies available in the courts of the State."[277]

If a death row inmate files an application for habeas corpus relief in a federal district court pursuant to § 2254 that asserts claims exhausted before a state's highest court as well as unexhausted claims, the district court may provide the applicant with discrete options. First, the district court can "dismiss such 'mixed petitions,' leaving the prisoner with the choice of returning to state court to exhaust his claims or of amending or resubmitting the habeas corpus petition to present only the exhausted claims to the district court."[278]

In 2005, the Supreme Court provided condemned prisoners with an additional option. It held that a district court may order that further proceedings on the mixed petition be stayed pending exhaustion of the federal constitutional claims before the highest state court.[279] The Court explained that "[a]s a result of the interplay between AEDPA's 1-year statute of limitations and *Lundy*'s dismissal requirement, petitioners who come into federal court with 'mixed' petitions run the risk of forever losing their opportunity for any federal review of their unexhausted claims."[280]

275. 28 U.S.C. § 2254(a) (2000).

276. 18 U.S.C.A. § 3599(a)(2) (West 2006). *See also* McFarland v. Scott, 512 U.S. 849, 855 (1994) (concluding that a petitioner has the right to have counsel prepare an application for habeas corpus and that the district court has jurisdiction to enter a stay of execution based on the request for appointment of counsel).

277. 28 U.S.C. § 2254(b)(1)(A).

278. Rose v. Lundy, 455 U.S. 509, 510 (1982).

279. Rhines v. Weber, 544 U.S. 269, 275–77 (2005).

280. *Id.* at 275.

The Court set several limits to the issuance of a stay. First, the petitioner must demonstrate good cause for failing to present the claims to the state's highest court.[281] Second, the district court should not order a stay when the unexhausted claims are "plainly meritless."[282] If a district court issues a stay, its "discretion in structuring the stay is limited to the timeliness concerns reflected in AEDPA."[283] The Court also noted that "district courts should place reasonable time limits on a petitioner's trip to state courts and back."[284]

Title 28 U.S.C. § 2254(b)(2) states that "[a]n application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State."[285] The statute further requires that a "State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement."[286] Finally, the statute stipulates that "[a] 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State Court."[287]

Congress has enacted a separate time requirement for the filing of an application for habeas corpus relief brought by prisoners subject to capital punishment.[288] An application by prisoners in state custody subject to capital punishment must be filed "not later than 180 days after final State court affirmance of the conviction and sentence on direct review or the expiration of the time for seeking such review" pursuant to the USA Patriot Improvement and Reauthorization Act of 2005.[289] The 180-day limitation is applicable only if "the Attorney General of the United States certifies that a State has established a mechanism for providing counsel in postconviction proceedings as provided in section 2265."[290]

Prior to the 2005 amendment to 28 U.S.C. § 2261, California had not established by statute or a court rule

281. *Id.* at 277.
282. *Id.*
283. *Id.*
284. *Id.*
285. 28 U.S.C. § 2254(b)(2) (2000).
286. *Id.* § 2254(b)(3).
287. *Id.* § 2244(d)(1).
288. *Id.* §§ 2263–2266.
289. USA Patriot Improvement and Reauthorization Act of 2005, 28 U.S.C.A. § 2263 (a), (b) (West 2006).
290. 28 U.S.C.A. § 2261 (West 2006).

> a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in State post-conviction proceedings brought by indigent prisoners whose capital convictions and sentences have been upheld on direct appeal to the court of last resort in the State or have otherwise become final for State law purposes.[291]

Since the amendment, the attorney general has not yet certified that California has an appropriate mechanism for appointing counsel.

Pursuant to 28 U.S.C. § 2253, a final order for habeas corpus relief "shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held."[292] An appeal may not be taken to the Court of Appeals "[u]nless a circuit justice or judge issues a certificate of appealability" from "the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State Court."[293]

Capital prisoners do not have the right to appeal to the United States Supreme Court from the affirmance by a United States Court of Appeals of a district court's dismissal or denial of an application for habeas corpus relief. Instead, the Supreme Court has jurisdiction over cases reviewed by the Courts of Appeals "[b]y writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree."[294] A writ of certiorari "is not a matter of right, but of judicial discretion."[295]

A state prisoner's second or successive application that presents a claim that was presented in a prior application "shall be dismissed."[296] A claim that is presented in a second or successive habeas corpus application that was not previously presented shall similarly be dismissed unless the

291. 28 U.S.C. § 2261(b) (2000) (current version at 28 U.S.C.A. § 2261(b)); Ashmus v. Woodford, 202 F.3d 1160 (9th Cir. 2000) (concluding that California's procedure for appointment of habeas counsel did not qualify under AEDPA).

292. 28 U.S.C.A. § 2253(a) (West 2006).

293. *Id.* § 2253(c)(1)(A).

294. 28 U.S.C. § 1254 (2000).

295. SUP. CT. R. 10.

296. 28 U.S.C. § 2244(a), (b)(1) (2000). Section 2244(a) provides:

> No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus . . . .

*Id.* § 2244(a). Section 2244(b)(1) provides: "A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed." *Id.* § 2244(b)(1).

applicant "relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court."[297] A second or successive petition will not be dismissed if

> the factual predicate for the claim could not have been discovered previously through the exercise of due diligence, and the facts underlying the claim, if proven and viewed in the light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for the constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense.[298]

The total average delay from the filing of the initial application for federal habeas corpus relief to the grant or denial of relief by a district court is 6.2 years.[299]

As discussed above, lawyers who file state habeas corpus petitions on behalf of death row inmates in California currently do not receive sufficient funds for investigation of their clients' claims. As a result, lawyers appointed to represent death row inmates in federal habeas proceedings are forced to conduct an investigation at federal government expense to determine all the facts necessary to support exhausted federal constitutional claims and to discover facts necessary to prove unexhausted claims.[300] This responsibility delays federal habeas corpus procedures an average of 2.4 years.

The failure of the California Legislature to provide sufficient funding to permit state habeas counsel to investigate each death row inmate's federal constitutional claims cannot be understated. It shifts to the federal government the burden of providing sufficient funds to permit federal habeas counsel to discover evidence to demonstrate additional federal constitutional violations. Because the United States Congress has concluded that persons whose federal constitutional rights have been

297. *Id.* § 2244(b)(2)(A).

298. *Id.* § 2244(b)(2)(B).

299. Docket Database, *supra* note 14.

300. Counsel may also be required to employ experts, with the court's approval, to unearth mitigating facts not presented at trial that may have persuaded the jury to recommend life imprisonment instead of death. The types of experts requested by counsel to assist them in preparing a federal habeas petition include the following: mitigation specialists, social historians, child abuse experts, addiction experts, institutional adjustment experts, psychologists, psychiatrists, neuropsychologists, neuropsychiatrists, toxicologists, pathologists, ballistics experts, fingerprint analysts, criminologists, mental health experts, atomic absorption experts, statisticians, criminalists, fair cross-sections experts, trial experts, fetal alcohol experts, hypnosis experts, sociological experts, gunshot residue experts, human vision experts, DNA experts, forensic serologists, eyewitness/memory experts, correctional consultants, jury selection experts, psychopharmacologists, serology experts, polygraph experts, blood spatter experts, social anthropologists, and rape experts.

violated in a state court's criminal proceedings must have their judgment of death vacated, it must consider whether it should subsidize investigation at the state habeas corpus level, rather than fund the same investigation at the federal level, years later.

Additionally, seventy-four percent of state prisoner federal habeas corpus applications filed by California death row inmates are stayed for the exhaustion of state remedies.[301] The average delay for the exhaustion of state remedies before the California Supreme Court is 2.8 years.[302] The average delay between the date a federal district court lifts the stay for exhaustion of California state remedies and renders its decision is 3.8 years.[303] The average delay between a request for federal habeas corpus counsel and the entry of the district court's final order where a stay has been granted to exhaust claims in state courts is 8.3 years.[304] The average length of a federal habeas corpus proceeding where no stay was issued to exhaust claims in state court is 6.4 years.[305]

The average delay from the filing of a notice of appeal from the decision of the district court granting or denying a death row inmate's federal application for a writ of habeas corpus to the decision of the three-judge panel of the Ninth Circuit is 2.2 years.[306] The average delay from the decision of this three-judge panel to a decision respecting rehearing en banc is 8.7 months.[307] The average delay from the decision of the three-judge panel to the United States Supreme Court's decision respecting the inmate's petition for a writ of certiorari is 1.3 years.[308] The average delay from a decision of the Ninth Circuit respecting rehearing en banc to the United States Supreme Court's decision respecting the inmate's petition for a writ of certiorari is 6.6 months.[309] The average delay from an en banc opinion of the Ninth Circuit to the United States Supreme Court's decision respecting the inmate's petition for a writ of certiorari is 3.6 months.[310] The Ninth Circuit has reheard en banc only six death penalty habeas corpus cases since 1978.[311]

301. Docket Database, *supra* note 14.
302. *Id.*
303. *Id.*
304. *Id.*
305. *Id.*
306. *Id.*
307. *Id.*
308. *Id.*
309. *Id.*
310. *Id.*
311. *See* Cooper v. Woodford, 358 F.3d 1117 (9th Cir. 2004) (en banc); Payton v. Woodford, 299 F.3d 815 (9th Cir. 2002) (en banc); Mayfield v. Woodford, 270 F.3d 915 (9th Cir. 2001) (en banc);

### D. RECOMMENDATIONS TO REDUCE DELAY IN FEDERAL HABEAS CORPUS PROCEEDINGS

It has become conventional wisdom that the majority of the delay in reviewing capital cases is attributable to federal habeas corpus proceedings.[312] Much of the delay in federal habeas corpus proceedings, however, is attributable to the need to exhaust state remedies and to conduct investigations. Accordingly, the suggestions made with regard to state habeas corpus proceedings will likely speed up federal habeas corpus proceedings as well. A written opinion from the trial court and the California Courts of Appeal regarding the reasons for denying habeas corpus relief will assist the United States District Court in determining whether the death row inmate's federal constitutional claims have merit. If all of the factual investigation is done during the state habeas corpus proceedings, there will be no need to conduct an investigation at the federal level. Additionally, if there is continuity of counsel between state and federal habeas corpus proceedings, federal habeas corpus petitions filed by death row inmates are less likely to include unexhausted claims. Counsel's familiarity with the case at the federal level due to the representation of the death row inmate at the state habeas corpus proceedings is also likely to hasten federal review of state capital convictions and sentences.

## VI. CONCLUSION

To determine the causes of delays in reviewing the validity of judgments of death for persons convicted of a capital crime in California, it was necessary to study the docket entries for each prisoner who has been sentenced to death in California[313] since the death penalty was reinstated in 1978. The results of this research confirmed California Supreme Court Chief Justice Ronald George's opinion that the review procedures for capital cases are "dysfunctional," and Circuit Judge Kozinski's view that the existence of a death penalty has become an "illusion."

McDowell v. Calderon, 197 F.3d 1253 (9th Cir. 1999) (en banc); Calderon v. U.S. Dist. Court for the Cent. Dist. of Cal., 163 F.3d 530 (9th Cir. 1998) (en banc); Thompson v. Calderon, 120 F.3d 1045 (9th Cir. 1997) (en banc); Docket Database, *supra* note 14.

312. *See, e.g.*, Tribune Editorial, *Death Penalty Cases Unnecessarily Held up by Federal Judges*, E. VALLEY TRIB. (Scottsdale, Ariz.), Aug. 20, 2006 (discussing the death penalty in Arizona and bemoaning the fact that capital cases are "sitting for five or six years on habeas review"); Egelko, *supra* note 120 (discussing a shortened statute of limitations for filing federal habeas corpus applications attached to a version of the Patriot Improvement and Reauthorization Act of 2005 and noting its intention to "shorten timetables for capital case appeals").

313. The dockets for prisoners who died while on death row by means other than execution were not reviewed or included in the Docket Database.

This research has identified the sources of these unacceptable delays. Because of the current number of death row inmates, the seven justices of the California Supreme Court cannot keep up with an ever-increasing backlog of automatic appeals and habeas corpus petitions in capital cases, while at the same time meeting their responsibility to review civil cases and convictions in noncapital cases. The California Constitution must be amended to shift this burden to the justices of the Courts of Appeal, with discretionary review by the Supreme Court to correct any erroneous rulings or to resolve conflicts between the various districts and divisions of California's intermediate appellate courts. If the California Legislature wishes to make its death penalty laws and procedures functional instead of illusory, it must enact laws to remove the impossible burden on the California Supreme Court to review every appeal automatically from a judgment of death and each petition for state habeas corpus relief.

The California Legislature should also increase the compensation paid to appointed counsel in death penalty cases. Despite its Herculean efforts, the California Supreme Court has only been able to induce a limited number of qualified lawyers to accept appointment to represent death row inmates because the hourly rate is only $140. For that reason, the delay in appointing counsel for death row inmates is more than three years. This delay alone may prejudice the right to a fair trial for those prisoners whose convictions must be set aside because of trial court errors in the admission of evidence or in its jury instructions, prosecutorial misconduct, or state and federal constitutional violations. Furthermore, the present absence of continuity of representation by the same habeas counsel in both state and federal courts contributes to the delay reflected in federal habeas corpus proceedings filed on behalf of death row inmates.

The failure of the California Legislature to provide adequate funds for the investigation of errors not in the trial record has shifted a significant burden to lawyers who are appointed to assist death row inmates in obtaining federal habeas corpus relief. The investigation of alleged federal constitutional errors has added years to the time necessary for the federal courts to determine whether federal habeas corpus relief must be granted. This delay could be reduced by many years if the lawyers appointed to represent death row inmates in state habeas corpus proceedings were provided sufficient funds to investigate and exhaust every constitutional claim.

The Supremacy Clause of the United States Constitution compels California's courts to ensure that each person accused of a capital crime receives the protections set forth in the Bill of Rights. This places a great

financial burden on the state court system. Thus, Congress should provide financial assistance to state courts to enable them to honor their responsibility to ensure that death row inmates' federal constitutional rights are fully protected. The cost of this assistance to the state would be defrayed by the federal taxpayers' dollars that would be saved by not having to compensate lawyers appointed pursuant to 28 U.S.C. § 2254 for their services and not having to pay for the cost of investigation at the federal level. It would also substantially reduce the average delay of six years required to review applications for habeas corpus relief.

In addition to providing funds to increase the hourly rate paid to appointed counsel and to pay for the costs of an adequate investigation, the California Legislature can also help increase the number of lawyers qualified to represent death row inmates. The Legislature could provide grants to law schools to train students and lawyers who wish to specialize as appellate advocates and/or habeas corpus litigators in capital cases.

It is my profound hope, as the messenger of these alarming statistics regarding the decades of delay in reviewing death penalty cases, that these data will stimulate the California Legislature and experts in criminal procedure to step forward with their own solutions. We must bring an end to the appalling delay in reviewing California death penalty convictions and reduce the wasteful expenditure of millions of taxpayer dollars in housing death row inmates for decades before determining whether their conviction or sentence should be vacated or affirmed. Without action by the California Legislature, the delays in reviewing capital cases will continue to grow in California to the point where the United States Supreme Court may some day hold that such imprisonment is, in and of itself, cruel and unusual punishment.