EXECUTING THE WILL OF THE VOTERS?: A ROADMAP TO MEND OR END THE CALIFORNIA LEGISLATURE'S MULTI-BILLION-DOLLAR DEATH PENALTY DEBACLE

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Since reinstating the death penalty in 1978, California taxpayers have spent roughly $4 billion to fund a dysfunctional death penalty system that has carried out no more than 13 executions. The current backlog of death penalty cases is so severe that most of the 714 prisoners now on death row will wait well over 20 years before their cases are resolved. Many of these condemned inmates will thus languish on death row for decades, only to die of natural causes while still waiting for their cases to be resolved. Despite numerous warnings

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of the deterioration of California's capital punishment system and its now imminent collapse, the Legislature has repeatedly failed to enact measures that would improve this death row deadlock. At the same time, voters have continued to expand the death penalty through the direct voter initiative process to increase the number of death-eligible crimes.

This Article uncovers the true costs of administering the death penalty in California by tracing how much taxpayers are spending for death penalty trials versus non–death penalty trials and for costs incurred due to the delay from the initial sentence of death to the execution. In addition, the Article examines how the voter initiative process has misled voters into agreeing to the wasteful expenditure of billions of dollars on a system that has been ineffective in carrying out punishment against those who commit the worst of crimes. Our research reveals that in every proposition expanding the list of death-eligible crimes between 1978 and 2000, the information provided by the Legislative Analyst's Office in the Voter Information Guides told voters that the fiscal impact of these initiatives would be "none," "unknown," "indeterminable," or "minor." Relying, at least in part, on this information, Californians have used the voter initiative process to enact "tough on crime" laws that, without adequate funding from the Legislature to create an effective capital punishment system, have wasted immense taxpayer resources and created increasingly serious due process problems.

Finally, this Article analyzes corrective measures that the Legislature could take to reduce the death row backlog, and proposes several voter initiatives that California voters may wish to consider if the Legislature continues to ignore the problem. It is the authors' view that unless California voters want to tolerate the continued waste of billions of tax dollars on the state's now-defunct death penalty system, they must either demand meaningful reforms to ensure that the system is administered in a fair and effective manner or, if they do not want to be taxed to fund the needed reforms, they must recognize that the only alternative is to abolish the death penalty and replace it with a sentence of life imprisonment without the possibility of parole.

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INTRODUCTION

> *"Whenever the people are well informed, they can be trusted with their own government; that whenever things get so far wrong as to attract their notice, they may be relied on to set them to rights."*
>
> —Letter from Thomas Jefferson to Richard Price, 1789

Despite numerous warnings of the deterioration of California's death penalty system over the last 25 years, and more recent signs of its imminent collapse, the Legislature and the Governor's office have failed to respond to this developing crisis. The net effect of this failure to act has been the perpetration of a multibillion-dollar fraud on California taxpayers. California voters have been led to believe that the capital punishment scheme they have been financing for the last 32 years would execute those murderers guilty of committing "the worst of crimes."[1] This has not occurred. Instead, billions of taxpayer dollars have been spent to create a bloated system, in which condemned inmates languish on death row for decades before dying of natural causes and in which executions rarely take place.

The electorate has the right to be informed about whether the Legislature is meeting its responsibility to avoid wasting the taxes it receives to fund the criminal justice system. Californians must demand an accounting of the real costs—the heretofore largely hidden costs—of administering an effective system of capital punishment. The costs of expensive death penalty trials are the tip of the iceberg; the exorbitant bills to the taxpayers begin to stack up in earnest after a death sentence is imposed. At that point, California taxpayers foot the $144 million annual bill for providing housing, healthcare, and legal representation to condemned inmates, many of whom are dying of natural causes.[2] Unless California voters want to tolerate the continued waste of billions of tax dollars on the state's now-defunct death penalty system, they must either demand meaningful reforms to ensure that the system is administered in a fair

1. Kennedy v. Louisiana, 554 U.S. 407, 446–47 (2008) ("[T]he [death] penalty must be reserved for the worst of crimes and limited in its instances of application.").

2. *See infra* Part I.A.4.b.i.

and effective manner or, if they do not want to be taxed to fund the needed reforms, they must recognize that the only alternative is to abolish the death penalty and replace it with a sentence of life imprisonment without the possibility of parole.

By failing to provide the funds necessary to appoint competent counsel to represent capital prisoners in their automatic appeals and state habeas corpus proceedings, the state has ensured that, on average, death row inmates are warehoused in the costly condemned inmate facility at San Quentin for as many as 10 years before the California Supreme Court reviews their convictions and sentences on direct appeal.[3] For the first four or five years of that period, condemned inmates simply sit awaiting the appointment of counsel.[4] If the conviction and sentence are affirmed on direct appeal, the condemned inmate waits an additional three or more years before state habeas corpus counsel is appointed,[5] only to find that the California Legislature has not provided sufficient funds to permit counsel to conduct an adequate investigation into the merits of his or her claims of state and federal constitutional violations. Finally, because the California Legislature fails to provide adequate funds to state habeas corpus counsel, federal courts are compelled to ensure that appointed federal habeas corpus counsel is sufficiently funded to investigate claims of constitutional violations that should have been, but were not, investigated during the state habeas corpus proceeding. Under the current system, the cost to *federal* taxpayers to litigate the federal constitutional claims of those prisoners sentenced to death since 1978 will total approximately three-quarters of a billion dollars.[6]

The Legislature's failure to follow the recommendations made by the California Commission for the Fair Administration of Justice ("the Commission" or "the CCFAJ") in 2008—the very commission it appointed to study the effectiveness of the death penalty in California—makes clear that the future of California's death penalty

3. Arthur L. Alarcón, *Remedies for California's Death Row Deadlock*, 80 S. CAL. L. REV. 697, 723 (2007).

4. CAL. COMM'N ON THE FAIR ADMIN. OF JUSTICE, FINAL REPORT AND RECOMMENDATIONS ON THE ADMINISTRATION OF THE DEATH PENALTY IN CALIFORNIA 122 (Gerald Uelmen ed., 2008) [hereinafter FINAL REPORT], *available at* http://www.ccfaj.org/documents/CCFAJFinalReport.pdf.

5. *Id.* at 123.

6. *See infra* Part I.A.3.

is now up to the voters.[7] It is the authors' hope that once the electorate has been informed of what these unconscionable delays are costing the taxpayers, and the degree to which the system has become unworkable, California voters will have the information they need to demand real reform.[8] Maintaining the status quo is untenable. We believe that an informed electorate, mindful of the Legislature's chronic failure to act, will either direct their elected representatives to take action to reduce the delay in the review of capital cases, or decide to use the direct-initiative process to reform the present dysfunctional system, or abolish the system completely.[9]

OVERVIEW

In 1978, California voters cast their ballots in favor of an initiative that promised to give California "famil[ies] the protection

7. The California Commission on the Fair Administration of Justice ("the Commission" or "the CCFAJ") issued its Final Report and Recommendations on the Administration of the Death Penalty in California ("*Final Report*") on June 30, 2008. FINAL REPORT, *supra* note 4. Specifically, the Legislature has failed to follow the Commission's recommendation that a constitutional amendment be passed that would allow condemned inmates' appeals to be heard by the California Court of Appeal's 110 justices in a timely manner, *id.* at 118, 147–49, and to enact legislation to provide funding for the timely appointment of post-conviction representation, *id.* at 116–17, 131–33, which would immediately address some of the most serious problems responsible for the current unconscionable backlog.

8. Then-sitting California Supreme Court Chief Justice Ronald M. George explained in his testimony before the Commission that "[a]ny attempt at a 'quick fix' will likely create only additional confusion and further delay that potentially could adversely affect not only the right of defendants, but also the interests of the friends and families of victims, as well as the administration of justice overall. We are at a point now at which choices must be made and expectations adjusted accordingly." Chief Justice Ronald M. George, Testimony Before the Commission on the Fair Administration of Justice 43 (Jan. 10, 2008), *available at* www.ccfaj.org/documents/reports/dp/expert/Chief'sTestimony.pdf [hereinafter Testimony of Chief Justice Ronald M. George].

9. The Commission found that it would cost an additional $232.7 million per year to keep the death penalty and reduce delays to the national average, or, an additional $130 million per year to keep the death penalty in a narrower scope with fewer death-eligible crimes. FINAL REPORT, *supra* note 4, at 147. The Commission found that abolishing capital punishment and replacing it with a system that imposes a sentence of life without the possibility of parole for those now eligible for the death penalty would reduce the costs now incurred by the state of California from $137.7 million per year to $11.5 million per year. *Id.* at 146; *see also* Carol J. Williams, *Death Row Foes Cite State Costs*, L.A. TIMES, June 30, 2009, at A3 (interviewing Mark Drozdowski, a deputy federal public defender who heads the Los Angeles capital case unit, and commenting that "California could save $1 billion by commuting all capital sentences to life without parole").

of the strongest, most effective death penalty law in the nation."[10] The voter information pamphlet that is mailed to all registered voters in the state of California ("Voter Information Guide") represented to voters that the costs of the new law were "[i]ndeterminable," but that "an increase in the number of executions" would "offset[] part of the increase in the prison population."[11] Between 1978 and 2000, California voters passed six additional crime initiatives, each one further broadening the scope of California's death penalty by expanding the list of death-eligible crimes.[12] At each of these elections, voters cast their ballots based on the information provided by the Legislative Analyst's Office (LAO or "Legislative Analyst") that was included in the Voter Information Guides. The LAO informed voters that the fiscal impact of these initiatives would be "none," "unknown," "indeterminable," or "minor."[13]

10. CAL. SEC'Y OF STATE, CALIFORNIA GENERAL ELECTION, NOVEMBER 7, 1978: BALLOT PAMPHLET 35 (1978), *available at* http://traynor.uchastings.edu/ballot_pdf/1978g.pdf (rebutting the argument against Proposition 7) [hereinafter CALIFORNIA BALLOT PAMPHLET, NOVEMBER 1978]. Proposition 7, a voter initiative known as the Briggs Initiative, added 16 special circumstances to the existing list of 12 death-eligible crimes. For more on this, see *infra* Part II.B.2.d, titled *The 1978 Briggs Initiative Proposition 7—16 More Special Circumstances: 28 Death-Eligible Crimes*. In the "Rebuttal to Argument Against Proposition 7" published in the Voter Information Guide, voters were told that "[t]his citizen's initiative will give your family the protection of the strongest, most effective death penalty law in the nation." CALIFORNIA BALLOT PAMPHLET, NOVEMBER 1978, *supra*, at 35.

11. CALIFORNIA BALLOT PAMPHLET, NOVEMBER 1978, *supra* note 10, at 32–33. The Official Title and Summary Prepared by the Attorney General, which included the "Analysis by Legislative Analyst" for the Voter Information Guide stated: "Financial impact: Indeterminable future increase in state costs." *Id.* at 32. The Legislative Analyst estimated that "over time, this measure would increase the number of persons in California prisons, and thereby increase the cost to the state of operating the prison system. . . . [But *t*]*here could also be an increase in the number of executions as a result of this proposition, offsetting part of the increase in the prison population.*" *Id.* at 33 (emphasis added).

12. *See infra* Part II.

13. The death penalty initiatives referenced here are discussed at length in Part II, *infra*. In summary, with each proposed initiative the Legislative Analyst told voters that the fiscal effect of these initiatives were: (1) "Fiscal impact: None." (Prop 17); (2) "Financial impact: Indeterminable future increase in state costs." (Prop 7); (3) "unknown increases in state costs." (Prop 114); (4) "only a minor fiscal impact on state and local governments, or there may be a major fiscal impact." (Prop 115); (5) "probably result in minor additional state costs." (Prop 195); (6) "unknown state costs," (Prop 196); (7) "unknown, but [] probably minor," (Prop 18); or (8) no mention of costs at all with respect to the proposed addition of more death-eligible crimes (Prop 21). *See generally California Ballot Measures Databases*, U. CAL. HASTINGS C. L. LIBR., http://library.uchastings.edu/library/california-research/ca-ballot-measures.html (last visited Mar. 26, 2011) (providing full text and accompanying materials of California ballot propositions from 1911 to 2006).

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According to records of the federal district courts and of the California Department of Corrections and Rehabilitation (CDCR), the following inmates died on death row (or in hospitals nearby) while their habeas corpus petitions were pending in federal court. The lengthy delays experienced by some of these condemned inmates in federal district court reflect the fact that federal habeas proceedings are often stayed one or more times, sometimes for a period of many years, in order to permit the condemned inmate petitioners to return to state court and "exhaust" habeas claims. *See* 28 U.S.C. § 2254(b)(1)(A) (2006) (requiring exhausting of remedies available in state courts prior to filing a federal habeas corpus petition).

1. JOSEPH MUSSELWHITE died of natural causes on February 2, 2010, at the age of 47. He was convicted in 1990 of one count of first-degree murder with the special circumstance of murder in the commission of a robbery and one count of attempted second-degree murder. At the time of his death, his § 2254 Petition for Writ of Habeas Corpus—which was filed in 2002—had been pending in the Eastern District of California for eight years.

2. CEDRIC HARRISON died of natural causes in a hospital on November 19, 2009. He was sentenced to death for two first-degree murders committed in 1987. At the time of his death, his § 2254 Petition for Writ of Habeas Corpus—which was filed in 2009—was pending in the Eastern District of California.

3. ALBERT HOWARD died at a hospital near San Quentin State Prison of natural causes on August 13, 2009, at the age of 57. He was sentenced to death in 1983 for murdering a 74-year-old woman in Tulare County. At the time of his death, his § 2254 Petition for Writ of Habeas Corpus—which was filed in 1993—had been pending in the Eastern District of California for 16 years.

Our research has disclosed that these death penalty initiatives have created the nation's largest death row at a cost of roughly $4 billion to state and federal taxpayers for those judgments of death imposed since 1978.[14] The state is poised to spend an additional $1 billion in the coming years to construct an even larger death row facility that will accommodate over 1,000 condemned inmates and will require hiring 347 additional staff.[15] Since executions are virtually nonexistent in California, the planned facility is expected to fill rapidly and reach capacity by the year 2014.[16]

Despite the fact that, as of May 2011, California's death row houses over 714 condemned inmates, it has carried out only 13 of the 1,242 executions that have occurred in the country since 1976.[17]

14. As set forth in detail in Part I.A, *infra*, we have calculated the total expenditures for costs associated with administering the death penalty in California since 1978 to be approximately $4 billion. When the costs are factored in that will ultimately be borne by federal taxpayers to litigate the federal habeas corpus petitions of those condemned inmates who have not yet begun their federal proceedings—an additional $619 million—the cost will be closer to $5 billion.

15. CAL. STATE AUDITOR, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION: ALTHOUGH BUILDING A CONDEMNED INMATE COMPLEX AT SAN QUENTIN MAY COST MORE THAN EXPECTED, THE COSTS OF OTHER ALTERNATIVES FOR HOUSING CONDEMNED INMATES ARE LIKELY TO BE EVEN HIGHER 2, 26 (2008), *available at* http://www.bsa.ca.gov/pdfs/reports/2007-120.2.pdf. The state has been preparing to construct and activate a new Condemned Inmate Complex (CIC) at San Quentin, which is estimated to cost over $400 million. *See id.* at 1. The new facility will cost an estimated $58.8 million per year to operate and is projected to cost $1.2 billion over the next 20 years. *Id.* On April 28, 2011, Governor Brown announced that construction of the planned CIC would not go forward at this time because "the state cannot justify the expense at a time of massive cuts to essential services." Associated Press, *Brown Cancels Plans for New Housing at San Quentin*, SILICON VALLEY MERCURY NEWS (Apr. 28, 2011, 3:55PM), http://www.mercurynews.com/breakingnews/ci_17951052?nclick_check=1.

16. CAL. STATE AUDITOR, *supra* note 15, at 2.

17. Just over three years ago, we noted that, with the 662 inmates on death row at that time, "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." Alarcón, *supra* note 3, at 711. The California Department of Corrections and Rehabilitation (CDCR) currently lists the total number of death row inmates at 714. DIV. OF ADULT OPERATIONS, CAL. DEP'T OF CORR. & REHAB., DEATH ROW TRACKING SYSTEM: CONDEMNED INMATE SUMMARY LIST 4 (2011), *available at* http://www.cdcr.ca.gov/Capital_Punishment/docs/CondemnedInmateSummary.pdf (last revised May 5, 2011) [hereinafter CONDEMNED INMATE SUMMARY LIST]. As of April 1, 2011, the number of U.S. executions since 1976 was 1,245. *U.S. Executions Since 1976*, CLARK CNTY. PROSECUTING ATTORNEY, http://www.clarkprosecutor.org/html/death/usexecute.htm (last visited Apr. 9, 2011). Between 1978 and March 2011, California has only executed 13 people. CAL. DEP'T OF CORR. & REHAB., INMATES EXECUTED, 1978 TO PRESENT, http://www.cdcr.ca.gov/Capital_Punishment/Inmates_Executed.html (last visited Apr. 9, 2011) [hereinafter INMATES EXECUTED, 1978 TO PRESENT]. California would now have to execute one prisoner per week for the next 13.8 years in order to

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4. FRED FREEMAN died of natural causes on July 25, 2009, at a hospital near San Quentin at the age of 69 after spending 22 years on death row for a 1984 execution-style murder at a bar in Alameda County. At the time of his death, his § 2254 Petition for Writ of Habeas Corpus—which was filed in 1999—had been pending in the Northern District of California for 10 years.

5. THOMAS EDWARDS died of natural causes on February 14, 2009, at the age of 65. He was sentenced to death in 1986 for the murder of a 12-year-old girl. At the time of his death, his § 2254 Petition for Writ of Habeas Corpus—which was filed in 1993—had been pending in the Central District of California for 16 years.

6. ISAAC GUTIERREZ JR. died in a hospital of natural causes on December 7, 2008, at the age of 64 while on San Quentin State Prison's death row. Gutierrez was convicted of two murders, aiding and abetting rape, kidnapping, and attempted murder of a police officer, all of which took place on October 31, 1986. At the time of his death, his § 2254 Petition for Writ of Habeas Corpus—which was filed in 2005—had been pending in the Central District of California for three years.

7. ALFREDO PADILLA died on July 25, 2008, of natural causes. At the time of his death, his § 2254 Petition for Writ of Habeas Corpus—which was filed in 2001—had been pending in the Eastern District of California for seven years.

8. BILL BRADFORD died of natural causes at a state prison medical facility in Vacaville on March 10, 2008, at the age of 61. Bradford had been on death row at San Quentin State Prison for 20 years, since May 1988, when he was convicted of murdering two women, one of whom was a minor. At the time of his death, his § 2254 Petition for Writ of Habeas Corpus—which was filed in 1998—had been pending in the Central District of California for 10 years.

9. BILLY RAY HAMILTON died of natural causes on October 22, 2007, at the age of 57. He had been on death row

During that same period, 78 capital inmates died of natural or other causes while on death row in California (54 died due to natural causes, 18 committed suicide, and six had the cause of death reported as "other").[18] The long wait for execution—which has been over 20 years for each of the five inmates executed in the last 10 years[19]—reflects a wholesale failure to fund the efficient, effective capital punishment system that California voters were told they were choosing.

The long wait for the appointment of appellate counsel raises due process concerns that are troubling at best, and may give rise to federal constitutional violation claims in extreme cases. For example, death row inmate John Post died after spending nine years on death row waiting for the California Supreme Court to review his direct appeal.[20] He died on December 20, 2010, after being found unconscious in his cell.[21] The California Supreme Court did not appoint counsel to represent Mr. Post on his automatic appeal until he had been on death row for nearly five years.[22] His automatic appeal was still pending before the California Supreme Court when he died.[23]

Between 1978 and 2006, the California Supreme Court vacated the judgments or sentences in 95 death penalty cases it

carry out the sentences of those currently on death row. We are not aware of any study that has been done to attempt to determine what it would cost to carry out executions on this scale.

18. CAL. DEP'T OF CORR. & REHAB., CONDEMNED INMATES WHO HAVE DIED SINCE 1978 (2011), *available at* http://www.cdcr.ca.gov/Capital_Punishment/docs/CONDEMNEDINMATESWHOHAVEDIEDSINCE1978.pdf.

19. INMATES EXECUTED, 1978 TO PRESENT, *supra* note 17. In the previous decade, from 1992 to 2000, the times spent on death row awaiting execution ranged from nine years, seven months to 19 years, one month. *Id.* The cumulative average time served on death row for all 13 inmates executed to date is 17.5 years. *Id.*

20. Andrew Blankstein, *Man Jailed for Drive-By Dies on Death Row*, L.A. TIMES, Dec. 22, 2010, at AA5.

21. Mr. Post was received onto California's death row from Los Angeles County on December 26, 2001. He was found guilty of first-degree murder, with the special circumstance of having committed the murder by drive-by shooting, and sentenced to death. *Id.*

22. Counsel was appointed for him on October 10, 2006. *See* People v. Post (John), No. S103087 (Cal. Oct. 10, 2006) (counsel appointment order filed), *available at* http://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=0&doc_id=1834766&doc_no=S103087 (last visited Mar. 26, 2011).

23. *Docket (Register of Actions), Cal. Appellate Courts*, http://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=0&doc_id=1834766&doc_no=S103087 (last visited Mar. 26, 2011).

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since his March 2, 1981, conviction for multiple murders predicated on the killing of other victims. At the time of his death, his § 2254 Petition for Writ of Habeas Corpus—which was filed in 1989—had been pending in the Northern District of California for 18 years.

10. HERBERT KOONTZ died of natural causes on May 5, 2007, at the age of 72 after 13 years on death row. Koontz was convicted of murder during the commission or attempted commission of robbery, robbery, kidnapping for the purpose of robbery, and vehicle taking—each of which involved the use of a firearm in the commission of the crimes. He was also convicted of petty theft. At the time of his death, his § 2254 Petition for Writ of Habeas Corpus—which was filed in 2003—had been pending in the Eastern District of California for four years.

11. MARCELINO RAMOS died of natural causes on January 22, 2007, at the age of 49. He had been on death row since January 30, 1980. At the time of his death, his § 2254 Petition for Writ of Habeas Corpus—which was filed in 1998—had been pending in the Central District of California for nine years.

12. ALEJANDRO GILBERT RUIZ died on January 4, 2007, of natural causes. He had been on death row since 1980. At the time of his death, his § 2254 Petition for Writ of Habeas Corpus—which was filed in 1989—had been pending in the Central District of California for 18 years.

13. ROBERT THOMPSON died of natural causes on October 1, 2006. He had been on death row for nearly 23 years, since his December 6, 1983, conviction for the rape and murder of a 12-year-old boy in 1981. At the time of his death, his § 2254 Petition for Writ of Habeas Corpus—which was filed in 1990—had been pending in the Central District of California for 16 years.

14. EARL PRESTON JONES died of natural causes on February 3, 2006. He had been on death row since his

reviewed, based on errors it found in convictions or sentences.[24] Mr. Post died before the California Supreme Court had the opportunity to determine whether the evidence in his case was legally sufficient to demonstrate that he was guilty beyond a reasonable doubt or whether his death sentence was erroneous because of procedural error or whether his trial counsel was ineffective for failure to discover or present proof of mitigating circumstances. Additionally, Mr. Post was never appointed habeas corpus counsel to investigate whether evidence that did not appear in the transcript of his trial court proceedings, and therefore could not be reviewed in his direct appeal, demonstrated that his federal constitutional rights had been violated by the conduct of the police, the prosecution, the trial court, or his trial counsel.

The long wait for the appointment of state habeas corpus counsel may also give rise to due process concerns because it prevents the timely presentation by capital prisoners of their claims of federal constitutional violations in federal court. Of the 78 prisoners who have died awaiting execution, 32 prisoners died while their petitions for habeas corpus relief were *still pending* in federal court.[25]

Of the California death row inmates whose petitions for federal habeas corpus relief have been reviewed, nearly 70 percent have been granted relief, in the form of either a new trial on the question of guilt or a new penalty proceeding.[26] It is therefore

24. CAL. DIST. ATTORNEYS ASS'N, PROSECUTOR'S PERSPECTIVE ON CALIFORNIA'S DEATH PENALTY app. A (2003), *available at* http://www.cdaa.org/WhitePapers/DPPaper.pdf (finding 95 capital judgments reversed in whole or in part, by the California Supreme Court between 1977 and 2002). We have counted six more reversals from March 2003 to December 2005. This data is on file with the authors.

25. The Sidebar includes the information regarding these prisoners and their deaths.

26. The *Final Report* indicated that "federal courts have rendered final judgment in 54 habeas corpus challenges to California death penalty judgments" and that "[r]elief in the form of a new guilt trial or a new penalty hearing was granted in 38 of the cases, or 70%." FINAL REPORT, *supra* note 4, at 115. Since publication of the *Final Report*, federal habeas corpus relief has been granted in five additional cases, and denied in four additional cases, all of which are final judgments, making the rate at which relief has been granted 68.25%. Our research indicates that in 25 of the 43 cases, relief was granted on the ground that the condemned prisoner's appointed trial counsel was ineffective—in six cases during the guilt phase and in 19 cases during the penalty phase—typically for counsel's failure to investigate mitigating evidence. Other grounds included: constitutionally infirm jury instructions (six cases); improper conduct by the prosecutor (five cases); due process violations in connection with the defendants' mental competence (two cases); other due process violations (two cases); violation of the Sixth Amendment right to self-representation (one case); and, juror bias (two cases). None were granted based on newly

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conviction for a 1982 double murder in Los Angeles. When he died, his § 2254 Petition for Writ of Habeas Corpus—which was filed in 1994—had been pending in the Central District of California for 12 years.

15. DONALD MILLER died of natural causes on October 14, 2005. At the time of his death, his § 2254 Petition for Writ of Habeas Corpus—which was filed in 1991—had been pending in the Central District of California for 14 years.

16. LARRY DAVIS JR. died on September 2, 2005, of what the coroner determined was acute drug toxicity; however, California Department of Corrections and Rehabilitation spokeswoman Terry Thornton said it was unclear whether the drugs were prescription or illicit. At the time of his death, his § 2254 Petition for Writ of Habeas Corpus—which was filed in 1996—had been pending in the Central District of California for nine years.

17. ROBERT GARCEAU died of natural causes on December 29, 2004. He had been on death row since 1985 for killing his girlfriend and her son. At the time of his death, his § 2254 Petition for Writ of Habeas Corpus—which was filed in 1995—had been pending in the Eastern District of California for nine years.

18. CHARLES WHITT died of natural causes on November 7, 2004. At the time of his death, his § 2254 Petition for Writ of Habeas Corpus—which was filed in 1994—had been pending in the Central District of California for 10 years.

19. ROBERT STANSBURY died of natural causes at the age of 66 on December 12, 2003. Stansbury had been on death row since his convictions for the kidnapping, rape, and murder of a 10-year-old girl in 1982. At the time of his death, his § 2254 Petition for Writ of Habeas Corpus—which was filed in 1995—had been pending in the Central District of California for eight years.

20. ROBERT NICOLAUS died of natural causes on April 12, 2003. At the time of his death, his § 2254 Petition for Writ of

reasonable to conclude that the federal courts may well have determined that a significant number of those prisoners who spent many years on death row and died while their federal habeas corpus petitions were pending had meritorious claims that required a new trial or a new sentencing proceeding.

That prisoners are dying of natural causes, including advanced age, before their convictions and sentences have been reviewed on direct appeal or before their claims of state and federal constitutional violations have been adequately investigated, articulated, and reviewed seriously undermines the integrity of the administration of capital punishment in California. It also creates disrespect for our system of justice. In the case of Mr. Post, there is no justification for a practice that allows a prisoner to spend nine years on death row, only to die before the California Supreme Court has ruled on his direct appeal.

Indeed, the continued funding of this broken system in California is occurring at the expense of other important criminal justice and public safety considerations. For example, a lack of resources was the excuse offered by the Legislature for its failure to fund enough trial judges to handle the state's prosecution of criminal defendants in noncapital felony cases, which recently resulted in the release of several Riverside County criminal defendants who had been apprehended but not prosecuted due to the state's inability to comply with the constitutional requirement for a speedy trial.[27] This is not a new phenomenon. In 1989, "Yolo County [was] struggling to keep its courts open because of the financial strain created by death penalty cases."[28] "California taxpayers legitimately can ask what return they are getting in

discovered evidence that the inmate was innocent. Additionally, our research indicates that state habeas corpus relief has been granted in seven cases: in five cases for ineffective assistance of trial counsel, in one case for juror misconduct, and in one case for constitutional error during the penalty phase during voir dire (peremptory challenges based on race). (Data on file with authors.)

27. *See* People v. Engram, 240 P.3d 237, 242–44 (Cal. 2010) (explaining that the Legislature's chronic failure to fund the criminal courts recently resulted in the dismissal of 18 misdemeanor and felony criminal cases, including the release of one defendant who was charged with first degree burglary, due to a lack of courtroom space and available judges to hear the cases).

28. DAVID ERICKSON, CAPITAL PUNISHMENT AT WHAT PRICE: AN ANALYSIS OF THE COST ISSUE IN A STRATEGY TO ABOLISH THE DEATH PENALTY 5 (1993), *available at* http://www.deathpenalty.org/downloads/Erickson1993COSTSTUDY.pdf (citing Lorena Natt, *Yolo Scrambles to Cope with Strained Courts*, SACRAMENTO BEE, Nov. 22, 1989, at B4).

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Habeas Corpus—which was filed in 1992—had been pending in the Northern District of California for 11 years.

21. GERALD GALLEGO died of natural causes at the age of 56 on July 18, 2002. Gallego had been on death row since 1984, when he was convicted of murdering 10 victims. At the time of his death, his § 2254 Petition for Writ of Habeas Corpus—which was filed in 1992—had been pending in the Northern District of California for 10 years.

22. STEPHEN DESANTIS died on March 2, 2002, of natural causes. He was convicted and sentenced to death for his role in the 1981 robbery-slaying of a 71-year-old man, and for the attempted murder of that man's wife. At the time of his death, his § 2254 Petition for Writ of Habeas Corpus—which was filed in 1993—had been pending in the Eastern District of California for nine years.

23. GEORGE MARSHALL died of natural causes on October 14, 2001. He had been on death row since 1983. At the time of his death, his § 2254 Petition for Writ of Habeas Corpus—which was filed in 1997—had been pending in the Eastern District of California for four years.

24. THEODORE FRANK died on September 5, 2001, at the age of 66, of an apparent heart attack in his cell at San Quentin State Prison. He was convicted for the 1978 torture-murder of a two-and-a-half-year-old child. At the time of his death, his § 2254 Petition for Writ of Habeas Corpus—which was filed in 1991—had been pending in the Central District of California for 10 years.

25. BRONTE WRIGHT died of natural causes on February 5, 2000. He had been on death row since 1982. At the time of his death, his § 2254 Petition for Writ of Habeas Corpus—which was filed in 1992—had been pending in the Central District of California for eight years.

26. ANDREW ROBERTSON, JR. died of natural causes on August 22, 1998. He had been on death row since 1978. At the time of his death, his § 2254 Petition for Writ of Habeas

increased public safety and question the trade-offs the State implicitly makes in spending an increasing portion of its general fund dollars on corrections."[29]

Ronald M. George, the former Chief Justice of the California Supreme Court, has concluded that the death penalty in California is "dysfunctional."[30] Former California Attorney General John Van de Kamp has come to a similar conclusion: California's death penalty "system simply isn't working. No one is being executed. . . . Yet death penalty cases are being prosecuted at great expense. . . . [M]illions of dollars [are] being wasted on a system that does not do what it is supposed to do."[31] Self-proclaimed white supremacist Billy Joe Johnson, after being convicted of killing a fellow gang member for divulging gang secrets, told his defense attorney to try to get him sentenced to death, because, as his attorney explained, "living conditions at San Quentin prison's death row will be better than if he serves a life term at Pelican Bay State Prison."[32] By any measure, it is beyond dispute that "the

29. Letter from Michael Alpert, Chairman, Little Hoover Comm'n, to Governor Schwarzenegger and others (Jan. 25, 2007), *available at* http://www.lhc.ca.gov/studies/185/Report185.pdf (noting that between 2002 and 2007 the budget for the CDCR surged by 52%).

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

31. John Van de Kamp, Op-Ed, *We Can't Afford the Death Penalty*, L.A. TIMES, June 10, 2009, at A23; *see also* FINAL REPORT, *supra* note 4, at 116 (concluding that California's death penalty "system is broken").

32. Dennis Lovelace, *White Supremacist Sentenced to Death*, MYFOXLA.COM (Nov. 23, 2009, 6:24 PM), http://www.myfoxla.com/dpp/news/local/white_supremacist_sentenced_to_death_20091123; *see also* Carol J. Williams, *When Death Penalty Means a Better Life: The State's Condemned Have Privileges, and Executions Are on Hold*, L.A. TIMES, Nov. 11, 2009, at A1 (describing conditions in death row prison facilities as "more comfortable than . . . other maximum security prisons"). Professor Laurie Levenson, a former prosecutor who teaches criminal law at Loyola Law School Los Angeles, commented to the *Los Angeles Times* recently that Billy Joe Johnson, who asked to be sentenced to death rather than life without parole because conditions on death row are more comfortable than they are in the general prison population, was probably correct in gauging that he would be better off on death row. "We have a perverse system, given that we have a death row but we don't really have executions," she said. Defendants who tell jurors to return a death sentence "don't really feel like they are making life-and-death decisions." *Id.* As the same feature story in the *Los Angeles Times* explained:

> Though death row inmates at San Quentin State Prison are far from coddled, they live in single cells that are slightly larger than the two-bunk, maximum-security confines elsewhere, they have better access to telephones and they have "contact visits" in plexiglass booths by themselves rather than in communal halls as in other institutions. They have about the only private accommodations in the state's 33-prison network, which is crammed with 160,000-plus convicts.
>
> Death row prisoners are served breakfast and dinner in their cells, can usually mingle with others in the outdoor exercise yards while eating their sack lunches, and

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Corpus—which was filed in 1990—had been pending in the Central District of California for eight years.

27. **MICHAEL WADER** died of natural causes on May 11, 1997. At the time of his death, his § 2254 Petition for Writ of Habeas Corpus—which was filed in 1996—had been pending in the Central District of California for one year.

28. **JEFFREY WASH** committed suicide on September 12, 1996. At the time of his death, his § 2254 Petition for Writ of Habeas Corpus—which was filed in 1995—had been pending in the Northern District of California for one year.

29. **ROBERT DANIELSON** committed suicide on September 7, 1995. At the time of his death, his § 2254 Petition for Writ of Habeas Corpus—which was filed in 1994—had been pending in the Northern District of California for one year.

30. **TIMOTHY PRICE PRIDE** was fatally shot in the chest by a corrections officer during a fistfight on September 30, 1994. At the time of his death, his application for appointment of counsel to file his Petition for Writ of Habeas Corpus had been pending in the Eastern District of California for one-and-a-half years.

31. **JAY KAURISH** died of natural causes on November 6, 1992. He was sentenced to death for the 1982 murder of his 12-year-old stepdaughter with the special circumstance allegation of murder in the commission of lewd and lascivious acts and oral copulation. At the time of his death, his § 2254 Petition for Writ of Habeas Corpus—which was filed in 1992—had been pending in the Central District of California for one year.

32. **GARY GUZMAN** died of natural causes on February 7, 1991. At the time of his death, his § 2254 Petition for Writ of Habeas Corpus—which was filed in 1989—had been pending in the Eastern District of California for two years.

(Case numbers on file with authors.)

strongest, most effective death penalty law in the nation" that was promised to California voters in 1978 has not been realized. Instead, California has the most expensive and least effective death penalty law in the nation.[33]

In this Article, we examine the costs incurred to date in carrying out California's capital punishment scheme since 1978. In so doing, we look to the numerous death penalty initiatives passed by a majority of the voters who have turned out to vote at given elections,[34] and we ask whether the current costly and inefficient death penalty scheme is what the voters anticipated when they cast their ballots in favor of these initiatives. Our goal is to expose, with as much precision as possible, how much taxpayers are spending on the administration of California's broken death penalty system and to explain how the system became so dysfunctional.

Part I examines the toll the current system is taking on state and federal taxpayers, including never-before-published data concerning the millions of dollars in federal funds expended to process California's condemned inmates' federal habeas corpus petitions due to the Legislature's failure to provide adequate state funds for appointed counsel to investigate federal constitutional claims. We also discuss the added costs incurred due to the constitutional requirement that the California Supreme Court review all direct appeals. Part II looks at the role voter initiatives passed by California voters over the last 40 years have played in shaping the current system of capital punishment in California. We discuss the Legislature's utter failure to respond to the repeated warnings of former Chief Justice Ronald M. George that the system of reviewing death penalty convictions and sentences is totally ineffective. Part III forecasts potential constitutional issues that may arise if the state Legislature persists in its refusal to address the collapse of the administration of capital punishment in California. Part IV summarizes and reviews the problems identified

have exclusive control over the television, CD player or other diversions in their cells. *Id*.

33. *See* Williams, *supra* note 32 (describing the high cost and lack of efficiency of California's administration of the death penalty).

34. While the "electorate" is defined as "a body of people entitled to vote," MERRIAM-WEBSTER COLLEGIATE DICTIONARY 400 (11th ed. 2008), in California it is not the majority of the electorate—or eligible voters—that is required to pass an initiative, but a simple majority of those voters who turn out at a given election. CAL. CONST. art. II, § 10.

and the corrective measures proposed in our earlier article *Remedies for California's Death Row Deadlock*[35] ("*Remedies*") and in the Commission's *Final Report*. It also looks at the Legislature's failure to conduct hearings and vote on whether those recommendations would be cost-effective.

Finally, in Part V we suggest several ballot initiatives California voters may wish to consider if the Legislature continues to ignore its duty to address the demonstrably flawed aspects of the administration of California's death penalty laws.

I. BULLDOZING BARRIERS AND UNEARTHING HIDDEN COSTS: HOW MUCH ARE CALIFORNIA TAXPAYERS REALLY PAYING FOR THE STATE'S ILLUSORY DEATH PENALTY?[36]

While California spends more on staffing the California Department of Corrections and Rehabilitation (CDCR) than any of the state's other 150 departments—$4.78 billion in 2009[37]—obtaining data concerning how much the administration of California's death penalty actually costs state and federal taxpayers has not been easy.[38] In our earlier article *Remedies*, which discussed the cumulative delays inherent in both automatic appeals and post-conviction proceedings in death penalty cases, we identified some of the costs associated with death penalty litigation in California's state and federal courts.[39] While researching and writing *Remedies*, we

35. Alarcón, *supra* note 3.

36. *See* Alex Kozinski & Sean Gallagher, *Death: The Ultimate Run-On Sentence*, 46 CASE W. RES. L. REV. 1, 3 (1995) ("[W]e have little more than an illusion of a death penalty in this country.").

37. Brian Joseph, *State Prison System Lucrative for Corrections Workers*, ORANGE COUNTY REGISTER (Jan. 9, 2011 3:18PM), http://www.ocregister.com/news/-283117--.html ("The next closest department was Transportation, better known as CalTrans, which employed more than 23,000 people and paid them more than $1.49 billion in salary, overtime and other wages."); *see also* PEW CTR. OF THE STATES & THE PUB. POLICY INST. OF CAL., FACING FACTS: PUBLIC ATTITUDES AND FISCAL REALITIES IN FIVE STRESSED STATES 43 (2010) (explaining that Governor Schwarzenegger kicked off this year's legislative session by calling for a constitutional amendment to limit spending on prisons and guarantee funding for higher education as follows: "'The priorities have become out of whack over the years,' Schwarzenegger told lawmakers in his State of the State address. 'What does it say about our state? What does it say about any state that focuses more on prison uniforms than on caps and gowns? It simply is not healthy.'").

38. As the Commission concluded in the *Final Report*, "[I]t is *impossible* to ascertain the precise costs of the administration of California's death penalty law at this time. But the choices that California faces require some comparison of projected costs; for this purpose, rough estimates will have to do." FINAL REPORT, *supra* note 4, at 144 (emphasis added).

39. Alarcón, *supra* note 3, at 709–10.

were unable to find a single state or federal official willing to go on the record concerning the cost of implementing the death penalty in California. As a result, we were forced to rely on various sources, such as the media and anecdotal reports, that attempted to estimate those overall costs. We noted that, with respect to expenses incurred in litigating capital habeas corpus petitions in federal court, those amounts are "not made public."[40]

A year after the publication of *Remedies*, the Commission issued its *Final Report*.[41] The Commission was created on August 24, 2004, by Senate Resolution No. 44 of the 2003–2004 Session of the California State Senate.[42]

The *Final Report* relates a grim tale of numerous procedural infirmities in California's administration of the death penalty. After conducting a thorough review of the implementation of the death penalty by the executive and legislative branches of California's government, the Commission gave those branches a failing grade. It concluded that

> [t]he failures in the administration of California's death penalty law create cynicism and disrespect for the rule of law, increase the duration and costs of confining death row inmates, weaken any possible deterrent benefits of capital punishment, increase the emotional trauma experienced by murder victims' families and delay the resolution of meritorious capital appeals.[43]

The Commission was unable to locate any reliable sources within the state or federal governments willing or able to discuss on the record what the death penalty costs taxpayers.[44] The Commission retained the RAND Corporation to determine the feasibility of a major study of the overall costs incurred for the administration of the death penalty in California.[45] The RAND representatives assigned to

40. *Id.* at 710.

41. *See* FINAL REPORT, *supra* note 4.

42. *Charge*, CAL. COMM'N ON THE FAIR ADMIN. OF JUSTICE, http://www.ccfaj.org/charge.html (last visited Mar. 29, 2011) ("Thorough, unbiased study and review in other states has resulted in recommendations for significant reforms to the criminal justice system in order to avoid wrongful convictions and executions, and California has not engaged in any such review of the state's criminal justice system." (quoting S. Res. 44, 2003–2004 Sess. (Cal. 2004))).

43. FINAL REPORT, *supra* note 4, at 115 (footnote omitted).

44. *Id.* at 144, 152–53.

45. *Id.* at 153.

interview state officials as part of the study reported that

> many (if not most) of the participants in the death penalty process have strongly held views about the death penalty, and . . . those views have implications for [their] ability to gather the necessary data for the proposed study. . . . [M]any of the stakeholders in the current death penalty process are wary of the kind of independent study [RAND] proposed, for fear that it could end up swaying opinion in a direction contrary to their own convictions. This wariness was expressed . . . [directly and indirectly] (e.g., difficulties we encountered getting connected in a timely fashion to the right people). In our experience, such ambivalence about a study can make data collection extremely difficult—if not effectively impossible.[46]

The Commission abandoned its effort to determine with precision what the cumulative costs are to administer the state's death penalty.[47] We encountered similar resistance in our attempts to gather data for this Article, and we agree entirely with the Commission's conclusion that "[p]roviding the public with reliable information about how the death penalty is being administered in California should not depend upon the discretion of those who are charged with its administration."[48]

The Commission recommended to the Legislature that there be

> more comprehensive collection of data and the continual monitoring and analysis of that data, to identify and address the problems of delay, chronic under-funding, and the potential risk of wrongful convictions and executions, and to assure ourselves that racial and geographic variations do not reflect the inappropriate exercise of discretion.[49]

The Commission majority recommended that a panel be appointed by the Governor and the Legislature and charged with the duty

> to issue an annual report to the Legislature, the Governor and the courts, gauging the progress of the courts in

46. *Id.* (quoting EVERINGHAM ET AL., FEASIBILITY STUDY: CHARACTERIZING THE ADMINISTRATION AND ASSESSING THE ADMINISTRATIVE COSTS OF THE DEATH PENALTY IN CALIFORNIA 11 (2007)).

47. *Id.* at 154–55.

48. *Id.* at 153.

49. *Id.* at 154.

> reducing delays in death penalty cases, analyzing the costs of and monitoring the implementation of the recommendations of this Commission, and examining ways of providing safeguards and making improvements in the way the California death penalty law functions.[50]

In the three years that have passed since the Commission issued its *Final Report*, the California Legislature has not acted on its recommendations.[51]

A. Cost Study: California's Death Penalty Is a $4 Billion Capital Blunder

The growing concern over the cost of implementing the death penalty in California and the lack of publically available information about these taxpayer-funded expenditures—matters of particular concern in view of California's developing budget crisis[52]—prompted us to undertake a study of our own. Over a two-year period, we requested death penalty cost data and related information from various state and federal agencies. We have reviewed the data

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50. *Id.* at 154–55.

> The Legislature should impose a requirement upon courts, prosecutors and defense counsel to collect and report any data other than privileged material designated by the California Death Penalty Review Panel which may be necessary: (1) to determine whether demographics affect decisions to implement the death penalty, and if so, how; (2) to determine what impact decisions to seek the death penalty have upon the costs of trials and postconviction review; and (3) to track the progress of potential and pending death penalty cases to predict the future impact upon the courts and correctional needs. The information should be reported to the California Department of Justice and the California Death Penalty Review Panel. *The information reported should be fully accessible to the public and to researchers.*

Id. at 154 (emphasis added).

51. In a recent survey by the PEW Center of the States and Public Policy Institute of California (PPIC), it is reported that "[o]nly 9 percent of respondents give the California legislature positive marks for its work on fiscal issues." PEW CTR. OF THE STATES & THE PUB. POLICY INST. OF CAL., *supra* note 37, at 39.

52. Marc Lifsher, *State Jobless Benefit Fund Overdrawn; California Is Forced to Borrow Billions to Provide Assistance to Unemployed Workers*, L.A. TIMES, Nov. 7, 2010, at A1 ("California's fund for paying unemployment insurance is broke. With one in every eight workers out of a job, the state is borrowing billions of dollars from the federal government to pay benefits at the rate of $40 million a day. The debt, now at $8.6 billion, is expected to reach $10.3 billion for the year, two-thirds greater than last year. Worse, the deficit is projected to hit $13.4 billion by the end of next year and $16 billion in 2012, according to the California Employment Development Department, which runs the program. Interest on that debt will soon start piling up, forcing the state to come up with a $362-million payment to Washington by the end of next September. That's money that otherwise would go into the state's general fund, where it could be spent to hire new teachers, provide healthcare to children and beef up law enforcement.").

we were able to obtain, and other data gathered from published studies that offer some degree of reliability, in an effort to determine what California is spending in taxpayer dollars on the administration of the death penalty.

Most of our inquiries were not well received; the responses we were able to get were typically laden with caveats, disclaimers, or other explanations as to why the data may or may not be reliable. When data was unavailable, the excuse most commonly offered for the lack of cost information was that government entities do not collect or maintain such data or that they have not begun to do so until very recently. The CDCR, for example, does not track or report what funds are expended on *any* costs associated with administration of the death penalty, including the costs associated with housing inmates on death row in California.[53] Concerning executions, according to the CDCR,

> [t]he cost of carrying out an execution in California is difficult to assess. . . . Staff assigned to the execution team receive their regular, budgeted salaries. The cost of the execution procedure, including the chemicals utilized, is minimal.
>
> The real cost involved in the capital punishment procedure is related to the court reviews, both those mandated by the Legislature as well as the appeal procedures initiated by the convicted inmates' legal staff. These costs vary depending upon the resources of the convicted inmate and the length of the court procedures involved.[54]

Until 1998, the federal government did not track how many federal tax dollars were being spent to compensate appointed defense counsel either to investigate capital state prisoners' federal

53. Terry Thornton, spokeswoman for the California Department of Corrections and Rehabilitation, stated that "her department has never put a figure on the cost for 'more staff-intensive' death row housing." Williams, *supra* note 32, at A1. The authors attempted to contact Terry Thornton by e-mail and voicemail but received no response. *See* E-mail from Honorable Arthur L. Alarcón, Ninth Circuit Court of Appeals, to Terry Thornton, Spokeswoman for the Cal. Dep't of Corr. & Rehab. (Nov. 5, 2010, 8:32AM) (on file with authors).

54. California Department of Corrections and Rehabilitation, *History of Capital Punishment in California*, *in* BILL LOCKYER, OFFICE OF VICTIMS SERVICES, PEOPLE V. MICHAEL ANGELO MORALES: BACKGROUND INFORMATION 44–45, *available at* http://ag.ca.gov/victimservices/pdf/aamorales_presspack.pdf.

constitutional claims or to represent them in federal habeas corpus proceedings.[55]

Concerns have been expressed that releasing data about costs incurred for publically funded, court-appointed defense attorneys could be taken out of context and might "inflame the body politic."[56] Both federal judges and defense counsel have expressed concerns over the potential negative reaction if the public knew about the sums of taxpayer dollars expended on legal representation for prisoners who have been sentenced to death.[57] They feared that voters would demand an end to these expenditures if they learned the truth and were concerned that reducing or eliminating public funding would deprive California's condemned inmates of qualified legal representation. Concern was also expressed that such a lack of funding would deprive death row prisoners of procedural due process. While understandable, these concerns do not appear to be well founded.[58] The due process provisions of both the California Constitution and the U.S. Constitution require that prisoners who are sentenced to death be provided with qualified counsel during their

55. E-mail from George Drakulich, Chief Info. Tech. Div., to Honorable Arthur L. Alarcón, Ninth Circuit Court of Appeals (July 15, 2009, 5:59AM) (on file with authors) (indicating that Statistics Division of the Administrative Office began tracking data related to capital habeas filings in federal court by state prisoners in 1998).

56. Martha K. Harrison, *Claims for Compensation: The Implications of Getting Paid When Appointed Under the Criminal Justice Act*, 79 B.U. L. REV. 553, 575 (1999) ("While the public has a legitimate interest in the expenditure of public funds for court appointed defense attorneys, even the disclosure of *just* the amounts paid would 'distort the public perception about the fairness of the process because the expenditures, out of context, would emphasize costs without any information about benefits obtained.' Even such a limited disclosure might 'inflame the body politic' against the defendant, thereby depriving him of a fair trial." (emphasis added) (quoting United States v. Suarez, 880 F.2d 626, 633 (2d Cir. 1989); United States v. McVeigh, 918 F. Supp. 1452, 1465 (W.D. Okla. 1996))).

57. *McVeigh*, 918 F. Supp. at 1465 (noting the media's argument "that the public is interested in the amount spent for the defense during the course of the case because the funds are public and the taxpayers may question both the reasonableness and the appropriateness of the expenditures[,]" but concluding that "any 'robust debate' about expenditures for the defense of the accused at this stage would be counter-productive to the process of adjudication by diverting counsel from proceeding with the task of preparing for trial."). But see Suarez, 880 F.2d at 630, 633 (rejecting defendant's concerns that disclosure of information on CJA forms related to remuneration of defense counsel and experts would "chill the willingness of defendants to apply for funds necessary for the preparation and presentation of a defense[,]" and, in light of the "obvious legitimate public interest in how taxpayers' money is being spent, particularly when the amount is large[,]" permitting disclosure with "some modest redaction." (internal quotation marks omitted)).

58. Rohan *ex rel.* Gates v. Woodford, 334 F.3d 803, 813 (9th Cir. 2003) ("In capital cases, prisoners challenging their convictions or sentences in federal court have a right to assistance of counsel." (citing 21 U.S.C. § 848(q)(4)(B))).

direct appeals.[59] Additionally, both the California Constitution and the U. S. Constitution guarantee the right to seek a writ of habeas corpus, a form of review that extends as far back as the English common law and the Magna Carta.[60] Both federal and state law provide for the appointment of counsel for indigent condemned inmates seeking review of alleged violations of rights guaranteed by the state or federal constitution.[61]

We believe it is highly improper to subvert the important public interest in transparency in governmental conduct, including the public's right to know how many tax dollars are being wasted because the death penalty system in California has broken down. It is

59. 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). In California, a condemned inmate is entitled to an automatic appeal directly to the California Supreme Court to seek review of legal errors that may have occurred prior to or during trial. The right to automatic appeal is guaranteed in CAL. PENAL CODE § 1239 (West 2004). Section 1239(b) provides: "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." *Id.*

60. After an automatic appeal is decided, a condemned inmate may file a state habeas corpus petition with the California Supreme Court, in which he or she may seek review only of errors that amount to a violation of rights guaranteed by the state or federal constitution and may rely on evidence not available or introduced at trial.

An effective capital punishment system necessarily involves post-conviction proceedings, which come at an enormous additional cost to taxpayers. After conviction and sentencing, a condemned inmate has lost the presumption of innocence. In all subsequent proceedings (collectively referred to as "post-conviction proceedings"), the burden shifts to the inmate to show that a significant error was made in the process that convicted him. State and federal law guarantee condemned inmates representation by qualified counsel in all post-conviction proceedings. A state prisoner who does not obtain relief through a state habeas petition is guaranteed the opportunity to challenge his or her conviction and sentence in federal court by filing a federal habeas corpus petition, pursuant to 28 U.S.C. § 2254(a), and seeking federal court review of any claims of federal constitutional error that were considered and rejected by state court. 21 U.S.C. § 848(q)(4)(B), *repealed by* Pub. L. 109–177, 120 Stat. 231, 232 (2006) (discussing circumstances under which a defendant can obtain federal habeas counsel in a post-conviction proceeding).

61. Capital prisoners have a right *per se* to habeas counsel, under both federal and California law, by statute. *See* 18 U.S.C. § 3599 (2006) ("[Any] defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services . . . shall be entitled to the appointment of one or more attorneys and the furnishing of such other services" for purposes of federal habeas proceedings); PENAL § 1239 (stating that prisoners sentenced to death are entitled to counsel in state and federal habeas proceedings). *See In re* Anderson, 447 P.2d 117, 131 (1968) (holding that "as a matter of policy, and upon application of the defendant," a court will appoint counsel "to represent indigent defendants in capital cases in the following proceedings undertaken between the termination of their state appeals and their execution: (a) Proceedings in this court for post-conviction review; (b) Proceedings for appellate or other post-conviction review of state court judgments in the United States Supreme Court, subject however to the power of that court to appoint counsel therein; (c) Applications for executive clemency, and the conduct of sanity hearings where indicated.").

deceitful and unethical to withhold the truth out of fear that the public may demand that the death penalty system be properly funded or that it be abolished if it cannot be properly implemented.

Despite the many obstacles we encountered in our efforts to gather data for this Article, we believe we have collected enough information to calculate with some precision what it has cost the state of California and the federal government to maintain California's death penalty system. Our study has revealed that years of keeping the public in the dark about the cost of the death penalty in California has resulted in billions of tax dollars quietly being wasted on a system of capital punishment in which very few are executed. The categories of costs associated with California's capital punishment system can be broken down as follows: (1) pre-trial and trial costs, (2) costs related to direct appeals and state habeas corpus petitions, (3) costs related to federal habeas corpus petitions, and (4) costs of incarceration.[62]

1. Death Penalty Pre-Trial and Trial Costs: $1.94 Billion

For purposes of calculating a figure for the overall total costs incurred to administer the death penalty in California, we have attempted to calculate the state funds expended during the pre-trial and trial phases of capital litigation.[63] As with the other data concerning the cost of the death penalty in California, published cost

62. We have not included in our calculation the costs incurred—which are, to be sure, significant—for the litigation of the civil rights suits brought by inmates on California's death row who are challenging the standards by which lethal injection is carried out in the state. We have also not included the added costs to the state of actually carrying out the thirteen executions which have been performed since 1978.

63. We note that expenses related to death penalty trials are funded by the counties in California, rather than by the state of California. *See* Gerald F. Uelmen, *Can California Confront Costs of the Death Penalty?*, SACRAMENTO BEE, Oct. 10, 2010, at 1E ("Among California's 58 elected district attorneys, many choose to pursue politically popular death sentences with extravagant frequency. Why not? Most of the $54.4 million we spend each year for capital appeals and habeas reviews comes out of the state budget, not county coffers.").

Once a defendant is convicted and sentenced to death, however, the expenses associated with the prisoner's appeals and state and federal habeas corpus proceedings, as well as the costs of incarceration, are borne by the state of California. The California Department of Corrections reports that three counties account for nearly half (48.39%) of all the inmates sentenced to death in the state: Los Angeles County (218 death sentences for 30.4% of the statewide total), Riverside County (69 death sentences for 9.62% of the statewide total), and Orange County (60 death sentences for 8.37% of the statewide total). No death sentences have been imposed in 21 of California's 58 counties, and only one death sentence has been imposed in another four counties. CONDEMNED INMATE SUMMARY LIST, *supra* note 17, at 3–4.

data relating to the pre-trial and trial phases is scant. We have calculated that the California taxpayers have spent approximately $1.94 billion on pre-trial and trial costs associated with the prosecution of an estimated 1,940 death penalty trials conducted since 1978.

We have found no data published by any California state governmental entity indicating how many death penalty trials take place each year in California. Nor have we discovered any state governmental entity responsible for officially auditing or reporting how much more it costs to prosecute a death penalty case than a noncapital murder case.[64] We know that there have been at least 970 capital trials, because that is how many death penalty judgments have been rendered in California since 1978; an average of about 30 per year.[65] Based on testimony and other objectively verifiable

64. Unlike the centralized system in place in the federal system, California has no system for overseeing that the death penalty is sought evenly throughout the state. Instead, the state has "fifty-eight locally elected county prosecutors [with] complete discretion to determine which murders should be prosecuted as death penalty cases." Gerald F. Uelmen, *Death Penalty Appeals and Habeas Proceedings: The California Experience*, 93 MARQ. L. REV. 495, 497 (2009). This system has given rise to numerous potential claims of discrimination. *See* ROMY GANSCHOW, AM. CIVIL LIBERTIES UNION OF N. CAL., DEATH BY GEOGRAPHY: A COUNTY BY COUNTY ANALYSIS OF THE ROAD TO EXECUTION IN CALIFORNIA 3 (Elise Banducci et al. eds., 2008), *available at* http://www.aclunc.org/docs/criminal_justice/death_penalty/death_by_geography/death_by_geography.pdf.

In Los Angeles County, which typically has more death penalty trials than any other county in California, there is a review system in place whereby death penalty cases "shall not be filed by other than a Deputy District Attorney IV or higher." Los Angeles County District Attorney's Office, Chapter 7: Special Circumstances Cases (on file with authors).

"The Department of Justice does not permit a federal prosecutor to seek the death penalty for a defendant unless specifically authorized to do so by the Attorney General of the United States." JON B. GOULD & LISA GREENMAN, UPDATE ON THE COST AND QUALITY OF DEFENSE REPRESENTATION IN FEDERAL DEATH PENALTY CASES 6 (2010), *available at* http://www.uscourts.gov/FederalCourts/AppointmentOfCounsel/Viewer.aspx?dox=/uscourts/FederalCourts/AppointmentOfCounsel/FDPC2010.pdf&page=1. "[T]he goal of the Department's death penalty review and decision-making process is nationwide consistency in the fair and even-handed application of federal capital sentencing laws in appropriate cases, irrespective of geography or local predisposition for or against the death penalty." *Id.* at 12 n.18 (citing Statement of Barry Sabin, Dep. Ass't Att'y Gen. of the United States, *Oversight of the Federal Death Penalty: Hearing Before the Senate Committee on the Judiciary*, 110th Cong. (2007)).

65. The Commission based the projected cost calculations published in its *Final Report* on the average number of death sentences imposed between 2000 and 2007, which averaged 20 per year. FINAL REPORT, *supra* note 4, at 120. Because our study is seeking to calculate funds already spent, rather than predict how many future death sentences will be imposed for future cost-projection purposes, we rely on the average figure of 30 per year, based on the average of all death sentences actually pronounced between 1978 and 2010. FINAL REPORT, *supra* note 4, at 121 (2005: 22; 2006: 22; 2007: 20); BARRY LATZER & JAMES N.G. CAUTHEN, JUSTICE DELAYED? TIME CONSUMPTION IN CAPITAL APPEALS: A MULTISTATE STUDY 26 n.38 (2007) (citing Bureau of Justice Statistics—828 judgments of death in California between 1973 and

evidence, such as data collected by the Office of the State Public Defender over a five-year period in the 1980s, the Commission concluded that juries recommend the death penalty in 50 percent of the cases in which charges for murder committed under special circumstances are filed.[66] This means that approximately 1,940 death penalty trials have taken place in California between 1978 and 2010.

Though it was unable to state with precision what the total expenses associated with a typical death penalty trial are, the Commission concluded that "[i]t can certainly be said that death penalty trials take longer and cost considerably more than non-death [penalty] murder trials."[67] The Commission also determined that "[t]he records reviewed . . . confirm that it is feasible to track the trial level costs in death penalty cases, if a uniform system of reporting data is imposed."[68] In other words, the Legislature's failure to track and report these trial costs is not a matter of a lack of ability, rather, it appears to be a lack of political will.

The few studies that have attempted to address the cost of a death penalty trial indicate that those trials cost significantly more than noncapital murder trials. The Legislature's Joint Committee on Prison Construction and Operations reported in 1992 that "an average death-penalty murder trial can cost more than six times the $93,000 spent on non-capital murder cases."[69] Another estimate made in 1993 was higher: "[C]apital cases often cost 10 to 20 times more than murder trials that don't involve the death penalty."[70]

2004), *available at* http://www.ncjrs.gov/pdffiles1/nij/grants/217555.pdf; NATASHA MINSKER ET AL., AM. CIVIL LIBERTIES UNION OF N. CAL., DEATH IN DECLINE '09 1 (Miriam Gerace ed., 2010), *available at* http://www.aclunc.org/docs/criminal_justice/death_penalty/death_in_decline_09.pdf (2008: 21; 2009: 29); *see* Carol J. Williams, *Crowd Grows on Death Row; the State Executes None But Adds 28 to the Queue in 2010*, L.A. TIMES, Dec. 29, 2010, at AA1; *see also* E-mail from Robert Reichman, Automatic Appeals Monitor for the Cal. Supreme Court, to Paula Mitchell, Career Clerk to the Honorable Arthur L. Alarcón, Ninth Circuit Court of Appeals (Feb. 3, 2011, 3:26PM) (on file with authors) (reporting that automatic appeals from the judgment of death have been filed in 961 cases).

66. *See* FINAL REPORT, *supra* note 4, at 128.

67. *Id.* at 129.

68. *Id.*

69. Marc Lifsher, *Is Gas Chamber Door Closing?: The Cost: 'Life' Would Have Been Cheaper*, ORANGE COUNTY REGISTER, Apr. 22, 1992, at A1, A4 (citing the Legislature's Joint Committee on Prison Construction and Operations and estimating that Robert Alton Harris's 1979 murder trial cost $600,000).

70. Alina Tugend, *News Focus: Death Penalty's High Cost; Courts: The State No Longer Reimburses Orange and Other Counties for Capital-Punishment Defense Expenses. Can O.C. Afford the Tab?*, ORANGE COUNTY REGISTER, Aug. 9, 1993, at B1.

News accounts reporting the costs of 15 capital murder trials in California since 1983 support the higher estimate:

(1) The 23-month trial of Angelo Buono Jr. in 1983 "cost taxpayers an estimated $2 million" ($4.49 million in 2011 dollars after adjusting for inflation).[71]

(2) The 1988 trial of David Carpenter cost taxpayers "between $2 million and $3 million," even though Carpenter was already on death row when he was tried in 1988, because he had been convicted of two other murders and sentenced to death in 1984.[72]

(3) The defense costs alone for Ronaldo Ayala, who was convicted and sentenced to death for the 1985 execution-style murders of three men in a Logan Heights garage, were $1.4 million.[73]

(4) The defense costs for Stacy Butler, whose "death penalty case ended in a mistrial when jurors deadlocked 6–6 over whether Butler murdered a San Diego police officer in 1988," were $1.36 million.[74]

(5) "It cost taxpayers $2.7 million in 1989 to defend serial killer David Lucas in an eight-month trial that resulted in three murder convictions and a death sentence." That figure apparently does not include costs of prosecution or court costs; it translates into $4.87 million in 2011 dollars, after adjusting for inflation.[75]

(6) The 1995 trial of Johnny Avila and his two co-defendants cost $1.6 million in defense attorney fees, investigators, and experts alone (excluding costs incurred for prosecuting the case and related court costs).[76]

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71. Linda Deutsch, *One Guilty Verdict in 'Hillside Strangler' Case*, ASSOCIATED PRESS, Nov. 1, 1983, *available at* 1983 WLNR 122315; *see* U.S. INFLATION CALCULATOR, http://www.usinflationcalculator.com (last visited Mar. 6, 2011) (calculating inflation rates based on year and amount entered by user).

72. Bill Callahan, *New Trial Ordered in 'Trailside Killings'; Juror Misconduct Cited by San Diego Judge*, SAN DIEGO UNION-TRIB., June 14, 1989, at A1. He remains on death row today. He is 80 years old.

73. Bill Callahan, *Lawyers No Longer Get Millions in Capital Cases*, SAN DIEGO UNION-TRIB., June 26, 1994, at A1.

74. *Id.*

75. *Id.* (comparing the cost of the Lucas trial to what it cost to defend "armed robber Darnell Jones, who was convicted in a three-week trial of murdering a Tierrasanta man and sentenced to spend the rest of his life in prison"—about $150,000); U.S. INFLATION CALCULATOR, http://www.usinflationcalculator.com (last visited Mar. 9, 2011) (calculating inflation rates based on year and amount entered by user).

76. Tom Kertscher, *Killers' Defense Sets High of $ 1.6m: Death Penalty Blamed for Cost of*

(7) The capital trial defense costs for Joselito Cinco were $1.1 million.[77]

(8) The capital trial defense costs for Billy Ray Waldon were $1.1 million.[78]

(9) Dean Carter's defense costs for his trial on the 1984 murder of a Pacific Beach woman were over $1 million. In the same year he was also convicted and sentenced to death in another trial for the murders of three women in Los Angeles.[79]

(10) The defense costs for Willie Ray Roberts, who "[p]leaded guilty to the 1988 murder of a 16-year-old schoolgirl and was sentenced to a prison term of life without the possibility of parole after a jury deadlocked 9–3 in favor of acquitting him," were over $1 million.[80]

(11) The defense costs for Jessie Moffett, who was "[c]onvicted and sentenced to death for the 1979 rape-murder of a San Diego woman and the 1987 murder of a hotel security guard," were over $1 million.[81]

(12) The costs were also over $1 million for Terry Bemore, who was "[c]onvicted and sentenced to death for the 1985 torture-murder of an East San Diego liquor store clerk."[82]

(13) More recently, the 2002 trial of Cary Stayner, who was already serving a life sentence without parole in federal prison, cost $2.4 million.[83]

(14) The 2003 capital trial of David Westerfield reportedly cost in excess of $1.3 million.[84]

(15) Although he ultimately pleaded guilty,[85] the 2010 death

Fresno Trial, FRESNO BEE (California), June 16, 1995, at A1.

77. Callahan, *supra* note 73, at A1.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. NATASHA MINSKER, AM. CIVIL LIBERTIES UNION OF N. CAL., THE HIDDEN DEATH TAX: THE SECRET COSTS OF SEEKING EXECUTION IN CALIFORNIA 20 (Claire Cooper & Elise Banducci eds., 2008), *available at* http://www.aclunc.org/docs/criminal_justice/death_penalty/the_hidden_death_tax.pdf; Brian Bergstein, *Yosemite Killer Going on Trial in State Court, Only Issue Is the Death Penalty*, ASSOCIATED PRESS WORLDSTREAM, July 13, 2002.

84. Greg Moran, *Westerfield's Attorneys Were Paid $304,500; Fees Only Part of County's Costs in Death-Penalty Trial*, SAN DIEGO UNION-TRIB., July 17, 2003, at NC-1, NI-1.

85. Kurt Streeter, *Convicted Murderer Pleads Guilty to Killing 10-Year-Old Riverside*

penalty trial of Joseph Edward Duncan III was estimated to cost "several million dollars by the time it's completed."[86]

A study conducted in 1993, which the Commission considered and included in its *Final Report*, looked at death penalty trial costs in California cases completed between 1989 and 1992.[87] That study concluded that at that time the "cost of a death penalty [trial was] at least $1.2 million more than a comparable murder trial pursuing the alternative of life in prison without parole."[88] This calculation is supported by a review of death penalty trial cost information obtained by the *San Diego Union-Tribune* ("*Union-Tribune*") in 1994.[89] The *Union-Tribune* examined information it obtained about 18 local death penalty trials occurring between 1984 and 1994, some of which are referenced above. The *Union-Tribune* determined that "[t]he defense costs [*alone*] in half of the 18 cases—including [court-appointed] attorneys' fees and costs for expert witnesses, investigators and other related expenses—were $1 million or more."[90] The District Attorney's Office "released estimated figures in most of the 18 cases at the request of the *Union-Tribune*."[91] It reported that the prosecution had incurred additional trial costs of between $255,000 and $979,000 per case.[92]

The Commission also reviewed a study of the costs of death penalty trials published by the ACLU of Northern California.[93] The

County Boy, L.A. NOW (Mar. 15, 2011, 1:45 PM), http://latimesblogs.latimes.com/lanow/2011/03/convicted-killer-pleads-guilty-to-killing-10-year-old-riverside-county-boy.html.

86. John Asbury, *Mounting Costs to Try Killer*, PRESS ENTERPRISE (Riverside, Cal.), Apr. 20, 2010, at A1 (reporting that "[t]he average death penalty trial can cost $3 million to $7 million, said Michael Radelet, a University of Colorado sociology professor and death penalty expert").

87. ERICKSON, *supra* note 28, at 20. Erickson's study was based on data "from a variety of sources including the Los Angeles County Auditor-Controller, Los Angeles County Superior Court, Los Angeles prosecuting and defense attorneys, the Los Angeles County Jail and the Judicial Council of California." *Id.* at 19. "All the cases [in Erickson's study] were completed between 1989 and 1992." *Id.* at 20.

88. *Id.* at 3.

89. Callahan, *supra* note 73, at A1.

90. *Id.*

91. *Id.*

92. *Id.*

93. FINAL REPORT, *supra* note 4, at 145 ("For comparative purposes, the Commission adopted a very conservative estimate that seeking the death penalty adds $500,000 to the cost of a murder trial in California."); *see* MINSKER, *supra* note 83, at 32 ("Because there is no consistent or comprehensive tracking of trial level costs across the state and so many costs are hidden, it is impossible to say for certain how much more counties are spending in pursuit of execution.").

authors of the ACLU study collected data pursuant to a series of Public Records Act requests concerning reimbursements by the state to smaller counties for homicide trials between 1996 and 2005.[94] The study surveyed 10 capital cases and found that the trial costs ranged from $454,000 in the case of Robert Allen Wigley, to $10.9 million in the case of Charles Ng.[95] "Comparing the *least expensive* death penalty trial to the *most expensive* noncapital trial yielded a difference of $1.1 million more for the death case, but it is impossible to project this difference to all death penalty trials."[96]

In the absence of any data provided by state or local governmental entities indicating what the actual costs of death penalty trials are, we are left to estimate those costs based on information obtained from other sources. The findings of the studies cited above, combined with available news accounts and other anecdotal evidence, support the conclusion that the costs associated with death penalty trials that took place between 1983 and 2006 averaged about $1 million more per trial than the costs of average non–death penalty homicide trials.[97]

This conclusion is also supported by the fact that there are several significant, easily identifiable costs incurred in every death penalty trial that are not incurred in non–death penalty homicide

94. FINAL REPORT, *supra* note 4, at 129; *see also* CAL. GOV'T CODE §§ 15200–04 (West 2009) (making available reimbursement for costs incurred by counties in murder trials "if such costs will seriously impair the finances of the county"); CAL. PENAL CODE § 987.9 (West 2007) (permitting defense counsel to "request the court for funds for the specific payment of investigators, experts, and others for the preparation or presentation of the defense" in death penalty cases).

95. MINSKER, *supra* note 83, at 20.

96. FINAL REPORT, *supra* note 4, at 129 (emphasis added) (noting that records from some trials indicate costs can be as high as $10.9 million). For example, the trial of Charles Ng cost approximately $10.9 million, of which $6.42 million was solely related to costs of defense, Donald Bowcutt's trial cost approximately $5 million, and Scott Peterson's trial cost approximately $3.2 million, excluding the costs for his defense, since he retained private counsel. *Id.*

97. *See id.* at 145. While acknowledging that both the Erickson study and the ACLU study calculated the cost of a capital murder trial to be between $1.27 million and $1.1 million more (respectively), on average, than the costliest noncapital felony trials, "the Commission adopted a very conservative estimate that seeking the death penalty adds $500,000 to the cost of a murder trial in California." *Id.* We are persuaded, based upon our review of all available data, that a more accurate estimate is that the death penalty adds, on average, $1 million to the cost of a murder trial in California. Notwithstanding our use of the higher figure for our calculations, it should be noted that even if we were to use the lower $500,000 figure employed by the Commission, the pre-trial and trial costs for death penalty trials would still be nearly $1 billion over and above what the taxpayers would have paid for non-death penalty trials.

trials.[98] First, there typically are two death penalty–qualified attorneys per side (prosecution and defense), rather than one. Because most capital defendants are indigent,[99] this means that taxpayers fund all of the attorneys involved in death penalty trials.

Second, death penalty trials usually require that the defendant's counsel employ the services of multiple investigators. Three of the 10 death penalty cases studied in the ACLU's report indicate that the prosecution also employed numerous investigators in some cases: Scott Peterson—seven investigators; Rex Allen Krebs—eight investigators; and Robert Wigley—three investigators.[100]

Third, the defense typically employs the services of multiple experts, particularly in connection with the penalty phase of the trial.[101] The prosecution similarly retains experts to rebut the theories

98. In his testimony before the Nevada Advisory Commission on the Administration of Justice on July 7, 2008, Richard C. Dieter, Executive Director of Death Penalty Information Center summarized the difference between death penalty trials and non–death penalty trials as follows:

> Death penalty cases are clearly more expensive at every stage of the judicial process than similar non-death cases. Everything that is needed for an ordinary trial is needed for a death penalty case, only more so:
>
> - more pre-trial time will be needed to prepare: cases typically take a year to come to trial
> - more pre-trial motions will be filed and answered
> - more experts will be hired
> - twice as many attorneys will be appointed for the defense, and a comparable team for the prosecution
> - jurors will have to be individually quizzed on their views about the death penalty, and they are more likely to be sequestered
> - two trials instead of one will be conducted: one for guilt and one for punishment; in the state of Washington, the EXTRA costs associated with the death penalty cases amounted to $463,000 per trial; in California, the extra trials costs in capital cases was about $1.2 million per trial.
> - the trial will be longer: a cost study at Duke University estimated that death penalty trials take three to five times longer than typical murder trials
> - and then will come a series of appeals during which the inmates are held in the high security of death row.

Richard C. Dieter, Exec. Dir., Death Penalty Info. Ctr., Testimony Before the Nevada Advisory Commission on the Administration of Justice (July 7, 2008), *available at* http://www.deathpenaltyinfo.org/NVTestimony08.pdf.

99. FINAL REPORT, *supra* note 4, at 121 ("All of the 670 inmates on California's death row qualify as indigents.").

100. MINSKER, *supra* note 83, at 6, 23, 27, 29 (additional costs incurred for prosecuting death penalty trials include two death penalty–qualified prosecutors who devote enormous resources to these cases (e.g., Scott Peterson trial consumed 20,000 hours of prosecutor staff time; Krebs 8700 hours)).

101. American Bar Association (ABA) Guideline 10.7 (A) provides: "Counsel at every stage have an obligation to conduct thorough and independent investigations relating to the issues of both guilt and penalty." Am. Bar Ass'n, *American Bar Association Guidelines for the*

presented by the defense. There are numerous areas in which the services of an expert may be required in a capital trial, including:

> 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. [102]

Because almost all capital defense is publically funded, the fees paid to these experts come out of the public coffers as well. In cases in which a defendant faces a maximum penalty of life without the possibility of parole, rather than the death penalty, there is no penalty phase trial at all. Thus, the government would not incur these costly expenditures if the death penalty were abolished.

Fourth, the jury selection process in a capital trial takes much longer than it does in a murder case in which the prosecutor does not seek the death penalty. [103] The Legislative Analyst estimated in 1999 that if the death penalty were abolished "jury selection [in murder cases] could be shortened by as much as three or four weeks." [104] Jury selection in capital trials takes longer because (1) each side is allowed more peremptory challenges, which requires that more

Appointment and Performance of Defense Counsel in Death Penalty Cases, 31 HOFSTRA L. REV. 913, 1015 (2003). The commentary to the Guidelines lists all of the elements of an appropriate investigation. *Id.* at 1016–27.

102. Alarcón, *supra* note 3, at 748 n.300 (listing the types of experts frequently retained by federal habeas corpus counsel).

103. Margot Garey, *The Cost of Taking a Life: Dollars and Sense of the Death Penalty*, 18 U.C. DAVIS L. REV. 1221, 1257 (1985) (estimating that jury selection in a death penalty trial took 5.3 times longer than a non–death penalty murder trial).

104. Letter from Elizabeth G. Hill, Legislative Analyst, Cal. Legislative Analyst's Office, and B. Timothy Gage, Dir. of Fin., Cal. Legislative Analyst's Office, to Bill Lockyer, Cal. Attorney Gen. (Sept. 9, 1999) [hereinafter Letter from Elizabeth G. Hill to Bill Lockyer], *available at* http://www.lao.ca.gov/ballot/1999/990670_INT.html.

jurors be screened;[105] (2) the prosecution excuses more jurors than in a noncapital trial due to jurors' opposition to capital punishment;[106] and (3) the court excuses roughly 75% of the jurors for financial hardship due to the extended length of capital trials.[107] "[A]s public opinion against the death penalty has grown," increasing numbers of jurors have been excused.[108] By one estimate, "jury selection alone has been known to add $200,000 to the cost" of a death penalty trial.[109]

Fifth, California death penalty trials cost more because they are conducted in two phases: a guilt phase trial and a separate penalty phase trial to determine punishment—either execution or life without parole. One study estimated that the guilt phase of a capital case takes about 30 more courtroom days than does a non–death penalty murder trial.[110] Additionally, the Legislative Analyst found that death penalty trials are costly to "state and local law enforcement agencies . . . because law enforcement personnel are often key witnesses in [those] murder trials."[111]

Sixth, California Penal Code section 190.9 requires that in death penalty cases "[t]he court reporter shall prepare and certify a daily transcript of all proceedings commencing with the preliminary hearing."[112] The rate charged for a daily copy of trial transcripts is significant, especially when the average death penalty trial transcript runs in excess of 9,000 pages.[113]

105. FINAL REPORT, *supra* note 4, at 143 ("In Los Angeles County, 800 potential jurors may be summoned for a death penalty case.").

106. *Id.* ("While a jury is normally selected in one or two days in most felony cases, the selection of a death-qualified jury normally takes 8–10 days of court time."); *see also* Uelmen, *supra* note 64, at 512 ("[J]urors must undergo individual questioning to determine whether they have opinions about the death penalty that would preclude their serving in a death case. This process of 'death qualification' has resulted in larger numbers of potential jurors being excused as public opinion against the death penalty has grown.").

107. FINAL REPORT, *supra* note 4, at 143.

108. *Id.*

109. Gerald F. Uelmen, *The Death Penalty Costs Too Much: Life Imprisonment Without Parole Is Only One-Third the Price*, L.A. TIMES, July 27, 1983, at II5.

110. Garey, *supra* note 103, at 1258–59.

111. Letter from Elizabeth G. Hill to Bill Lockyer, *supra* note 104.

112. CAL. PENAL CODE §190.9(a) (West 2003) ("Upon receiving notification from the prosecution that the death penalty is being sought, the clerk shall order the transcription and preparation of the record of all proceedings prior to and including the preliminary hearing in the manner prescribed by the Judicial Council in the rules of court.").

113. FINAL REPORT, *supra* note 4, at 131.

Finally, the extended length of capital trials consumes the state criminal court system's valuable resources, leaving courts unavailable to handle other cases. This issue is of considerable importance as the shortage of available criminal court judges has now become acute in some counties.[114] The California Supreme Court upheld the dismissals of 18 criminal cases in Riverside County based, in part, on its conclusion that no exception to the speedy-trial requirement was applicable because "the state's failure, over a considerable period of time, to provide a number of judges sufficient to meet the needs of the Riverside County's rapidly growing population and caseload [was a] circumstance fairly attributable to the fault or neglect of the state."[115]

Based on the foregoing, we have calculated that an average death penalty trial consumes approximately $1 million in publically funded resources, resulting in the expenditure of $1.94 billion for the prosecution of the estimated 1,940 death penalty trials conducted since 1978.

2. Automatic Appeals and State Habeas Corpus Petitions: $925 Million

Our research has shown that California taxpayers have spent approximately $925 million to fund the litigation of the automatic appeals and state habeas corpus petitions filed by capital prisoners since 1985. This figure is based on our review of the 2008–2009

114. For example, as mentioned *supra*, the Riverside Superior Court was required to dismiss 18 misdemeanor and felony criminal cases, including the release of one defendant who was charged with first degree burglary, due to a lack of courtroom space and judges to hear those cases. *See* Richard K. DeAtley, *High Court Shuns DA's Bid*, PRESS-ENTERPRISE, Oct. 26, 2010, at A1 ("From January 2007 through June 2009, about 350 cases were thrown out because of speedy trial limits, and no judge was available to hear them."); *see also* People v. Engram, 240 P.3d 237, 259 n.13 (Cal. 2010) ("Cognizant of the state's difficult financial situation, the Judicial Council requested only that the Legislature create the 150 most urgently needed new judgeships over a three-year period. In 2006, the Legislature authorized the creation of the first 50 new judgeships to be allocated to the various superior courts according to the council's uniform-need criteria, and in 2007 the Legislature authorized the creation of 50 additional new judgeships to be similarly allocated pursuant to the council's criteria. Although a total of 14 of the 100 new judicial positions authorized under the 2006 and 2007 legislation have been allocated to the Riverside Superior Court, only seven of those positions have been funded to date due to state budget constraints, and the growth in workload in the Riverside Superior Court between 2004 and 2008 'largely overwhelmed' even the significant allocation of new judgeships to that court. In the Judicial Council's 2008 report to the Legislature regarding the need for new superior court judgeships, the Riverside Superior Court was ranked first in unmet judicial needs." (citations omitted)).

115. *Engram*, 240 P.3d at 241.

published annual budgets of the (a) California Supreme Court, (b) Habeas Corpus Resource Center, (c) Office of the State Public Defender, and (d) California Attorney General. It does not include funds spent litigating petitions for writs of habeas corpus filed in federal court by death row prisoners.[116] Relying on these budget allocations, we have extrapolated backward in time to come up with a total cost estimate for these categories of expenditures.

a. California Supreme Court

The California Supreme Court automatically considers the appeal from every judgment of death rendered against a defendant.[117] Death row inmates have a constitutional right to be represented by counsel in their automatic appeals.[118] The right to file a petition for a writ of habeas corpus is also provided for by statute, as well as by the California Constitution.[119] The California Supreme Court must appoint counsel to represent all state capital prisoners in their direct appeals and state post-conviction proceedings.[120] An attorney who wishes to take on representation of a capital prisoner in an automatic appeal or state habeas corpus matter must submit an application for appointment to the California Supreme Court.[121] Dual appointments are extremely rare.[122] Appointed counsel is compensated "on either a

116. The costs incurred to litigate petitions for writs of habeas corpus filed in federal court are addressed separately below.

117. Alarcón, *supra* note 3, at 715.

118. *Id.* at 716 (citing 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)).

119. CAL. PENAL CODE § 1473 (West 2000); CAL. CONST. of 1849, art. I, § 5. Furthermore, to file an application for federal habeas relief pursuant to 28 U.S.C. § 2254(a), a prisoner must first file a state petition and exhaust all claims before the California Supreme Court. 28 U.S.C. § 2254(b)(1) (2006).

120. CAL. GOV'T CODE § 68662 (West 2009); GOVERNOR'S BUDGET 2011–12, DEP'T OF FIN., ST. OF CAL., PROPOSED BUDGET DETAIL: LEGISLATIVE, JUDICIAL, AND EXECUTIVE 8 (2001), *available at* http://www.ebudget.ca.gov/pdf/GovernorsBudget/0010.pdf ("Article VI of the Constitution creates the Supreme Court of California and the Courts of Appeal to exercise the judicial power of the state at the appellate level. Article VI also creates the Judicial Council of California to administer the state's judicial system. Chapter 869, Statutes of 1997, created the California Habeas Corpus Resource Center to represent any person financially unable to employ appellate counsel in capital cases.").

121. *See* Telephone Interview with Robert Reichman, Automatic Appeals Monitor for the Cal. Supreme Court (Aug. 5, 2009) (on file with authors). Attorneys who are not yet qualified are redirected to noncapital work to gain more experience.

122. *Id.* A dual appointment occurs when an attorney is appointed to represent a condemned prisoner in both the automatic appeal and the state habeas corpus proceeding. FREDERICK K.

time-and-costs or a fixed fee basis. Compensation for time-and-costs appointments is $145 per allowable hour plus specified incidental expenses."[123]

The Legislature has failed to provide adequate funding for those public agencies charged with providing counsel to represent capital prisoners. This lack of funding has forced the California Supreme Court to rely heavily on the appointment of private counsel. California, however, does not have enough attorneys qualified to represent death row inmates in their appellate and post-conviction proceedings.[124] As of November 2010, there were 99 prisoners on death row awaiting the appointment of counsel for their automatic appeals.[125] The shortage of available, qualified counsel grows worse each year.[126] The average time expended before the California Supreme Court appoints counsel for a direct appeal in a capital case is now about five years,[127] while the wait for state habeas counsel can be as long as 13 years.[128]

OHLRICH, CAL. SUPREME COURT, APPOINTMENTS IN CAPITAL CASES IN THE CALIFORNIA SUPREME COURT (2009), *available at* http://www.courtinfo.ca.gov/courts/supreme/documents/supremebroch.pdf.

123. OHLRICH, *supra* note 122 ("Compensation for fixed fee appointments is determined by case length and complexity. There are five fixed fee categories for appeal and dual appointments, and three fixed fee categories for habeas corpus appointments. Dual fixed fee categories range from $160,000 for the least complex cases to a $368,000 base fee for the most complex cases, and contain 11 junctures for progress payments.").

124. Telephone Interview with Robert Reichman, *supra* note 121. Mr. Reichman indicated that since 1998, the California Supreme Court has made only 127 separate appointments of private counsel for capital direct appeals and habeas corpus proceedings. Mr. Reichman explained that of the 127 appointments, some have been the same counsel, handling more than one case, and some have been cases where a prisoner has to get new counsel. So the figure of 127 is not very helpful in terms of quantifying the number of qualified counsel at any given time.

125. E-mail from Michael Laurence, Exec. Dir., Habeas Corpus Res. Ctr., to Honorable Arthur L. Alarcón, Ninth Circuit Court of Appeals, and Paula Mitchell, Career Clerk to the Honorable Arthur L. Alarcón (Nov. 3, 2010, 11:34AM) [hereinafter E-mail from Michael Laurence to Authors] (on file with authors) (stating that there are currently 324 inmates on death row without counsel and 99 inmates on death row awaiting counsel to represent them in their automatic appeals).

126. Year: Number of Inmates Awaiting Appointment of State Habeas Counsel: 2006: 156; 2008: 291; 2009: 303; 2010: 324. *See* Table, *infra* note 563. *See also* Uelmen, *supra* note 63, at 1E (estimating that "[m]ore than 40 percent of the 713 inmates on California's death row are still waiting for the appointment of a lawyer to handle the habeas corpus reviews to which they are constitutionally entitled").

127. FINAL REPORT, *supra* note 4, at 122.

128. *E.g.*, *In re* Jimenez, 237 P.3d 1004, 1005 (Cal. 2010) (describing how petitioner had to wait eight-and-a-half years for counsel's appointment); *In re* Morgan, 237 P.3d 993, 994 (Cal. 2010) (describing how petitioner had to wait 13 years for appointment of habeas corpus counsel to challenge his conviction and his death sentence).

Even if a sufficient number of qualified attorneys were available to represent death row inmates in their appeals and they were appointed in a timely manner, it would still be *years* before those cases could be heard because the California Supreme Court simply does not have sufficient judicial resources to handle the number of cases awaiting review. As of October 26, 2010, there were 356 direct appeals from judgments of death pending before the California Supreme Court.[129] Approximately 80 of these cases have been fully briefed and are awaiting oral argument.[130] In 2010, the court issued final opinions in 23 such cases.[131]

Similarly, 324 prisoners await the appointment of counsel in order to file their state habeas corpus petitions.[132] Meanwhile, 89 fully briefed state habeas corpus petitions await review by the California Supreme Court.[133]

It is difficult for the California Supreme Court to attract qualified counsel to represent capital inmates because funds are not available to adequately compensate them.[134] Additionally, private counsel shy away from accepting appointments because they are provided with a budget of only $50,000 to investigate federal constitutional claims raised in capital state habeas petitions.[135] This amount is insufficient for such investigations because many claims arise outside the trial court record and, as such, require extensive investigation to locate witnesses and track down evidence many years after the crimes were committed.[136] This amount is insufficient,

129. Summary of Post-Conviction Capital Litigation in the California Supreme Court, Oct. 26, 2010 (on file with authors).

130. FINAL REPORT, *supra* note 4, at 131, 147 (stating that "80 direct appeals" are fully briefed and awaiting oral argument as of June 1, 2008); Uelmen, *supra* note 63, at 1E (noting that "77 fully briefed death penalty appeals and 89 fully briefed habeas corpus petitions await decision"). Gerald F. Uelmen served as executive director of the CCFAJ, which undertook a comprehensive review of California's death penalty law. Gerald F. Uelmen is also a professor of law at Santa Clara University School of Law.

131. E-mail from Robert Reichman to Paula Mitchell, *supra* note 65.

132. E-mail from Michael Laurence to Authors, *supra* note 125.

133. Uelmen, *supra* note 63.

134. *See* FINAL REPORT, *supra* note 4, at 135.

135. *Id.*

136. LEGISLATIVE ANALYST'S OFFICE, LAO ANALYSIS OF THE 1997–98 BUDGET BILL: JUDICIARY AND CRIMINAL JUSTICE, CROSSCUTTING ISSUES, PART B: THE BACKLOG OF DEATH PENALTY APPEALS, http://www.lao.ca.gov/analysis_1997/crim_justice_crosscutting-b_anal97.html#_1_29 (last visited Apr. 20, 2011) ("Habeas corpus claims concern issues of whether the defendant received a fair trial. These claims often include matters which are not necessarily

by any measure, to fund a thorough investigation into a condemned inmate's constitutional claims.[137] Additionally, in seeking to attract private counsel to handle capital habeas corpus cases, the California Supreme Court must compete for qualified counsel with the federal government, which appoints private counsel, known as Criminal Justice Act (CJA) Panel attorneys,[138] at $178 per hour and offers significantly greater funding for investigation of claims and expert fees.[139]

Michael Millman, Executive Director of the California Appellate Project (CAP),[140] explained that the shortage of available, qualified private counsel to represent condemned prisoners in their state habeas corpus proceedings is due in part to the fact that there is no logical pool from which qualified attorneys may be drawn.[141] Appellate lawyers are not typically trained as "investigators" the way trial lawyers are, and criminal trial lawyers, who are the most obvious candidates because they do understand "investigations," often find that there is not enough time to handle habeas corpus cases because of their trial schedules, which can be juggled but only to a certain extent.[142] To be presumptively timely, a state habeas corpus

reflected in any of the trial court records, and require independent investigation.").

137. FINAL REPORT, *supra* note 4, at 135.

138. 18 U.S.C. § 3006A(a) (2006) (Criminal Justice Act of 1964 ("CJA"), as amended, providing that "[e]ach United States district court, with the approval of the judicial council of the circuit, shall place in operation throughout the district a plan for furnishing representation for any person financially unable to obtain adequate representation in accordance with this section."); 18 U.S.C. § 3006A(a)(2)(B) (2006) (providing for the appointment of CJA counsel for state prisoners seeking federal habeas corpus relief).

139. Telephone Interview with Robert Reichman, *supra* note 121; *see* U.S. COURTS, GUIDE TO JUDICIARY POLICY Vol. 7, Part A, Chapter 6 (2010), *available at* http://www.uscourts.gov/FederalCourts/AppointmentOfCounsel/CJAGuidelinesForms/vol7PartA/vol7PartAChapter6.aspx (providing that "[u]nder 21 U.S.C. § 848(q)(10)(A), recodified in 18 U.S.C. § 3599(g)(1), [as of January 2, 2010,] the presiding judicial officer [sets] the hourly compensation at a rate not to exceed [$178] per hour for appointed counsel in federal death penalty cases and federal capital habeas corpus proceedings commenced, and appellate proceedings in which an appeal was perfected, on or after April 24, 1996").

140. "The California Appellate Project ('CAP') is a non-profit law firm established in 1983 by the State Bar of California at the request of the Chief Justice of the California Supreme Court. Its Board of Directors is made up of former State Bar officials. Its original mandate was to recruit and assist private attorneys who would be appointed to represent indigent persons in death penalty appeals and other criminal appeals and writs before the California Supreme Court." CALIFORNIA APPELLATE PROJECT LOS ANGELES, http://www.lacap.com/About_Cap/about_cap.asp#history (last visited Mar. 24, 2011).

141. Telephone Interview with Michael Millman, Exec. Dir. of the S.F. Office of the Cal. Appellate Project (CAP) (Aug. 4, 2009) (on file with authors).

142. *Id.*

petition must be filed within three years of the condemned inmate's conviction and sentencing becoming final.[143] If a capital state habeas corpus petition is filed more than three years after an inmate's conviction is final, the prisoner runs afoul of the one-year statute of limitations prescribed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), foreclosing federal review of any federal constitutional claims.[144] Mr. Millman explained that most attorneys are not willing to take state capital habeas corpus cases for fear of blowing a deadline that would mean the loss of the condemned inmate's opportunity to present his claims in federal court.[145] Mr. Millman also confirmed that inadequate funding for investigations discourages private counsel from seeking appointments.[146]

Robert Reichman, Automatic Appeals Monitor for the California Supreme Court, indicated that the system currently in place, which is heavily dependent on the appointment of private counsel, is enormously inefficient and costly.[147] On average, the cost to California taxpayers for legal representation in each case in which private counsel is appointed to represent a condemned inmate in state habeas corpus proceedings is between $200,000 and $300,000.[148]

143. SUPREME COURT POLICIES REGARDING CASES ARISING FROM JUDGMENTS OF DEATH, policy 3, std. 1-1.1 (Cal. Supreme Court 2008), *available at* http://www.courtinfo.ca.gov/courts/supreme/aa02f.pdf ("A petition for a writ of habeas corpus will be presumed to be filed without substantial delay if it is filed within 180 days after the final due date for the filing of appellant's reply brief on the direct appeal or within 36 months after appointment of habeas corpus counsel, whichever is later.").

144. *Id.*

145. Telephone Interview with Michael Millman, *supra* note 141.

146. *Id.* Mr. Millman indicated that if we were to ask a seasoned criminal defense attorney like Judy Clarke what the average figure is for how much is needed to do a capital state habeas investigation right, the answer would probably be $250,000–$300,000. According to the Associated Press, Judy Clarke "is one of the top lawyers in the country for defendants facing prominent death penalty cases, having represented clients such 'Unabomber' Ted Kaczynski and Olympic bomber Eric Rudolph. She has a reputation for working out plea deals that spare defendants the death penalty, as was the case for Rudolph and Kaczynski." Clarke has also represented convicted Islamic terrorist Zacarias Moussaoui and child murderer Susan Smith, among others. She represents Jared L. Loughner who is charged with the killing of Judge Roll and others in Tucson in early 2011. William Glaberson, *Defense Lawyer Is Known as a Master of Strategy*, N.Y. TIMES, Jan. 11, 2011, at A17.

147. Telephone Interview with Robert Reichman, *supra* note 121.

148. Beth Jay, principal attorney to the Chief Justice of the California Supreme Court, stated that the court pays a lawyer $200,000 to $300,000 on average for a post-conviction challenge, which can take years. Maura Dolan, *Inmates on Death Row Wait Years for Lawyers*, L.A. TIMES, Nov. 27, 2010, at AA1, AA6. This figure includes attorney's fees and investigation costs.

Public attorneys earn fixed salaries and specialize in capital litigation, which allows them to develop the skills and experience necessary to effectively manage their capital litigation practices over many years. By contrast, most private attorneys typically do not specialize in complicated habeas corpus matters and thus require more learning time on the front end.[149] Once a matter is completed and an attorney has developed the necessary skills and experience to handle these complicated cases, he or she may decline to accept additional appointments. Thus, the institutional knowledge acquired and paid for by public funds is lost.[150]

Even when a private attorney seeks reappointment on future cases, that attorney must be re-evaluated each time he or she wants to work on a capital habeas case.[151] Due to advanced age, or because they have not had enough *recent* criminal experience, formerly qualified counsel are sometimes determined to no longer be qualified.[152]

Despite the best efforts of the California Supreme Court, there is no indication that it will see an end to the backlog in post-conviction proceedings in capital cases in the near future. The influx of new death sentences handed down each year outpaces the rate at which appellate counsel is appointed to represent inmates already on death row. For example, "[i]n 2009, 21 inmates were appointed new appellate attorneys, while 29 were sentenced to death" and added to death row to begin their long waits for the appointment of their appellate counsel.[153] "According to [former] Chief Justice Ronald M. George, the Court now faces a crisis, in which the death penalty backlog is threatening the Court's ability to resolve other statewide issues of law and settle conflicts at the appellate level, which is its primary duty and responsibility."[154]

In 2009, the California Supreme Court had an annual capital

149. Telephone Interview with Robert Reichman, *supra* note 121; Telephone Interview with Robert Reichman, Automatic Appeals Monitor for the Cal. Supreme Court (Feb. 2, 2011).

150. Telephone Interview with Robert Reichman, *supra* note 121.

151. *Id.*

152. *Id.* (noting that similarly, sometimes previously unqualified counsel later become qualified after they have more experience).

153. MINSKER ET AL., *supra* note 65, at 7.

154. FINAL REPORT, *supra* note 4, at 147. Automatic appeals from convictions and judgments of death constituted 20% to 25% of the Supreme Court's docket as of January 2008. Testimony of Chief Justice Ronald M. George, *supra* note 8, at 7.

case budget of $15,406,000 to compensate and reimburse expenses for lawyers appointed to represent condemned prisoners in both their direct appeals and habeas corpus proceedings.[155] Out of that budget, the court funds CAP through a contract with the Judicial Council of California. CAP has an annual budget of $5,955,781.[156] Additionally, the California Supreme Court has added attorneys to the staff of each justice's chambers and has created a central staff of 10 attorneys assigned to review death penalty motions, appeals, and state habeas corpus proceedings.[157]

b. Habeas Corpus Resource Center

The California Legislature created the Habeas Corpus Resource Center (HCRC) in 1998.[158] HCRC attorneys "may be appointed by the Supreme Court to represent any person convicted and sentenced to death in this state 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 . . . ."[159] "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."[160]

In 2008–2009, the HCRC had an annual budget of $13,857,000, with up to $1 million in additional funding from the federal government in reimbursements for work done in federal court.[161] Our research indicates that the HCRC's budget has remained somewhat

155. FINAL REPORT, *supra* note 4, at 135 ("Currently, the State Supreme Court allocates approximately half of its $15.4 million annual capital defense budget to habeas counsel.").

156. JUDICIAL COUNCIL OF CAL., FISCAL YEAR 2008–2009 EXPENDITURE INFORMATION 6 (2009), *available at* http://www.courtinfo.ca.gov/jc/documents/reports/JCReporton08-09BranchExpenditures.pdf.

157. Testimony of Chief Justice Ronald M. George, *supra* note 8, at 7.

158. Habeas Corpus Resource Center: About HCRC, http://www.hcrc.ca.gov/about.php (last visited May 2, 2011) ("The Habeas Corpus Resource Center (HCRC) was established in 1998 to accept appointments in state and federal habeas corpus proceedings and to provide training and support for private attorneys who take on these cases. The HCRC was created as a part of the judicial branch of the State of California, effective January 1, 1998, by Senate Bill (SB) 513 (Ch. 869, 1998 Stats.).")

159. CAL. GOV'T CODE § 68661(a) (West 2009).

160. Alarcón, *supra* note 3, at 739.

161. CAL. GOVERNOR'S BUDGET 2010–11, DEP'T. OF FIN., 3-YR EXPENDITURES & PERSONNEL YEARS (2010) (on file with authors); *see also* FINAL REPORT, *supra* note 4, at 134 n.68 (stating that the 2008 annual budget was $14.9 million).

steady since 2000 (the earliest year for which budget information has been verified), when it received $11,002,000.[162]

c. Office of the State Public Defender

The Office of the State Public Defender (OSPD) was created in 1976 to represent indigent appellants in all criminal cases.[163] "Over the years, the mission of the agency has changed. Now, the OSPD focuses its resources on post-conviction appellate representation in death penalty cases. The agency currently represents more than 130 men and women on death row in California."[164] The OSPD is funded by the State's General Fund and had an annual budget of approximately $12 million in 2008–2009.[165] The OSPD's budget has also remained approximately the same since 2000 (the earliest year for which budget information has been verified).[166]

d. Office of the California Attorney General

The Office of the California Attorney General's Criminal Law Division represents the state of California in automatic appeals and capital (state and federal) habeas corpus proceedings.[167] In 2009–2010, the Criminal Law Division had an annual budget of $115,200,000.[168] Then–Attorney General Bill Lockyer estimated in 2005 that 15% of the criminal division budget was devoted to capital cases.[169] Fifteen percent of the Criminal Law Division's 2009–2010

162. DEP'T OF FIN., ST. OF CAL., 2000–01 FINAL BUDGET SUMMARY 76 (2001), *available at* http://www.documents.dgs.ca.gov/osp/GovernorsBudget/pdf/2000-01budsum.pdf.

163. *Welcome*, OFF. OF THE ST. PUB. DEFENDER, http://www.ospd.ca.gov/ (last visited May 16, 2011).

164. *Id.*

165. FINAL REPORT, *supra* note 4, at 132.

166. *See* DEP'T OF FIN., *supra* note 162, at 779.

167. GOVERNOR'S BUDGET 2011–12, *supra* note 120, at 99 ("[The] Criminal Law [division] represents the state in criminal matters before the Appellate and Supreme courts. Criminal Law [division] also . . . defends state and federal habeas corpus matters.").

168. *Id.* at 101.

169. 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 ("Atty. Gen. Bill Lockyer, whose deputies represent the counties during appeals, estimates that he devotes about 15% of his criminal division budget to capital cases, or about $11 million annually."); *see also* E-mail from Ronald S. Matthias, Senior Assistant Attorney Gen., Cal. Dep't of Justice, to authors (Jan. 27, 2011, 9:46AM) (on file with authors) (confirming that between 2004 and 2010 an annual average of 14.36% of the hours and costs of the Appeals, Writs and Trial Section with in the criminal division of the state AG's office was devoted to "capital case litigation").

annual budget totaled approximately $17,280,000.

Current Annual Costs Associated with Automatic Appeals and Capital State Habeas Proceedings	
California Supreme Court	$15,406,000
Habeas Corpus Resource Center (HCRC)	$13,857,000
Office of the State Public Defender	$12,000,000
California Attorney General	$17,280,000
TOTAL	$58,543,000

We have calculated that the approximate annual expense incurred by the state of California in 2009 to compensate counsel engaged in litigating direct appeals from convictions and judgments of death and state capital habeas corpus cases was $58,543,000.[170] We estimate that by the end of 2010, the state of California had spent a total of approximately $925 million on direct appeals from capital convictions and capital state habeas proceedings since 1985.

This $925 million figure is based on (1) an estimated average of $50 million per year, for each year between the creation of the HCRC and 2010 (1999 through 2010, or 12 years), totaling $600 million; and (2) an estimated average of half that amount, or an average of $25 million per year, between 1985 and 1998 (13 years), totaling $325 million. These estimates are intended to be conservative and are based on both our review of prior state annual budgets and the increase in the number of death row inmates. This data indicates that from 1985 to 1998, when the HCRC was created, the California state budget more than doubled from $35 billion to $71.9 billion and the number of inmates more than tripled from 159 to 518.[171] This estimate does not include estimated costs for any automatic appeals or state habeas corpus petitions filed prior to 1985.

3. Federal Habeas Corpus Petitions: $775 Million

Under federal law, a California prisoner on death row may file an application for a writ of habeas corpus in federal court "on the

170. This figure also includes costs incurred by the Office of the Attorney General for the State of California to litigate condemned inmates claims of federal constitutional violations in federal courts.

171. *See* SEN. COMM. ON BUDGET AND FISCAL REVIEW, CALIFORNIA STATE BUDGET HISTORY, at iii (2010), *available at* http://www.sen.ca.gov/budget/budgethistory.pdf.

ground that he is in custody in violation of the Constitution or laws or treaties of the United States."[172] Almost without exception, every capital prisoner seeks habeas corpus relief in federal court after the California Supreme Court has rejected his or her federal constitutional claims. The expense incurred for the provision of counsel to represent death row inmates who seek federal habeas corpus relief pursuant to 28 U.S.C. § 2254(a) is borne by federal taxpayers rather than by state taxpayers. This expense is increased significantly because of the limitations that inadequate funding imposes on the investigations conducted by state habeas corpus lawyers who are appointed by the California Supreme Court. Thus, the cost of further investigating the claims exhausted in state court habeas corpus proceedings, and of any additional investigation of federal constitutional claims not asserted by state habeas counsel in state court, are paid for by federal taxpayers.

Additionally, the delay in appointing state appellate and habeas corpus counsel, combined with the state Legislature's chronic underfunding of the investigations into the merits of a petitioner's state habeas corpus claims, postpones a proper and complete investigation for many years. "Inevitably, records are lost, witnesses become unavailable, and memories fade."[173] Accordingly, in most cases, a full investigation into the inmate's alleged federal constitutional violations does not occur until many years after the judgment of death was imposed, when the petitioner's claims are presented in a federal habeas corpus petition. Almost without exception, in the course of their investigations, counsel representing condemned state prisoners in federal court discover claims of federal constitutional violations that have not yet been reviewed by the California Supreme Court. Under AEDPA,[174] which created the current federal version of the traditional writ of habeas corpus, these claims must be exhausted in the state's highest court before they can be considered in federal court.[175] Federal proceedings are typically stayed while the newly discovered claims are filed in state court for

172. 28 U.S.C. § 2254(a) (2006).

173. FINAL REPORT, *supra* note 4, at 134.

174. Pub. L. 104-132, 110 Stat. 1214 (1996), (codified as amended at 28 U.S.C. §§ 2254–2255).

175. *See* 28 U.S.C. § 2254(b).

exhaustion purposes.[176]

In the case of Richard Ramirez, who was convicted in 1989, federal habeas corpus counsel was appointed on February 1, 2008.[177]

176. *Id.* § 2254(d); *see also* Jackson v. Roe, 425 F.3d 654, 657 (9th Cir. 2005) ("For reasons of comity and federalism, the Supreme Court required exhaustion of state remedies long before Congress included the requirement in the statute governing federal habeas corpus review of state court convictions.").

177. In *Remedies*, we discussed the astonishing delays in the review of Richard Ramirez's automatic appeal. *See* Alarcón, *supra* note 3, at 700–01. Set forth below is the history of Mr. Ramirez's case and an update as to what has transpired in *People v. Ramirez* since *Remedies* was published:

TRIAL AND CONVICTION

1984: Mr. Ramirez was arrested for multiple murders.

1989: Judgment of Death was entered.

DIRECT APPEAL

11/5/1992: The California Supreme Court appointed counsel for his automatic direct appeal.

10/4/1999: After eleven requests for an extension of time to correct the record, the record on appeal was filed.

3/1/2002: After eleven requests for an extension of time to file an opening brief, Mr. Ramirez's counsel filed a 413-page opening brief.

8/8/2002: The California Attorney General's Office filed a 338-page responsive brief.

12/31/2003: After eight requests for an extension of time, Mr. Ramirez's counsel filed a 171-page reply brief.

6/6/2006–8/7/2006: Mr. Ramirez's direct appeal was argued and submitted; the California Supreme Court affirmed Mr. Ramirez's conviction and sentence.

For Mr. Ramirez's direct appeal, see *People v. Ramirez*, No. S012944 (Cal. Nov. 7, 1989), *available at* http://appellatecases.courtinfo.ca.gov/search/case/mainCaseScreen.cfm?dist=0&doc_id=1744755&doc_no=S012944&search=party&start=1&query_partyLastNameOrOrg=ramirez&query_partyFirstName=richard.

FIRST STATE HABEAS PETITION

6/21/2004: Mr. Ramirez filed a related habeas corpus petition in the California Supreme Court.

11/22/2004: After four requests for an extension of time, the Attorney General filed an informal response.

11/30/2005: After eleven requests for an extension of time, Mr. Ramirez's counsel filed a reply to the informal response.

2007: Mr. Ramirez's petition for writ of habeas corpus was denied by the California Supreme Court.

For Mr. Ramirez's first state habeas petition, see People v. Ramirez, No. S125755 (Cal. June 21, 2004), *available at* http://appellatecases.courtinfo.ca.gov/search/case/mainCaseScreen.cfm?dist=0&doc_id=1857434&doc_no=S125755.

FEDERAL HABEAS CORPUS PETITION

12/26/2007: Request for appointment of counsel filed in the Central District of California.

2/1/2008: Federal Public Defender appointed as counsel.

6/12/2008: Protective Petition for Writ of Habeas Corpus filed by Petitioner Richard Ramirez.

12/17/2008: Petition for Writ of Habeas Corpus filed.

1/15/2009: Stipulation to Stay Case pending Filing and Exhaustion of State Habeas Petition filed by Respondent.

A petition for a writ of habeas corpus identifying unexhausted claims was filed in federal court on December 17, 2008.[178] Ramirez's federally funded counsel has been representing him before the California Supreme Court in his state court exhaustion proceedings for the last two years.[179]

As they do in state habeas proceedings, both public and private attorneys represent capital prisoners in federal court habeas proceedings. The Federal Public Defender Capital Habeas Units (FPD CHUs) for the Central and Eastern Districts of California represent many of California's capital prisoners in federal court. The HCRC also represents prisoners in federal capital habeas corpus proceedings, but only in a small number of cases.[180] When federal public defenders in the Central and Eastern Districts of California are unable to represent a California death row inmate in federal court, the district court has the jurisdiction to grant the inmate's request for the appointment of private counsel to prepare an application for a

For Mr. Ramirez's Federal Habeas Corpus Petition, see *Ramirez v. Ayers*, No. 2:07-cv-08310 (on file with authors).

SECOND STATE HABEAS PETITION

3/16/2009: Petitioner filed a Petition for Writ of Habeas Corpus in the California Supreme Court.

12/23/2009: Respondent filed his informal response.

1/22/2010: Petitioner's first request for extension to file reply to informal response.

1/29/2010: Extension granted.

4/07/2010: Petitioner's second request for extension to file reply to informal response; extension of time granted to May 21, 2010.

5/28/2010: Petitioner's third request for extension of time filed to file reply to informal response; extension of time granted to July 20, 2010.

8/2/2010: Petitioner's fourth request for extension of time filed to file reply to informal response; extension of time granted to September 20, 2010.

9/15/2010: Petitioner's fifth request for extension of time filed to file reply to informal response.

9/21/2010: Extension of time granted to October 27, 2010.

10/26/2010: Petitioner's sixth request for extension of time filed to file reply to informal response.

11/3/2010: Petitioner's amended sixth request for extension of time filed to file reply to informal response.

For Mr. Ramirez's second state habeas petition, see *People v. Ramirez*, No. S171312, (Cal. Mar. 16, 2009), *available at* http://appellatecases.courtinfo.ca.gov/search/case/mainCaseScreen.cfm?dist=0&doc_id=1902990.

178. *Ramirez*, No. 2:07-cv-08310, *supra* note 177.

179. *Id.*

180. Federal district courts in California have appointed HCRC as counsel in only three cases. Letter from Michael Laurence, Exec. Dir., Habeas Corpus Res. Ctr., to Honorable Arthur L. Alarcón, Ninth Circuit Court of Appeals (Aug. 4, 2009).

writ of habeas corpus.[181] Court-appointed counsel must possess the qualifications set forth in the CJA Panel Guidelines and by the Judicial Council of the Ninth Circuit.[182] Private attorneys must apply for approval to serve as a CJA Panel attorney. Applications are reviewed by various methods, depending on the district.

Once appointed, CJA Panel attorneys must submit a capital habeas corpus case budget to the presiding judge of the district court in which the case is being heard, indicating expenses likely to be incurred in the litigation and seeking authorization to incur the costs associated with investigating and litigating the claims in a given petition.[183] "The budgets are reviewed and approved by the Judicial Council of the Ninth Circuit based on recommendations from the Capital Case Committee."[184] The membership of the Capital Case Committee includes federal judges and court administrators. The committee oversees the budgeting for all federal habeas corpus petitions seeking review of death sentences imposed in California state courts.[185] Unlike the FPD CHUs, which can determine, without review by the Capital Case Committee, when and how its resources are allocated, CJA Panel attorneys receive only those portions of their payment requests that are approved by the Judicial Council of the Ninth Circuit. After a budget has been approved, CJA Panel attorneys must submit vouchers for payment of fees and expenses incurred. These vouchers are reviewed by CJA staff, and payments to CJA Panel attorneys are reconciled with the budgeted amounts.[186]

These procedures were put in place because "[c]apital habeas corpus petitions, in which a death penalty defendant claims a violation of constitutional rights, are extremely complex and often

181. Alarcón, *supra* note 3, at 745.

182. U.S. COURTS, *supra* note 139. In 1964, Congress passed the Criminal Justice Act (CJA) which established a federal indigent defense system intended to ensure that every defendant had representation to ensure a fair trial. *See* 18 U.S.C. § 3006A (2010); CATHY A. CATTERSON, OFFICE OF THE CIRCUIT EXECUTIVE, NINTH CIRCUIT UNITED STATES COURTS 2008 ANNUAL REPORT 27 (2008), *available at* http://www.ce9.uscourts.gov/publications/AnnualReport2008.pdf.

183. *Courts Focus on Capital Habeas Management*, *in* CATTERSON, *supra* note 182, at 27.

184. *Id.*

185. *Id.*

186. *See Voucher Review Guidelines for Capital Habeas and Capital Prosecution Cases*, U.S. DIST. COURT FOR THE CENT. DIST. OF CAL. (Mar. 2, 1998), *available at* http://www.cacd.uscourts.gov/cacd/AttyAsst.nsf/23b71cb60036042a882574ab005dcf3a/3e5243953eeac671882567c80059dc6a?OpenDocument (last updated Mar. 28, 2010).

quite costly to adjudicate. Through its Capital Case Committee, the Ninth Circuit seeks to manage capital habeas corpus cases better, thereby containing costs without compromising legal representation." [187]

Despite the considerable challenges presented to counsel charged with representing and investigating these petitioners' federal constitutional claims, federal courts have granted relief in the form of a new guilt trial or a new penalty hearing in roughly 70% of the 100 cases that federal courts have disposed of thus far. [188]

For more than a year, we attempted—unsuccessfully—to obtain specific cost information from federal governmental entities disclosing the costs incurred by the federal government to provide counsel to litigate petitions for writs of habeas corpus filed by California death row inmates in federal court. We were finally able to obtain data, which allowed us to calculate what the average costs are to federal taxpayers to fund the legal representation of California death row inmates in federal habeas corpus proceedings. We have extrapolated from these estimates that the total cost to fund representation for 700 capital habeas corpus prisoners' petitions in federal court (there are currently 714 prisoners on California's death row) will be $775 million. [189]

a. Data from district court closed cases: CJA Panel attorney representation costs $635,000 per case on average

By narrowing our request for cost information to closed cases, in order to avoid prejudice or invade the attorney-client privilege in ongoing federal habeas corpus proceedings, we obtained data from all federal district courts in California for the fees and costs, including the costs of investigation and travel in those closed cases in

187. *Courts Focus on Capital Habeas Management*, *in* CATTERSON, *supra* note 182, at 27 ("In 2008, the [Capital Case] [C]ommittee also evaluated whether there was a need to increase the maximum hourly rates charged by investigators and paralegals involved in capital habeas cases. [It] recommended increasing the maximum hourly rates that can be charged by investigators and paralegals to $75 per hour from $55–$65 per hour, and paralegal rates to $45 per hour from $35 per hour, respectively. The higher rates were approved in October by the Judicial Council of the Ninth Circuit. It was the first increase in rates for investigators and paralegals since 2002.").

188. *Supra* text accompanying note 26; *see* FINAL REPORT, *supra* note 4, at 115.

189. Because the vast majority of condemned inmates on California's death row have not yet completed their direct appeals and state habeas corpus proceedings, they have not yet filed federal habeas corpus petitions. Therefore, the federal government can expect to incur substantial costs in the future in connection with litigating these federal habeas corpus petitions.

which petitioners were represented by CJA Panel attorneys.[190]

Approximately 194 federal habeas corpus cases that have been filed by California death row inmates since 1988 are now closed for various reasons.[191] Thirty-two cases were closed because the petitioners died while their cases were pending. As of mid-2010, 37 cases had been decided in the district courts, and any appeals concluded. Of those, 24 were handled exclusively by CJA counsel.[192] The cost to federal taxpayers in those cases staffed entirely by court-appointed CJA counsel averaged a total of $635,000 per case, including appeals.[193] We did not obtain a comparable cost-per-case figure for cases handled solely by the FPD CHUs from the district courts because the FPD does not submit itemized billing and expense reimbursement vouchers to the district court like CJA Panel attorneys do.

b. Data from the Office of Defender Services: FPD CHU representations cost $1.58 million per case on average

We also obtained a second set of data from the Administrative Office of the United States Courts, indicating the expenditures incurred by the federal government in the FPD CHUs for the Central and Eastern Districts of California and in the CJA Panel attorney cases.[194] The data provided by Defender Services tracked costs

190. *See* Letter from Honorable Arthur L. Alarcón, Ninth Circuit Court of Appeals, to Chief Judges of District Courts in California (June 9, 2010) [hereinafter Letter from Honorable Arthur L. Alarcón to Chief Judges] (on file with authors). Some of the cases we requested were closed due to the petitioners' deaths of the petitioner while the petition was still pending in federal court; thus, the overall costs in some of those cases are not representative of what the total costs would be to litigate a case to completion. We attempted to account for this and other types of discrepancies in our cost calculations.

191. *Id.* (listing closed cases for which we requested CJA voucher payment information); *see* PACER, http://www.pacer.gov/cmecf/ (last visited June 1, 2011) (select "Civil"; then select "California"; then select "Nature of Suit: 535 Death Penalty—Habeas Corpus"). Seventy-four of the 194 cases were filed and closed within two years, which typically indicates a dismissal on procedural grounds prior to the expenditure of significant public funds. As such, these closed cases were not considered for purposes of our study.

192. In some cases, a petitioner may be represented by both a federal public defender and court appointed counsel. We did not include any such cases in our study. *See* Letter from Honorable Arthur L. Alarcón to Chief Judges, *supra* note 190.

193. We checked our data with the Circuit Executive for the Ninth Circuit Court of Appeals who confirmed the accuracy of the data we had received from the district courts as to these cases.

194. The data reported in this article is on file with the authors. While the specific data sets obtained by the authors will not be released to the public, the authors are pleased to respond to inquiries about the nature of the data generally, and/or how the calculations reported herein were made.

incurred by the federal government to litigate California death row inmates' habeas corpus petitions in federal court for 11 years: 1998–2008.[195] In those 11 years, the federal government spent a total of $141,318,909 on expenditures associated with FPD CHUs and CJA Panel legal representation of California's state prisoners on death row who were seeking habeas relief in federal courts.[196] Of these funds, CJA Panel attorneys received $53,702,609: $46, 542,115 for attorney's fees; and, $7,160,494 for investigators, experts and other ancillary costs associated with legal representation.[197] The FPD CHUs in the Central and Eastern Districts of California received $87,616,300, of which $4,299,700 was spent on outside experts.[198]

Similar data was captured for the year 1994, in a report prepared by the Committee on Defender Services and the Subcommittee on Death Penalty Representation.[199] A separate Defender Services report published in 1995 reported that the total amount of federal funds expended on legal representation of California's death row prisoners seeking habeas relief in federal courts in 1994 was $14,712,766.[200] This resulted in a total expenditure of $156,031,675 in federal funds over twelve years (1994, and, 1998–2008), or an average annual expenditure of $13,002,639.[201]

The 1998–2008 data indicate that CJA Panel attorneys represented 98 clients per year on average, while the FPD CHUs in

195. *See* E-mail from George Drakulich to Honorable Arthur L. Alarcón, *supra* note 55. "The information on filings was obtained from the Statistics Division of the AO. They indicated that tracking of capital habeas filings was not initiated until 1998. The data they provided reflects national filings and breakouts by district in California." *Id.*

196. *Id.*

197. *Id.*

198. *Id.*

199. COMM. ON DEFENDER SERVS. & SUBCOMM. ON DEATH PENALTY REPRESENTATION, REPORT ON DEATH PENALTY REPRESENTATION , app. A (Sept. 19, 1995) (on file with authors) (listing data for 1994).

200. *See id.* at 3–4. In 1994, prior to the creation of the Capital Habeas Units in the Federal Public Defender offices,

> [t]he federal courts provide[d] counsel in one of three ways. They . . . appoint[ed] an attorney from the private bar, a Post-Conviction Defender Organization (PCDO), or a federal defender organization. . . . In fiscal year 1994, Criminal Justice Act payments to attorneys in capital habeas cases amounted to $15,115,636, of which $10,167,026 was for California alone. . . . In fiscal year 1994, PCDO grants totaled $19,589,304 and ranged from a low of $188,235 for Nevada to a high of $4,545,740 for California.

Id. ($10,167,026 + $4,545,740 = $14,712,766).

201. $141,318,909 (1998–2008) + $14,712,766 (1994) = $156,031,675. E-mail from George Drakulich to Honorable Arthur L. Alarcón, *supra* note 55; *see supra* note 200.

the Central and Eastern Districts of California combined represented 64 clients per year on average.[202] Extrapolating more precise cost data from these calculated "averages" is somewhat problematic because the number of representations varies from year to year. Additionally, the nature of these cases is such that there may be one year in which numerous cases handled by the FPD suddenly become very active, and thus costly, while during that same year, cases being litigated by CJA Panel attorneys may be particularly inactive. Thus, it is difficult to make an apples-to-apples comparison of the cost of a typical case handled by a CJA Panel attorney and the cost of one involving representation by the FPD CHUs. Based on the data provided over the 11-year period between 1998 and 2008, however, it appears that the FPD CHUs are provided with significantly more funding than are CJA Panel attorneys.[203] The average annual funding per client received by a CJA Panel attorney between 1998 and 2008 was $47,915, while the average funding per year per client represented by FPD CHUs between 1998 and 2008 was $125,565. Thus, the data indicate that FPD CHU representations received more than two-and-a-half times the funding that CJA Panel attorney representations received.[204] This estimate is supported by data for the year 2007, a year in which CJA Panel attorneys represented 85 clients in federal court and the FPD represented 87 clients in federal court. Though they represented an almost equal number of clients, the FPD CHUs for the Central and Eastern Districts of California received funding in the amount of $10,754,300 from Defender Services, while court-appointed CJA Panel attorneys received $3,113,713—less than one-third of the funding provided to the FPD

202. E-mail from George Drakulich to Honorable Arthur L. Alarcón, *supra* note 55.

203. The average funds expended per client for those petitioners represented by CJA Panel attorneys was as follows: 1998: $64,870; 1999: $60,224; 2000: $48,733; 2001: $66,924; 2002: $59,712; 2003: $44,776; 2004: $41,831; 2005: $33,312; 2006: $38,166; 2007: $36,632; 2008: $31,895.

The same figures for the FPD CHUs are as follows: 1998: $129,089; 1999: $145,990; 2000: $136,826; 2001: $121,964; 2002: $105,572; 2003: $127,197; 2004: $125,943; 2005: $125,042; 2006: $117,042; 2007: $123,613; 2008: $122,944. Thus, the average per client, per year expense for cases involving representation by a CJA Panel attorney was $47,915; the same figure for cases involving FPD CHU representation was $125,565.

204. The average annual funding received by a CJA Panel attorney between 1998 and 2008 was $47,915 x 2.6 = $124,579 (average funding per year per client represented by FPD CHUs 1998–2008 was $125,565).

CHUs that year for virtually the same number of representations.[205]

The disparity in funding between a representation by a CJA Panel attorney and one by a Federal Public Defender is due in large part to the strict constraints placed on the budgets with which CJA Panel attorneys must comply. The federal government typically reimburses CJA Panel attorneys for less than the full amount of the expenses that they have incurred in representing a capital prisoner in federal court, e.g., conducting investigations, interviewing witnesses, hiring experts.[206]

Based on (1) our calculation that CJA Panel representations average a total of $635,000 per case, and (2) our calculation that cases litigated by the FPD CHUs in the Central and Eastern Districts of California cost approximately two-and-a-half times more than an average CJA Panel representation, we have concluded that an average case litigated by the FPD CHUs in the Central and Eastern Districts of California costs approximately $1.58 million.[207]

The data for 1998–2008 indicate that CJA Panel attorneys and FPD CHUs have handled similar shares of the federal habeas petitions filed in California: CJA Panel attorneys: 60%, FPD CHUs: 40%.[208] Assuming all representations are equally split, and assuming costs remain steady and do not increase, we estimate that the total bill to the federal government to investigate, review, and litigate federal petitions for all of the inmates currently on death row will be $775,250,000:

350 CJA cases x $635,000 per case = $222,250,000
<u>+ 350 FPD CHU cases x $1.58 million per case = $553,000,000</u>
$775,250,000

205. *See* E-mail from George Drakulich to Honorable Arthur L. Alarcón, *supra* note 55.

206. U.S. COURTS, *Compensation and Expenses of Appointed Counsel*, NAT'L CJA VOUCHER REFERENCE TOOL, http://www.uscourts.gov/uscourts/cjaort/compensation_expenses.html (last visited Mar. 8, 2011) (providing information on reimbursable expenses for attorneys). This assessment is corroborated by a report we obtained that was generated by the Judicial Council of the Ninth Circuit on May 25, 2006, and which indicates that only about 50% of the amounts requested by CJA Panel attorneys were approved for budgeting purposes by the Capital Case Committee. JUDICIAL COUNCIL OF THE NINTH CIRCUIT, CAPITAL HABEAS CASES (2006) (on file with authors). More recent data obtained from the Ninth Circuit Office of the Circuit Executive indicates that the current figure is higher: 61% for the Central District of California; 75% for the Eastern District of California; 74% for the Northern District of California; and 69% for the Southern District of California. This data is on file with the authors.

207. $635,000 x 2.5 = $1,587,500.

208. CJA Panel attorneys represented 1,081 federal habeas petitions, while FPD CHUs handled 706.

That will be the amount owed to petitioners' counsel alone and does not include costs to the state Attorney General's Office to respond to these challenges in federal court.

This figure is a conservative estimate insofar as the data we received from the Office of Defender Services indicate a trend toward the representation of condemned inmates by FPD CHUs in an increasing number of federal habeas corpus proceedings, while CJA Panel attorney appointments are on the decline. For example, in 1998, CJA Panel attorneys represented 78% of California capital prisoners with petitions pending in federal court, while the FPD CHUs represented 22%. By 2008, CJA Panel attorneys represented 44% of California capital prisoners with petitions pending in federal court, while the FPD CHUs represented 56%. If these trends continue, the cost to federal taxpayers for these representations will be even greater because the FPD CHUs have more resources at their disposal than do CJA Panel attorneys. Either way, the federal government is set to incur substantial costs in the future to litigate these petitioners' claims, as the vast majority of inmates on California's death row have yet to file their habeas corpus petitions in federal court.

This $775,250,000 figure also does not account for the substantial administrative costs associated with federal habeas corpus petitions filed by state-condemned inmates. The time district court judges and their staffs spend reviewing these capital habeas cases cannot be overstated. Law clerks routinely report spending significant amounts of time processing these cases. Additionally, the Administrative Office of the United States Courts has authorized funding for the district courts to employ one death penalty law clerk for every 15 capital habeas corpus cases filed.[209] There are approximately 200 capital habeas corpus cases currently pending in

209. FED. JUDICIAL CTR., DESKBOOK FOR CHIEF JUDGES OF U.S. DISTRICT COURTS 59 (3d ed. 2003), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/Deskbook.pdf/$file/Deskbook.pdf. Death penalty law clerks assist the court in the management of death penalty cases. *Id.* In 1998, the Conference agreed to provide funding on a national basis for death penalty law clerks in the district courts at the rate of one law clerk for each fifteen capital habeas corpus cases, if requested by the circuit judicial council. JUDICIAL CONFERENCE OF THE U.S., REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 24 (1999), *available at* http://www.uscourts.gov/FederalCourts/JudicialConference/Proceedings/Proceedings.aspx?doc=/uscourts/FederalCourts/judconf/proceedings/1999-03.pdf. The chief district judge appoints and supervises the death penalty law clerks under 28 U.S.C. § 752. FED. JUDICIAL CTR., *supra*, at 59.

the district courts in California.[210] They are being processed by approximately 13 death penalty law clerks with the federal district courts in California at a cost of roughly $1 million per year.[211] The federal courts also employ a staff of clerical workers in each of the four districts in California who are supervised by attorneys and responsible for reviewing and processing CJA Panel attorney requests for payment.[212] We have not included cost calculations concerning the total amounts paid to the death penalty law clerks, court accountants, and clerical workers.

Thus, the bill paid by federal taxpayers—which represents in some large part the cost of ameliorating the California Legislature's failure to provide funding for the proper administration of the death penalty in California—comes to over $775 million, a figure that does not include projections for expenses that will be incurred as new inmates continue to enter the system.

4. Costs of Incarceration: $70 Million Per Year; $1 Billion Since 1978

To provide some context for our inquiry into incarceration costs, we begin by noting that in the 1980s the budget for California's prison system represented about 4% of the state's General Fund,[213] while the budget for the University of California system accounted for 5%.[214] By 2009, the budget for California's prison system had nearly tripled to 11% of the state's General Fund, or about $10

210. *See* PACER, http://www.pacer.gov/cmecf/ (last visited June 1, 2011) (select "Civil"; then select "California"; then select "Nature of Suit: 535 Death Penalty—Habeas Corpus").

211. This figure assumes annual salaries for 13 death penalty law clerks of approximately $76,000 per law clerk.

212. *Supra* note 206.

213. *See California Budget Frequently Asked Questions*, CAL. DEP'T OF FIN., http://www.dof.ca.gov/budgeting/budget_faqs/#1 (last visited Apr. 9, 2011). The General Fund is

> [u]sed to account for all revenues and activities financed therefrom which are not required by law to be accounted by any other fund. Most state expenditures are financed from the General Fund. Normally, the only difference between the General Fund and the other governmental costs funds is the restriction placed on the use of the other governmental cost funds.

CAL. DEP'T OF FIN., *Description of Fund Classifications in the Treasury*, *available at* http://www.dof.ca.gov/budgeting/budget_faqs/documents/FundClassifications.pdf.

214. *See* Henry E. Brady, Dean, Goldman Sch. of Pub. Policy, Univ. of Cal.Berkeley, Moderator of Panel Discussion: What Can You Get for $10 Billion? Prison Spending and the California Budget Crisis (Apr. 15, 2010), *available at* http://www.youtube.com/watch?v=zRWtk-xz9eo.

billion, while the budget for the University of California system has been reduced by half to about 2.5% of the General Fund, or $2.6 billion. Additionally, tuition for in-state students has been increased by 40% in the last two years alone.[215] Governor Brown's proposed budget for 2011–2012 would cut an additional $500 million in state funding for the University of California.[216]

By contrast, the enacted 2009–2010 budget for the CDCR was nearly $13 billion ($12,986,397,000).[217] The CDCR is now planning construction of a complex solely for the purpose of housing condemned inmates, which is expected to cost an additional nearly $2 billion to build and operate over the first 20 years.[218]

a. Construction of a new Condemned Inmate Complex (CIC): $1.66 billion for first 20 years

Cost to Construct: *over $395.5 million* Cost to Activate: *$7.3 million* Cost to Operate: *$58.8 million per year* Additional Staffing Costs for First 20 Years in Operation: *$1.2 billion*

Despite the Commission's request in its *Final Report* that the Governor and the Legislature authorize further study of costs associated with the administration of the death penalty in California, including costs for incarcerating inmates on death row, no action has been forthcoming, except for legislative inquiries made in connection with construction of the new CIC.[219]

On July 29, 2008, the California State Auditor was asked by the

215. *Id.*

216. Nicholas Greitzer, *Governor Brown's Proposed 2011–2012 Budget Cuts $500 Million in State Funding for the University of California; Gov. Brown's Proposed Reduction Would Make Student Fees the Largest Contributor of Funds*, DAILY BRUIN (Jan. 11, 2011), http://www.dailybruin.com/index.php/article/2011/01/governor_browns_proposed_20112012_budget_cuts_500_million_in_state_funding_for_the_university_of_cal.

217. *Corrections and Rehabilitation*, GOVERNOR'S BUDGET 2009–2010 (July 28, 2009), http://2009-10.archives.ebudget.ca.gov/Enacted/StateAgencyBudgets/5210/5225/department.html.

218. CAL. STATE AUDITOR, *supra* note 15, at 23, 29.

219. FINAL REPORT, *supra* note 4, at 10–21 (summarizing recommendations for the Legislature).

Joint Legislative Audit Committee to present an "audit report concerning [the CDCR's] efforts to build a new condemned inmate complex (CIC) and the projected costs of building a new CIC" at San Quentin State Prison.[220] The State Auditor estimated that the cost of constructing a new CIC had increased 61.9% over the original budget of $220 million. The Auditor explained that

> The [CDCR] houses inmates who have been condemned to death (condemned inmates) in three separate housing units at San Quentin State Prison (San Quentin). However, these units do not meet many of [CDCR's] design standards for maximum-security facilities, increasing the escape risk for inmates and posing potential safety concerns for inmates, staff, and the general public. Accordingly, in 2003 the Legislature approved [CDCR's] request for $220 million to build a new condemned inmate complex (CIC) at San Quentin. However, . . . before construction could begin, the cost of the project increased significantly [which caused CDCR to] reduce[] the capacity of the complex from eight housing units to six and from 1,024 cells to 768 cells. Despite the 25 percent reduction in the capacity of the CIC, [CDCR] now estimates the cost of the project at $356 million, an increase of $136 million, or 62 percent in the five years since 2003.
>
> However, . . . the cost to construct the CIC will be more than $395.5 million[,] . . . the additional cost to activate the new CIC will reach $7.3 million[,] . . . [and] the average net new staffing costs to operate the new CIC will be $58.8 million per year. . . . San Quentin will spend $39.5 million more in staffing costs in the first full year after the facility opens than it would spend if the new CIC were not built. Overall, . . . San Quentin will incur additional staffing costs of approximately $1.2 billion during the first 20 years the facility is in operation.[221]

220. Letter from Elaine M. Howle, State Auditor, to Governor of Cal. & Legislative Leaders (July 29, 2008), *in* CAL. STATE AUDITOR, *supra* note 15, at iii.

221. CAL. STATE AUDITOR, *supra* note 15, at 1, 23 (emphasis added). "In the capital outlay budget change proposal submitted to Finance for fiscal year 2008–09, [CDCR] indicated that it would need a total of 505 staff to operate the CIC, consisting of 158 existing San Quentin employees and 347 new staff." *Id.* at 26.

b. Incarcerating inmates on death row: $1 billion since 1978

To date, the Legislature has failed to follow the recommendation of the Commission that the Legislature order the State Auditor to study the cumulative costs associated with the administration of the death penalty in California. The Legislature did ask the California State Auditor to "present[] [an] audit report concerning [CDCR] impact on the state budget."[222] The Auditor's 112-page report, however, *does not contain a single mention of any of the costs associated with the death penalty in California*.[223]

The State Auditor concluded as follows:

> [CDCR] fails to track, maintain, and use data that would allow it to more effectively monitor and manage its operations. Specifically, [CDCR's] expenditures increased by 32 percent in the past three years to $10 billion; however, its ability to determine the impact various factors such as overcrowding, the transition of the health care function to a federal court-appointed receiver, escalating overtime costs, and the presence of aging inmates have on the cost of its operations is limited by a lack of information. Furthermore, *despite rising costs for incarcerating inmates, [CDCR] does not have sufficient information to identify how much specific inmate characteristics contribute to these costs and how changes in [CDCR's] operations would affect expenditures*. For example, housing, security, and support are the largest contributors to the cost of incarceration, but the number of custody staff associated with specific populations of inmates—which are not

> To maximize the CIC's capacity, [CDCR] plans to double-cell certain condemned inmates; however, experts we spoke with and our consultant expressed legal confidentiality and safety concerns with double-celling. If double-celling occurs as planned, we estimate the CIC will reach capacity in 2035; however, if the plan to double-cell is not a feasible approach, the CIC will reach capacity in 2014, less than three years after it is expected to open.

Letter from Elaine M. Howle, State Auditor, to Governor of Cal. & Legislative Leaders, *supra* note 220.

222. Letter from Elaine M. Howle, State Auditor, to Governor of Cal. and Legislative Leaders (Sept. 8, 2009), *in* CAL. STATE AUDITOR, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION: IT FAILS TO TRACK AND USE DATA THAT WOULD ALLOW IT TO MORE EFFECTIVELY MONITOR AND MANAGE ITS OPERATIONS, at iii (2009), *available at* http://www.bsa.ca.gov/pdfs/reports/2009-107.1.pdf.

223. *Id.*

> tracked by [CDCR]—depends on the security and custody levels of the inmates as well as various institutional considerations. Custody staff costs include $431 million paid in overtime during fiscal year 2007–08; however the cost to recruit and train new correctional officers, combined with the significant increases in the cost of benefits in recent years makes hiring a new correctional officer slightly more expensive than paying overtime to those currently employed by [CDCR].[224]

The State Auditor concluded that the CDCR's budget comprises 10 percent of the State's General Fund budget, with expenditures of roughly $10 billion in fiscal year 2007–2008.[225] The CDCR spent "80 percent of its $10 billion on adult operations, making the average annual cost to incarcerate an adult inmate $49,300."[226] The State Auditor's results refer only to "inmates" and do not separately address the cost of housing inmates on death row.

The cost-per-inmate figure does not include expenditures of $221 million related to the Corrections Standards Authority or to capital outlay of $150 million because the CDCR's accounting records do not indicate allocation of those costs to specific institutions.[227] Additionally, it is important to note that this average-annual-cost-per-inmate figure of $49,300 includes an additional $6,000 to $7,000 per inmate because there are additional expenditures totaling $1.1 billion within the other cost areas that are spent in support of adult operations, but which the State Auditor was unable to attribute to specific institutions.[228] Thus, to calculate the annual cost per inmate, we have divided $1.1 billion by the total number of adult inmates, resulting in the $49,300 figure.[229]

224. *Id.* (emphasis added).

225. CAL. STATE AUDITOR, *supra* note 222, at 77 app. A.

226. *Id.* (listing expenditures in Table A).

227. *Id.* at 9 & n.1 ("The Corrections Standards Authority works in partnership with city and county officials to, among other things, develop and maintain standards for the construction, operation, and staffing of state and local jails and juvenile detention facilities.").

228. *Id.* at 27.

229. *Id.* According to the State Auditor, some of the $1.1 billion of "additional expenditures" is charged as follows: $145 million in support of inmate health care; $137 million for office support for the federally appointed receiver; and $329 million for facilities planning, design, and construction management. *Id.* In addition, some institution support costs are included in this amount, including $154 million for substance abuse programs provided at some institutions, $12 million for inmate classification services, and $38 million for CDCR's transportation unit. *Id.*

We are left to wonder, given the complete absence of any mention in the State Auditor's report of the annual cost of housing condemned inmates—a report that was issued more than one year after the Commission recommended collecting data associated with housing inmates on death row—whether any of the hundreds of millions of dollars that are unaccounted for are attributable to costs related to housing condemned inmates.

In May 2010, the State Auditor "present[ed an] audit report concerning the effect of the [CDCR's] operations on the state budget," as requested by the Legislature.[230] Once again, there was *no mention* of any costs associated with funding the state's death penalty system or the cost of housing condemned inmates on death row.[231]

While the State Auditor is capable of undertaking the type of complex analysis involved in answering questions such as whether "inmates sentenced under the three strikes law, and . . . inmates receiving specialty health care,"[232] represent significant costs, the Legislature has failed to request that the State Auditor answer the question of whether housing California's condemned inmates represents significant costs. For its part, the CDCR continues to suppress the costs to state taxpayers of incarcerating prisoners on death row.

In attempting to determine the cost of incarcerating prisoners on California's death row for its *Final Report*, the Commission was forced to rely on "rough estimates," including a figure from an article published in the *Los Angeles Times* in March 2005, which stated that the cost was an additional $90,000 per year per inmate for housing on death row.[233]

The remainder of the additional expenditures is charged to CDCR's headquarters, as unallocated support and administration expenditures. CDCR does not attribute these costs to any specific unit or institution. *Id.* at 77 app. A.

230. Letter from Elaine M. Howle, State Auditor, to Governor of Cal. & Legislative Leaders (May 18, 2010), *in* CAL. STATE AUDITOR, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION: INMATES SENTENCED UNDER THE THREE STRIKES LAW AND A SMALL NUMBER OF INMATES RECEIVING SPECIALTY HEALTH CARE REPRESENT SIGNIFICANT COSTS (2010), *available at* http://www.bsa.ca.gov/pdfs/reports/2009-107.2.pdf.

231. *See* CAL. STATE AUDITOR, *supra* note 230, at 8 (emphasis added).

232. Letter from Elaine M. Howle, *supra* note 230.

233. FINAL REPORT, *supra* note 4, at 141 n.94 (citing Tempest, *supra* note 169, at B1). The Tempest article quoted CDCR Spokeswoman Margot Bach, who reportedly stated that the additional cost of confining an inmate to death row, as compared to the maximum security

As part of our study, we contacted Dr. Steven Chapman, the Assistant Secretary in the CDCR Office of Research, to verify the accuracy of the cost estimates relied on by the Commission. We asked Dr. Chapman: (1) to confirm that the average yearly cost per inmate to the State of California is $49,000; (2) to tell us what the "average annual cost of incarcerating a condemned inmate on death row in California [was] as of year end 2008"; and (3) given that Margot Bach reported in 2005 that housing on death row costs an additional $90,000 per inmate per year, to tell us what the current figure is for additional costs the state of California incurs to house an inmate on death row rather than housing the inmate with the general population, as of year end 2008.[234]

Dr. Chapman confirmed that the average yearly cost per inmate to the state of California is $49,000.[235] Dr. Chapman indicated, "[h]owever, [that the CDCR] cannot determine how this figure was calculated based on information provided by the Office of Fiscal Services."[236] Dr. Chapman also stated that

> our Office of Fiscal Services determined that CDCR does not compute an average cost specifically for condemned inmates separate from the general population. There are many expenses uniquely associated with managing a condemned inmate, but some are borne by other agencies, such as the Attorney General's Office or the Public Defender's Office, etc.[237]

With regard to Margot Bach's reported statement that the cost to house a death row inmate is approximately $90,000 more than the cost to maintain an inmate in the general population, Dr. Chapman indicated that "[t]his amount cannot be verified by the Office of

prisons where those sentenced to life without possibility of parole ordinarily serve their sentences, is $90,000 per year per inmate. Tempest, *supra* note 169, at B1.

234. Letter from Honorable Arthur L. Alarcón, Ninth Circuit Court of Appeals, to Dr. Steven Chapman, Assistant Sec'y, Office of Research, Cal. Dep't of Corr. & Rehab. (Sept. 3, 2009) (on file with authors).

235. Letter from Dr. Steven Chapman, Assistant Sec'y, Office of Research, Cal. Dep't of Corr. & Rehab., to Honorable Arthur L. Alarcón, Ninth Circuit Court of Appeals (Dec. 16, 2009) (on file with authors).

236. *Id.*

237. *Id.* On October 4, 2010, the authors wrote to Attorney General Edmund G. Brown, Jr., to seek clarification about the issue of the cost of incarcerating inmates on California's death row and are awaiting a reply.

Fiscal Services."[238]

Because the $90,000 figure came from a public information officer within the CDCR, and because that department, while stating it cannot confirm the accuracy of Ms. Bach's estimate, has also not disavowed its accuracy, we have been forced to rely on this figure in calculating how much more it costs to house a prisoner on death row in California than elsewhere in the prison system. Adjusting for yearly inflation rates, as well as for the increase in the number of condemned inmates added to death row each year, we have calculated that since 1978, California taxpayers have spent over $1 billion ($1,021,653,767) incarcerating inmates on death row.[239]

238. *Id.* We attempted to contact Margot Bach at the CDCR by e-mail on November 5, 2010, and learned that she had retired in June 2010. We attempted to contact Terry Thornton, Deputy Press Secretary for the CDCR, by both e-mail and telephone on November 5, 2010, to inquire about the basis for Ms. Bach's $90,000 estimate. To date, Terry Thornton has not responded to our inquiries.

239. This figure is calculated based on the CDCR figure of $90,000 in additional costs provided in 2005. The inflation rate is based on the U.S. Bureau of Labor Statistics Inflation Calculator. U.S. INFLATION CALCULATOR, http://www.usinflationcalculator.com (last visited Mar. 28, 2011). We have summarized the calculation in the following table.

	Death Row Population by Year	Additional Death Row Incarceration Costs Per Inmate, in Dollars	Total Annual Costs for Incarceration on Death Row 1978–2010, in Dollars
1978	7	30,046	210,322
1979	25	33,456	836,400
1980	42	37,972	1,594,824
1981	80	41,889	3,351,120
1982	113	44,470	5,025,110
1983	143	45,898	6,563,414
1984	161	47,880	7,708,680
1985	159	49,585	7,884,015
1986	179	50,506	9,040,574
1987	203	52,350	10,627,050
1988	223	54,516	12,157,068
1989	247	57,142	14,114,074
1990	279	60,230	16,804,170
1991	305	62,764	19,143,020
1992	345	64,654	22,305,630
1993	374	66,589	24,904,286
1994	391	68,294	26,702,954
1995	426	70,230	29,917,980
1996	461	72,304	33,332,144
1997	493	73,963	36,463,759
1998	518	75,115	38,909,570
1999	558	76,774	42,839,892

The cost of incarcerating those inmates on death row whose convictions or sentences were later reversed on direct appeal or who were later granted state habeas corpus relief by the California Supreme Court and then removed from death row (and not subsequently returned following a retrial or resentencing) is an estimated $30 million.[240] That sum is in addition to funds that were expended in their state appellate and habeas corpus proceedings, including payment of counsel. The cost of incarcerating on death row those inmates who were later granted federal habeas corpus relief and removed from death row (and were not subsequently returned following a retrial or resentencing) is an estimated *$24 million*.[241] That sum is in addition to those funds expended for their automatic appeals and state and federal habeas proceedings, including representation and investigation by counsel.

The cost of incarcerating on death row inmates who died of natural causes—either while their petitions for habeas corpus relief were still pending, or who had exhausted all of their post-conviction relief proceedings and were awaiting execution—is an estimated *$58.3 million*. That sum is in addition to funds that were expended to compensate their post-conviction counsel. That figure also does not

2000	589	79,354	46,739,506
2001	610	81,566	49,755,260
2002	618	82,903	51,234,054
2003	639	84,792	54,182,088
2004	642	87,050	55,886,100
2005	654	**90,000**	58,860,000
2006	662	92,903	61,501,786
2007	670	95,549	64,017,830
2008	688	99,217	68,261,296
2009	698	98,864	69,007,072
2010	713	100,663	71,772,719
TOTAL			$1,021,653,767

240. *See supra* note 24 (indicating that the California Supreme Court has vacated the sentences or reversed the convictions in 101 death penalty cases). We have calculated the cost of incarcerating those prisoners on death row for the years they spent on death row (adjusted for inflation) awaiting appointment of counsel and the outcome of their automatic appeals. We have also included four cases in which condemned inmates were granted relief in their state habeas corpus proceedings.

241. The cost to incarcerate those condemned inmates who were removed from death row based upon the grant of their petitions for a writ of habeas corpus is approximately $23,913,056 (adjusted for inflation).

include the medical expenses incurred in connection with specialty health care services provided in connection with terminal illnesses. For example, the State Auditor reported:

> Each of the 72 inmates who died during the last quarter of fiscal year 2007–08 incurred, on average, $122,300 for specialty health care services for that fiscal year. Ranging from $150 for one inmate to more than $1 million for another, these 72 inmates accounted for $8.8 million in specialty health care costs during fiscal year 2007–08.[242]

Thus, of the estimated total of $1.02 billion in taxpayer dollars spent on housing inmates on death row, an estimated total of $112.3 million—over 10% of the total housing costs—was spent housing inmates on death row who would never face execution, either because their sentences were later vacated on appeal (or in post-conviction proceedings) or because they died of natural causes. Many of those condemned inmates who died were still awaiting the outcomes of their petitions for federal habeas corpus relief.

In any event, it is quite disturbing that neither the CDCR nor any other agency in the state of California has attempted to calculate the extra cost of incarcerating condemned prisoners on death row, especially given that this question has been the subject of tremendous concern by researchers and the media. It is highly troubling that *billions* of taxpayer dollars have been allocated to the CDCR without any statutory requirement that it account to the electorate regarding the expense of housing death row inmates.[243]

242. CAL. STATE AUDITOR, *supra* note 230, at 39. While the report does not indicate whether any of these medical expenses were for death row prisoners, it is safe to assume that there are prisoners on death row with health issues, particularly in view of the fact that there are 85 prisoners on death row aged 60–69, and 10 prisoners aged 70–89. DIV. OF ADULT OPERATIONS, *supra* note 17, at 1.

243. CAL. STATE AUDITOR, *supra* note 222, at 27 (stating there are "additional expenditures totaling $1.1 billion within the other cost areas that [the State Auditor] was unable to attribute to specific institutions," but which are spent in support of adult operations).

5. The Present Administration of California's Death Penalty: A Complete Failure

Our research has revealed that $4 billion of state and federal taxpayer money has been expended administering the death penalty in California since 1978, with a cost in 2009 of approximately $184 million above what taxpayers would have spent without the death penalty.[244] While the cost data supporting our calculations are of varying degrees of reliability because state agencies have failed to report the costs of housing condemned state prisoners, our estimates are consistent with those published in the Commission's *Final Report*. The Commission estimated in 2008 that the annual costs of the present system were $137 million per year.[245] The Commission did not incorporate the costs associated with federal habeas litigation. It also used a more conservative estimate of the cost of death penalty trials, and it calculated the cost of incarceration based on 2007 figures.[246]

244. This figure does not include funds expended defending the death penalty in federal court in actions based on civil rights violations pursuant to § 42 U.S.C. 1983 challenging methods used in carrying out execution or related delays in violation of the Eighth Amendments.

245. FINAL REPORT, *supra* note 4, at 117.

246. *Id.* at 146–47. The Commission based its projected cost calculations published in its *Final Report* on the average number of death sentences imposed between 2000 and 2007, which averaged 20 per year. *Id.* at 120. Because our study is seeking to calculate funds already spent, rather than predict how many future death sentences will be imposed for future cost projection purposes, we will rely on the average figure of 30 direct appeals decided per year, based on the calculated average of all death sentences actually imposed between 1978 and 2010.

Expense	Commission's *Final Report* Annual Costs (2008)	Estimated Annual Cost for 2009	Estimated Total Cost 1978–2010
Pre-Trial Investigation and Trial Costs	$20 million [247]	$40 million [248]	$1.94 billion
Direct Appeal and State Habeas	$54.4 million	$58.5 million	$925 million
Federal Habeas	$0	$14 million [249]	$156 million [250]
Costs of Incarceration	$63.3 million	$71.7 million [251]	$1.02 billion
TOTAL	$137.7 million	$184.2 million	$4.04 billion

These totals do not include the additional funds the state is poised to spend to maintain the current broken system, including an additional $400 million to build and activate a new CIC to house more than 1,000 prisoners, which will cost an additional $58.8 million per year to operate and will be the nation's most populous death row. The State Auditor estimates that San Quentin will incur additional staffing costs of approximately $1.2 billion during the first 20 years that the new CIC facility is in operation. The $4.04 billion total includes only a fraction of the total cost to federal taxpayers to fund representation to litigate the federal habeas corpus petitions of approximately 700 California death row prisoners, which will total about $775,250,000 by the time those cases are resolved.

247. While acknowledging that two studies calculated the cost of a capital murder trial to be between $1.1 million and $1.27 million more, on average, than the costliest noncapital felony trials, "the Commission adopted a very conservative estimate that seeking the death penalty adds $500,000 to the cost of a murder trial in California." *Id.* at 145.

248. This figure is based on the Commission's statement in its *Final Report* that the average number of death sentences imposed between 2000 and 2007 was 20 per year. *Id.* at 120. Because of an estimate of 20 death penalty convictions and estimates of approximately 40 death penalty trials, the conviction rate is an estimated 50%. *Id.* at 28.

249. As of 2008, average annual expenditures for federal habeas corpus proceedings was $13,002,639. *See supra* note 201 and accompanying text.

250. This figure only includes costs incurred in 1994 and 1998–2008.

251. For the estimated costs for 2010, see *supra* note 239.

II. PAVED WITH GOOD INTENTIONS: THE LEGISLATIVE HISTORY OF THE DEATH PENALTY IN CALIFORNIA

Having established that, since 1978, California taxpayers have spent billions of dollars to fund the administration of a dysfunctional death penalty system, we next look at California's voter initiative process and consider how the state's death penalty scheme developed. Since 1978, *all* of the state's death penalty legislation has been adopted through the passage of initiatives by a majority of those citizens who voted. We have examined what California voters were told about the effect of and potential costs of the death penalty in those initiatives that called for extending capital sentencing to reach conduct that had not been previously punishable by death. Based on our study of the legislative history of the current death penalty scheme in California, it is clear to us that the voters were not informed before they cast their ballots that these initiatives would result in the expenditure of $4 billion over 32 years to fund a failed system that includes the nation's most populous death row—housing more than 700 condemned inmates, only 13 of whom have been executed since 1978.

A. Direct Democracy

In discussing the merits of a representative form of government, John Adams explained that "[i]n a large society, inhabiting an extensive country, it is impossible that the whole should assemble to make laws. The first necessary step, then, is to delegate power from the many to a few of the most wise and good."[252] The Framers created a republic with a system of checks and balances "that could temper human imperfection and protect the people from one another. . . . They refused to include provisions in the Constitution allowing voters to bind their representatives with instructions and were eventually successful in eliminating this direct democracy device."[253] Article IV, section 4, of the U.S. Constitution "guarantee[s] to every State in this Union a Republican Form of Government . . . ."[254] Since the Continental Congress and ratification

252. PHILIP L. DUBOIS & FLOYD FEENEY, LAWMAKING BY INITIATIVE: ISSUES, OPTIONS AND COMPARISONS 15 (1998).

253. *Id.* at 16.

254. U.S. CONST. art. IV, §4.

of the U.S. Constitution, many of the states have opted to incorporate some form of direct democracy into their governing processes. The states' movement toward direct democracy began in the late 1800s and gained momentum after the turn of the 20th century. [255]

The initiative process has been criticized as not sufficiently deliberative to be compatible with the republican form of government enshrined in the Guarantee Clause of the Constitution. "[T]he United States Supreme Court has refused to rule on the general question of the compatibility of the initiative and the Guarantee Clause." [256]

> The cry for adoption of the initiative, the referendum, and the recall in the late 1800s came not from theorists seeking to develop some abstract concept of better government but from citizens with major problems, particularly farmers who found it difficult to live with prices below the cost of production. By the time they paid the banks and the railroads, they had nothing left for their families.
>
> Because the railroads, the trusts, and the monopolies so often dominated both the legislatures and the two main political parties, farmers and other outcast groups came together to form a new party—the People's or Populist party. Although the initiative, the referendum, and the recall formed only one part of this new party's platform, these direct democracy devices were nonetheless a very important part, because they provided a means for "temporarily bypassing their legislatures and enacting needed laws on behalf of the downtrodden farmer, debtor, or laborer."
>
> Woodrow Wilson, a leading scholar of government before he became a governor and a president, explained the movement. The reformers, he said, were not bent upon any radical transformation. They had no intention of undermining legislative or representative processes, but

255. *See* DUBOIS & FEENEY, *supra* note 252, at 8–14.

256. *Id.* at 16 n.6 (quoting Pacific States Tel. & Tel. Co. v. Oregon, 223 U.S. 118, 118 (1912)) ("The enforcement of the provision in § 4 of Art. IV of the Constitution that the United States shall guarantee to every State a republican form of government is of a political character and exclusively committed to Congress, and as such is beyond the jurisdiction of the courts.").

> rather sought to redeem them. . . .
>
> The reformers believed that the populace as a whole could not be corrupted in the way that the legislatures had been corrupted, and that the initiative would help to make all governmental processes more honest and responsive.
>
> Around the turn of the century the torch passed from the Populists to the Progressives, a more establishment group but in many respects the spiritual heirs of the Populists.[257]

Hiram Johnson, the leader of California's movement for the use of the initiative, referendum, and recall process, said that while those devices would not be "a miracle cure or a 'panacea for all our ills,' . . . 'they do give to the electorate the power of action when desired, and they do place in the hands of the people the means by which they may protect themselves.'"[258]

B. Understanding the Voter Initiative Process in California

One hundred years ago, in 1911, the California Constitution was amended to give voters the right to enact legislation and amend the constitution through the initiative process.[259]

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257. *Id.* at 16–17 (footnotes omitted).

258. *Id.* at 17 (quoting EUGENE LEE & LARRY BERG, THE CHALLENGE OF CALIFORNIA 98 (2d ed. 1976) (1970)).

259. California Constitution, article II, section 8, provides:

> (a) The initiative is the power of the electors to propose statutes and amendments to the Constitution and to adopt or reject them.
>
> (b) An initiative measure may be proposed by presenting to the Secretary of State a petition that sets forth the text of the proposed statute or amendment to the Constitution and is certified to have been signed by electors equal in number to 5 percent in the case of a statute, and 8 percent in the case of an amendment to the Constitution, of the votes for all candidates for Governor at the last gubernatorial election.
>
> (c) The Secretary of State shall then submit the measure at the next general election held at least 131 days after it qualifies or at any special statewide election held prior to that general election. The Governor may call a special statewide election for the measure.
>
> (d) An initiative measure embracing more than one subject may not be submitted to the electors or have any effect.
>
> (e) An initiative measure may not include or exclude any political subdivision of the State from the application or effect of its provisions based upon approval or disapproval of the initiative measure, or based upon the casting of a specified percentage of votes in favor of the measure, by the electors of that political subdivision.
>
> (f) An initiative measure shall not contain alternative or cumulative provisions wherein one or more of those provisions would become law depending upon the casting of a specified percentage of votes for or against the measure.

> As originally instituted in California, there were two initiative processes available: the direct initiative and the indirect initiative. The direct initiative process allows voters to place a proposed statute or an amendment to the Constitution directly on the ballot. If a majority of the voters approve the measure, it becomes law. The direct initiative as practiced in California is designed to bypass the legislative process . . . [T]he legislature's only role in the direct initiative is to hold a legislative committee hearing 30 days prior to the election.
>
> The indirect initiative allows the proponent of a statutory initiative to gather signatures and present the measure to the legislature for enactment. If the measure is enacted, it becomes law and the measure is not placed on the ballot.[260] . . . In the early 1960s, the California Constitution Revision Commission recommended that the [indirect initiative] provision be deleted from the Constitution due to lack of use. It was repealed in 1966.[261]

For some,

> the initiative [process has become] the very essence of democracy, an opportunity for citizens to participate directly in making the laws under which they live. . . . In their view, the initiative increases interest and participation in government, reduces citizen alienation, and serves as an antidote for declining voter turnout in elections. . . . Others question the wisdom of the initiative. In their view, societal problems have become much too complicated for the black

CAL. CONST. art. II, § 8. Article XVIII, section 3, provides: "The electors may amend the Constitution by initiative." *Id.* art. XVIII, § 3.

260. J. FRED SILVA, PUB. POLICY INST. OF CAL., THE CALIFORNIA INITIATIVE PROCESS: BACKGROUND AND PERSPECTIVE 1–2 (2010), *available at* http://www.ppic.org/content/pubs/op/OP_1100FSOP.pdf ("This process was in effect from 1912 to 1966. However, this parallel process was seldom used. One of the reasons for its lack of use was the legislative schedule. Prior to 1964, the legislature met in biennium session: The first year was devoted solely to the budget and the second year devoted to legislation. This gave proponents a short period of time every two years to use the indirect process.").

261. *Id.* at 2, 7 ("The indirect initiative process was used only four times in the state's history. Only once was a measure approved by the legislature. The three measures that the legislature reviewed but did not approve were submitted to the voters. The voters defeated all three measures. The Constitution Revision Commission impaneled in the 1960s reviewed the use of the indirect initiative and recommended its repeal. The voters agreed and the measure was deleted from the Constitution in 1966.").

> and white kind of solutions they believe possible through use of the initiative process. Detractors are also appalled by the demagoguery and simple-minded campaigns that characterize many initiative elections.[262]

Historically, initiatives placed on ballots in California have addressed a broad spectrum of issues affecting fundamental rights. Some noteworthy examples include "[a] 1914 initiative [that] abolished the poll tax in California, . . . a 1918 initiative [that] created the state's first usury law[,] . . . [and a] 1920 initiative [that] strengthened the alien land law that restricted ownership of land by persons not eligible for naturalization, principally Japanese immigrants."[263] More recently, "[i]n the 1970s California voters used the initiative to reinstitute the death penalty, create environmental protections for the coastal area, enact stiff new campaign finance and political ethics legislation, and reduce property taxes."[264] Although there is some appeal to a system that allows citizens to weigh the pros and cons of a policy or legal issue and to vote "yes" or "no" on a proposed law, administration of the system of direct democracy in California has not provided voters with the type of information that is fundamental to making educated decisions regarding the merits of changes to the state's capital punishment system.

1. Distinguishing Features of California's Initiative Process

> *"[N]owhere is the practice of government by voter initiative as extreme as it is in California."*[265]

Several features of California's initiative process work together to create a systematic destabilization of the state's constitutional law and a disruption of the state's legislative process. These features include (a) the unusual ease with which voters are able to amend the state's constitution as compared to the amendment process employed in other states; (b) the voters' ability to use the initiative process to appropriate state funds for any cause without apparent regard for the budgetary impact; (c) the voters' ability to prevent the legislature

262. *Id.* at 2.

263. *Id.* at 13.

264. *Id.* at 14.

265. Honorable Ronald M. George, Chief Justice Cal. Supreme Court, Keynote Address at Stanford Law Review Symposium: State Constitutions (Feb. 19, 2010), *in* 62 STAN. L. REV. 1515, 1516 (2010).

from amending or repealing a voter-initiated law, even when a law is not performing as anticipated or has become unworkable; and (d) the sheer number of voter initiatives that California voters are asked to consider.

a. Frequent amendment of the California Constitution through the initiative process creates "perpetual instability" [266]

When the Framers drafted the U.S. Constitution, they devised a brief document that was primarily limited to setting forth the framework of the system of government. Amending the Constitution was only possible through a showing of overwhelming popular support as demonstrated by three-fourths of the states ratifying the amendment. "Amendments were deliberately made difficult in order to discourage changes that were not themselves fundamental. In over 200 years there have been only 27 amendments, and only 17 since the adoption of the Bill of Rights in 1791." [267]

As one scholar explained:

> The very idea of a Constitution turns on the separation of the legal and the political realms. The Constitution sets up the framework of government. It also sets forth a few fundamental political ideals—equality, representation, individual liberties—that place limits on how far any short-term majority may go. This is our higher law. All the rest is left to politics. Those who lose in the short run of ordinary politics obey the winners out of respect for the long-run rules and boundaries set forth in the Constitution. Without such respect for the constitutional framework, the peaceful operation of ordinary politics would degenerate into

266. *Id.* ("[T]he ease with which California's Constitution can be—and regularly is—amended, [has] result[ed] in the perpetual instability of California's state constitutional law.").

267. DUBOIS & FEENEY, *supra* note 252, at 71. The U.S. Constitution, Article V, provides for two methods of proposing a constitutional amendment, empowering both Congress and the states to propose amendments to the Constitution:

> The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress.

U.S. CONST. art. V.

> fractious war.
>
> Frequent constitutional amendment can be expected to undermine this respect by breaking down the boundary between law and politics. The more you amend the Constitution, the more it seems like ordinary legislation. And the more the Constitution is cluttered up with specific regulatory directives, the less it looks like a fundamental charter of government. Picture the Ten Commandments with a few parking regulations thrown in.
>
> This is why opponents of new amendments often argue that they would tend to trivialize or politicize the Constitution. They trivialize it in the sense that they clutter it up and diminish its fundamentality. Consider the experience of the state constitutions. Most state constitutions are amendable by simple majority, including by popular initiative and referendum. . . . [M]any of these state constitutional amendments are products of pure interest group politics. State constitutions thus are difficult to distinguish from general state legislation, and they water down the notion of fundamental rights in the process: the California constitution, for example, protects not only the right to speak but also the right to fish.
>
> Amendments politicize a constitution to the extent that they embed in it a controversial substantive choice. Here the experience of Prohibition is instructive: the only modern amendment to enact a social policy into the Constitution, it is also the only modern amendment to have been repealed. Amendments that embody a specific and controversial social or economic policy allow one generation to tie the hands of another, entrenching approaches that ought to be revisable in the crucible of ordinary politics.[268]

California's Constitution is six times longer than the federal Constitution. Amending the California Constitution by means of the initiative process is relatively easy, compared to the process the Legislature must comply with if it wishes to propose a constitutional

268. Kathleen M. Sullivan, *Constitutional Constancy: Why Congress Should Cure Itself of Amendment Fever*, 17 CARDOZO L. REV. 691, 695–96 (1996).

amendment.[269] While all 50 states allow their legislatures to amend their constitutions, only 17 states allow voters to amend their constitutions through the initiative process.[270] In most of these states, it is at least as easy for the legislature to propose a constitutional amendment as it is for the voters to amend by initiative. Only in California and Colorado is it harder to amend the state's constitution through legislative action than to amend by direct voter initiative.[271]

Most states that allow constitutional amendments through a voter initiative process have ballot-qualification standards that are more onerous than California's, which is relatively straightforward and unrestricted.[272] For example, in Illinois, a proposed amendment must "be limited to structural and procedural subjects contained in Article IV," which establishes the rights and responsibilities of the Illinois General Assembly.[273] In Nevada, if an initiative amending the constitution receives a majority vote, it must be approved again at the next general election for it to become part of the constitution.[274] In Mississippi, which has adopted the indirect initiative process, to get on the ballot the initiative must receive 12% of the total vote cast for governor in the last gubernatorial election, with one-fifth (1/5) of the signatures from each of Mississippi's five congressional districts.[275] Massachusetts has a similar requirement.[276] In Florida,

269. DUBOIS & FEENEY, *supra* note 252, at 76 ("In California it is harder for the legislature to propose a constitutional amendment than for many initiative proponents to do so. The legislature must achieve a two-thirds vote, a difficult, if not impossible, task on any hotly disputed matter. Initiative sponsors, however, can propose constitutional amendments by obtaining signatures equal to 8% of the last gubernatorial vote, a task that sponsors who have enough money to pay signature gatherers generally have no trouble publishing.").

270. *Id.* at 73–75. These states are Arizona, Arkansas, California, Colorado, Florida, Illinois, Massachusetts, Michigan, Missouri, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, Oregon, and South Dakota.

271. *Id.* at 74 (California and Colorado "have difficult legislative procedures for amending their constitutions but relatively easy initiative procedures.").

272. California Constitution, article II, section 8(b), provides:

> An initiative measure may be proposed by presenting to the Secretary of State a petition that sets forth the text of the proposed statute or amendment to the Constitution and is certified to have been signed by electors equal in number to 5 percent in the case of a statute, and 8 percent in the case of an amendment to the Constitution, of the votes for all candidates for Governor at the last gubernatorial election.

CAL. CONST. art. II, § 8(b).

273. ILL. CONST. art. XIV, § 3; *id.* at art. IV.

274. NEV. CONST. art. 19, § 2; *Supermajority Vote Requirements*, NAT'L CONFERENCE OF STATE LEGISLATURES, http://www.ncsl.org/default.aspx?tabid=16584 (last visited Mar. 3, 2011).

275. *Mississippi*, INITIATIVE & REFERENDUM INST. AT THE UNIV. OF S. CAL.,

voters have the right to initiate constitutional amendments.[277] A proposed initiative, however, must be approved by a supermajority equal to 60% or more of the votes cast.[278] In Montana, to be placed on the ballot, an initiative proposal must be signed by at least 10% of the state's qualified electors, including at least 10% of the qualified electors in each of at least one-half of the counties.[279] In Nebraska, the rules have changed to make the process more difficult; specifically, the number of signatures required to qualify an amendment for the ballot has gone from 10% of those who voted in the last gubernatorial election to 10% of the state's registered voters.[280]

In California, however,

> [i]t is almost as easy for proponents with money to pay for gathering signatures to propose constitutional amendments through the initiative process as to propose statutes. The only difference is that an initiative to amend the Constitution requires the gathering of signatures equal to 8 percent of the previous votes whereas initiative[s proposing] statutes require 5 percent.[281]

"If approved by a simple majority of those voting at the next election, the initiative measure goes into effect on the following day."[282] Thus, California's Constitution can be—and has been—amended at the request of a relatively small percentage of the state's populace and an even smaller percentage of its eligible voters. For

http://iandrinstitute.org/Mississippi.htm (last visited Mar. 3, 2011). Qualifying requirements are so onerous that only two initiatives have qualified for the ballot in the two decades since adoption and both were defeated. *Id.*

276. *The Basic Steps to Do an Initiative in Massachusetts: Statutes and Amendments—Indirect Initiative Process*, INITIATIVE & REFERENDUM INST. AT THE UNIV. OF S. CAL., http://www.iandrinstitute.org/New%20IRI%20Website%20Info/I&R%20Research%20and%20History/I&R%20at%20the%20Statewide%20Level/Basic%20steps/Massachusetts.pdf (last visited Mar. 3, 2011) (requiring one-fourth (1/4) of the total number of signatures).

277. FLA. CONST. art. XI, § 3.

278. *Supermajority Vote Requirements*, *supra* note 274.

279. MONT. CONST. art. XIV, § 9.

280. NEB. CONST. art. III, § 2; Duggan v. Beermann, 515 N.W.2d 788, 792 (Neb. 1994); *The Basic Steps to Do an Initiative in Nebraska: Statutes and Amendments—Direct Initiative Process*, INITIATIVE & REFERENDUM INST. AT THE UNIV. OF S. CAL., http://www.iandrinstitute.org/New%20IRI%20Website%20Info/I&R%20Research%20and%20History/I&R%20at%20the%20Statewide%20Level/Basic%20steps/Nebraska.pdf (last visited Mar. 3, 2011).

281. DUBOIS & FEENEY, *supra* note 252, at 77.

282. George, *supra* note 265, at 1516.

example, after the California Supreme Court determined, in *People v. Anderson*,[283] that capital punishment violated the prohibition against cruel or unusual punishment in the California Constitution, voters overrode the California Supreme Court to make the constitutional infirmity disappear by passing Proposition 17—a constitutional amendment providing that capital punishment was *not* cruel or unusual punishment under the California Constitution.[284] When Proposition 17 passed, California had a population of approximately 20 million people, with about 13.9 million eligible voters. Proposition 17 became part of California law because 5,447,165 people voted in favor of it. Thus, the state's constitution was amended by 39% of the state's eligible voters, or about 27% of the state's overall population.[285] Similarly, and more recently, in 2008, California had 22,153,555 eligible voters. In the November 2008 election, Proposition 8 amended the California Constitution when 7,001,084 voters—32% of the eligible voters—supported the initiative.[286]

Justice Mosk described California's relatively unrestricted initiative process as follows:

> [I]nitiative promoters may obtain signatures for any proposal, however radical in concept and effect, and if they can persuade 51 percent of those who vote at an ensuing election to say "aye," the measure becomes law regardless of how patently it may offend constitutional limitations. . . . [T]he fleeting whims of public opinion and prejudice are controlling over specific constitutional provisions. This seriously denigrates the Constitution as the foundation upon

283. 493 P.2d 880 (Cal. 1972).

284. In *People v. Anderson*, 493 P.2d 880 (Cal. 1972), the California Supreme Court held that the death penalty in California constituted cruel or unusual punishment under the state constitution. Later that year, the California electorate nullified the court's ruling in *Anderson* when it passed an initiative that amended the California constitution to provide that the death penalty does *not* constitute cruel or unusual punishment in California. *Infra* note 333 and accompanying text.

285. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, POPULATION ESTIMATES AND PROJECTIONS 3 (1972), *available at* http://www.census.gov/hhes/www/socdemo/voting/publications/p25/z1972/p25-479.pdf.

286. DEBRA BOWEN, CAL. SEC'Y OF STATE, STATEMENT OF VOTE: NOVEMBER 4, 2008, GENERAL ELECTION 62 (2008), *available at h*ttp://www.sos.ca.gov/elections/sov/2008_general/sov_complete.pdf; *2008 General Election Turnout Rates*, U.S. ELECTIONS PROJECT, http://elections.gmu.edu/Turnout_2008G.html (last updated Oct. 6, 2010).

which our governmental structure is based.

> James Madison, in the Federalist Papers (No. LXXVIII), wrote, inter alia, "The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It, therefore, belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body [or the people acting in a legislative capacity].[287]

The California Constitution has been amended 510 times since its 1879 ratification, frequently by voter initiative.[288] Former Chief Justice Ronald M. George has commented that, as a general matter, there is a disparity between the quality of laws enacted through the initiative process and those enacted through the legislative process.[289]

287. Brosnahan v. Brown, 651 P.2d 274, 312 (Cal. 1982) (Mosk, J., dissenting) ("A democratic government must do more than serve the immediate needs of a majority of its constituency—it must respect the 'enduring general values' of the society. Somehow, a democracy must tenaciously cling to its long-term concepts of justice regardless of the vacillating feelings experienced by a majority of the electorate." *Id.* at 313. (quoting Donald R. Wright, *The Role of the Judiciary*, 60 CALIF. L. REV. 1262, 1267 (1972)).

288. George, *supra* note 265, at 1517 ("Only seventeen amendments to the United States Constitution (in addition to the Bill of Rights, ratified in 1791) have been adopted since that document was ratified in 1788. In contrast, more than five hundred amendments to the current California Constitution have been adopted since ratification of that document in 1879. Although the majority of these amendments were placed before voters by the legislature, many with the most severe impact on the operation of state and local government have been the product of the initiative process."); *see also* Strauss v. Horton, 207 P.3d 48, 103 (Cal. 2009) (explaining that California voters have a long history of amending the state's constitution to include provisions which discriminate against minority groups, such as "Proposition 14 (a state constitutional amendment, adopted in 1964, that repealed a statutory provision barring racial discrimination in the sale or rental of housing)").

289. George, *supra* note 265, at 1518 ("Much of this constitutional and statutory structure has been brought about not by legislative fact-gathering and deliberation, but rather by the approval of voter initiative measures, often funded by special interests. These interests are allowed under the law to pay a bounty to signature-gatherers for each petition signer. Frequent amendments—coupled with the implicit threat of more in the future—have rendered our state government dysfunctional, at least in times of severe economic decline."); *see also Brosnahan*, 651 P.2d at 305 (Bird, C.J., dissenting) ("It is the very essence of the legislative process to deal with and become immersed in laws, existing and proposed. A legislator's professional life is one of passing and amending laws. This daily involvement with the law, combined with ready access to extensive professional research staffs and legal libraries, creates an expertise in the Legislature that is impossible to duplicate, or even approximate, among the electorate at large. As the late Justice Wiley Manuel noted, 'Voters have neither the time nor the resources to mount an in depth investigation of a proposed initiative.' This is not true of legislators. Thus, it makes eminently good sense to attribute to legislators knowledge of the primary purpose and effects of a proposed statutory amendment, even if not explicitly set forth. However, the same cannot be said for the voting public." (citations omitted)).

Because the general public has no corollary to the legislative debate process, which typically includes legislative hearings or committee reports or both, citizens who propose initiatives do not have the benefit of hearing opposing or competing views that might inform their decisions about whether an initiative is necessary and appropriate.[290] Thus, when the constitutionality of a voter-initiated constitutional amendment or statute is challenged in the courts, the absence of any legislative record makes it difficult for courts to determine what the voters' intent was in approving the new law.[291] If state or federal courts conclude that a voter-initiated constitutional amendment or statute violates one or more provisions of the U.S. Constitution, under the Supremacy Clause the law may not be enforced.

The drafting of constitutional amendments or legislation affecting criminal justice policy or procedure requires an in-depth understanding of the impact of such a policy change and of any complex budgetary issues that may flow from that change, as well as an understanding of the importance of preserving the protections guaranteed to criminal defendants under state and federal constitutions. Nevertheless, in California "[w]ithout question, the initiative plays an important role in . . . setting criminal justice policy in particular."[292]

290. Jane S. Schacter, *The Pursuit of "Popular Intent": Interpretive Dilemmas in Direct Democracy*, 105 YALE L.J. 107, 155 (1995) ("Voters often do not read proposed laws, but instead rely on media coverage that is frequently reductive. The laws and the ballot pamphlets explaining them are difficult to comprehend. The obscuring legal jargon in initiatives and the gaps in the public's knowledge about the surrounding legal context hamper voters' ability to weigh and assess proposals. Even when voters read and understand proposed laws, they may fail to anticipate or consider an issue that arises only when the initiative law is later applied to a particular set of facts. These factors leave citizen-lawmakers poorly situated to deliberate about proposed initiatives.").

291. In *People v. Bigelow*, 691 P.2d 994 (Cal. 1984), the California Supreme Court was asked to interpret what the voters intended when they passed the 1978 Death Penalty initiative that included a "financial gain" special circumstance. The Court noted that "[n]o legislative history illumines the adoption of this special circumstance. The ballot arguments and other materials concerning the 1978 initiative do not address the subject." *Id.* at 1006.

292. California Annual Review: Summary: 2008 California Criminal Law Ballot Initiatives, 14 BERKELEY J. CRIM. L. 173, 174 n.7 (2009) (citing CTR. FOR GOVERNMENTAL STUDIES, DEMOCRACY BY INITIATIVE: SHAPING CALIFORNIA'S FOURTH BRANCH OF GOVERNMENT (2d ed. 2008), *available at* http://www.cgs.org/index.php?option=com_content&view=article&id=164:PUBLICATIONS&catid=39:all_pubs&a mp;Itemid=72).

b. No subject-matter restrictions on California initiatives

Voter-initiated constitutional amendments and statutes in California also create fiscal challenges for the Legislature because appropriations required to fund a voter initiative measure are not subject to the restrictions that apply to legislative appropriations, which must be passed by a two-thirds majority of each house[293] and are subject to veto by the governor.[294] Voters are not asked to determine how, or from what source, an initiative measure will be funded, or even whether there is any funding available in the state budget to pay for the costs associated with implementing a proposed new law.[295] Thus, the California process permits the adoption of initiatives that the state may not be able to afford and, at the same time, prohibits the Legislature and the Governor from amending, repealing, or vetoing a costly statute or constitutional change.[296] One California legislator has commented that "[t]he initiative process has become more powerful than the legislature in this state. A big part of what we do here is clean up after ballot initiatives. You begin to feel like the guy who follows the parade and sweeps up after the elephants!"[297] As another commentator expressed it:

California's problems are those of "direct democracy." The

293. Proposition 13 amended the California Constitution to require a two-thirds majority vote in the Legislature to raise statewide taxes. CAL. CONST. art. XIIIA, §3. However, Proposition 98 mandates that a percent of the state's General Fund be allocated for to K–14 schools. Christopher Witko, *The California Legislature and the Decline of Majority Rule*, *in* REMAKING CALIFORNIA: RECLAIMING THE PUBLIC GOOD 60, 66–67 (R. Jeffrey Lustig ed. 2010).

294. DUBOIS & FEENEY, *supra* note 252, at 83.

295. *Id.*

296. In *Strauss v. Horton*, 207 P.3d 48 (Cal. 2009), the California Supreme Court explained:

> As we have seen, when the initiative power was added to the California Constitution in 1911, the relevant provision specified that the initiative afforded the people authority to propose and adopt statutes and "amendments to the constitution." (Cal. Const., former art. IV, § 1, as adopted Oct. 10, 1911, now art. II, § 8, subd. (a), and art. XVIII, § 3.) The provision placed no subject-matter limitation on the initiative process and did not exempt any provision of the existing Constitution from amendment through the initiative process. During the nearly 100 years since adoption of the statewide initiative process in California, a number of constitutional amendments have been adopted that impose some restrictions on the initiative process in this state (see Cal. Const., art. II, § 8, subds. (d), (e), (f)), but no provision purports to place any section or segment of the state Constitution off-limits to the initiative process or to preclude the use of the initiative with respect to specified subjects.

Id. at 109–10.

297. KENNETH P. MILLER, DIRECT DEMOCRACY AND THE COURTS, at vii (2009), *available at* http://assets.cambridge.org/97805217/65640/frontmatter/9780521765640_frontmatter.pdf.

> state's laws are shaped by plebiscites to a degree unmatched outside of Venezuela. In voting on "propositions," which sometimes touch on detailed budgetary matters, citizens of the Golden State have stood up consistently for two principles: the state should provide vastly more services to its citizens, and citizens should pay vastly less to the state. [298]

Indeed, "[a recent] survey by the Public Policy Institute of California found that, overwhelmingly, Californians want themselves—not the governor or the Legislature—to be in charge of big budget matters." [299] Despite this strong sentiment, "[o]nly 6% of Californians [polled in the survey] could identify both the biggest revenue source and the biggest beneficiary of state money." [300] Perhaps, in part, because voters are not charged with or held directly accountable for determining how a proposed piece of legislation fits into a state's overall budget, 10 of the 24 states with voter ballot initiatives "place restrictions on the extent to which taxes can be levied or appropriations made through the initiative process." [301] California has no such restrictions. [302]

c. No amendment or repeal by Legislature

Perhaps the most serious flaw in California's initiative process is that it prohibits the Legislature from amending or repealing voter-initiated legislation, even when the cost of funding a voter-initiated law far exceeds what the taxpayers were told in the Voter Information Guide before they cast their votes. [303]

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298. Christopher Caldwell, *California's Fiscal Charade*, FIN. TIMES, July 24, 2009, http://www.ft.com/cms/s/0/27fc634c-7879-11de-bb06-00144feabdc0.html#axzz1GgSkEn8j.

299. Cathlene Decker, *Public Ignorance Bites California in the Wallet*, L.A. TIMES, Jan. 31, 2010, at A31.

300. *Id.* at A35.

301. DUBOIS & FEENEY, *supra* note 252, at 81, tbl.25, 83, n.23 (listing the subject-matter restrictions other states have on the voter initiative processes).

302. Jessica A. Levinson & Robert M. Stern, *Ballot Box Budgeting in California: The Bane of the Golden State or an Overstated Problem?*, 37 HASTINGS CONST. L.Q. 689, 690 (2010) (proposing that "all [California] measures calling for increased funding identify funding sources, . . . measures that reduce revenue should identify which program(s) will be cut, . . . [and w]hen making fiscal policy, whether it is by initiative or by legislative measure, the consequences of those decisions must be made clear to the voters.")

303. DUBOIS & FEENEY, *supra* note 252, at 78–81.

> An important policy question is whether the initiative statutes should be treated any differently than statutes adopted by the legislature. While it may be reasonable to

Of the 24 states that allow citizen initiatives to make law outside of the traditional legislative process,[304] *only in California is the state Legislature expressly prohibited from amending a voter-initiated staute* "unless the initiative establishing the law expressly provided for amendment by the legislature."[305] This rule applies whether an initiative is statutory or is a constitutional amendment.[306] Unlike in California, 13 of the 24 states with initiative processes—Colorado, Florida, Idaho, Illinois, Maine, Massachusetts, Missouri, Montana, Ohio, Oklahoma, Oregon, South Dakota, Utah, and the District of Columbia—have a process whereby "the legislature is free to amend or repeal an initiated measure at any time."[307] In nine states—Alaska,

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> protect statutes enacted by the people through the initiative process from immediate change by the legislature, it seems highly undesirable to have a category of "super statutes" that are very difficult to change without a vote of the people. As the circumstances upon which statutes are based change, the legislature should have the power to make changes. Aside from the improvement that such power would bring in the legislature's ability to manage the affairs of the state, giving the legislature this kind of authority would reduce the number of ballot measures by eliminating the need to have trivial changes in old initiatives approved by the people.

Id. at 80 (footnotes omitted) (citations omitted).

304. *State-by-State List of Initiative and Referendum Provisions*, INITIATIVE AND REFERENDUM INST. AT THE UNIV. OF S. CAL., http://www.iandrinstitute.org/statewide_i%26r.htm (last visited Mar. 3, 2011).

305. *Limiting the Legislature's Power to Amend and Repeal Initiated Statutes*, NAT'L CONFERENCE OF STATE LEGISLATURES, http://www.ncsl.org/default.aspx?tabid=16539 (last visited Apr. 9, 2011); CTR. FOR GOVERNMENTAL STUDIES, *supra* note 292, at 114 ("No other state in the nation carries the concept of initiatives as 'written in stone' to such lengths as to forbid their legislatures from updating or amending initiative legislation.").

Article II, section 10, of the California Constitution provides:

> (a) An initiative statute or referendum approved by a majority of votes thereon takes effect the day after the election unless the measure provides otherwise. If a referendum petition is filed against a part of a statute the remainder shall not be delayed from going into effect.
>
> (b) If provisions of 2 or more measures approved at the same election conflict, those of the measure receiving the highest affirmative vote shall prevail.
>
> (c) *The Legislature* may amend or repeal referendum statutes. It *may amend or repeal an initiative statute by another statute that becomes effective only when approved by the electors unless the initiative statute permits amendment or repeal without their approval.*
>
> (d) Prior to circulation of an initiative or referendum petition for signatures, a copy shall be submitted to the Attorney General who shall prepare a title and summary of the measure as provided by law.
>
> (e) The Legislature shall provide the manner in which petitions shall be circulated, presented, and certified, and measures submitted to the electors.

CAL. CONST. art. II, § 10 (emphasis added).

306. *See* DUBOIS & FEENEY, *supra* note 252, at 80.

307. *Limiting the Legislature's Power to Amend and Repeal Initiated Statutes*, *supra* note 305; *see also State-by-State List of Initiative and Referendum Provisions*, *supra* note 304.

Arizona, Arkansas, Michigan, Nebraska, Nevada, North Dakota, Washington, and Wyoming—the state legislature's power to amend or repeal a statute passed by an initiative is subject to certain restrictions, such as waiting periods after passage of a voter initiative before legislative amendment, or the requirement that a legislative amendment be passed by a supermajority, or some combination of those limitations.[308]

The provision in the California Constitution that prohibits the Legislature from amending an initiative statute unless the initiative authorizes the amendment reflects the citizenry's longstanding and "profound, deeply rooted historical distrust of statewide governing institutions."[309]

308. *Limiting the Legislature's Power to Amend and Repeal Initiated Statutes*, *supra* note 305. Alaska Constitution, article XI, section 6, provides that an initiated measure "may be amended at any time" by a majority vote of the legislature, but Alaska law prohibits repeal of initiated measures within two years. ALASKA CONST. art. XI, § 6. Arizona Constitution, article IV, part 1, section 1(6)(C) and section 1(14), provide that the legislature may amend an initiated measure by a vote of "at least three-fourths of the members of each house of the legislature, by a roll call of ayes and nays, vote to amend such measure" so long as "any measure that supersedes, in whole or in part, any initiative measure approved by a majority of the votes cast thereon or any referendum measure decided by a majority of the votes cast thereon . . . furthers the purposes of the initiative or referendum measure." ARIZ. CONST. art. IV, part 1, §§ 1(6)(C), 1(14). Arkansas Constitution, amendment 7, provides that "[n]o measure approved by a vote of the people shall be amended or repealed by the General Assembly or by any City Council, except upon a yea and nay vote on roll call of two-thirds of all the members elected to each house of the General Assembly." ARK. CONST. amend. 7. Michigan Constitution, article II, section 9, provides that laws "initiated or adopted by the people" may be amended or repealed in any manner "provided in the initiative measure or by three-fourths of the members elected to and serving in each house of the legislature." MICH. CONST. art. II, § 9. Nebraska Constitution, article III-2 provides that "[t]he Legislature shall not amend, repeal, modify, or impair a law enacted by the people by initiative, contemporaneously with the adoption of this initiative measure or at any time thereafter, except upon a vote of at least two-thirds of all the members of the Legislature." NEB. CONST. art. III-2. Nevada Constitution, article XIX, section 2, part 3, provides that "[a]n initiative measure so approved by the voters shall not be amended, annulled, repealed, set aside or suspended by the Legislature within 3 years from the date it takes effect." NEV. CONST. art. XIX, § 2, part 3. North Dakota Constitution, article III, section 8, provides that "[a] measure approved by the electors may not be repealed or amended by the legislative assembly for seven years from its effective date, except by a two-thirds vote of the members elected to each house." N.D. CONST. art. III, § 8. Washington Constitution, article II, section 1(c) provides that the Washington State Legislature can repeal or amend an initiative by a two-thirds vote of each house during the first two years of enactment and by majority vote thereafter. WASH. CONST. art. II, § 1(c). Wyoming Constitution, article III, section 52(f) provides that "[a]n initiated law . . . is not subject to veto, and may not be repealed by the legislature within two (2) years of its effective date[, but] may be amended at any time." WYO. CONST. art. III, § 52(f).

309. Karl Manheim & Edward P. Howard, *Symposium on the California Initiative Process: A Structural Theory of the Initiative Power in California*, 31 LOY. L.A. L. REV. 1165, 1197 n.213 (1998) (citing CAL. CONST. art. II, § 10(c)) ("The Legislature . . . may amend or repeal an initiative statute by another statute that becomes effective only when approved by the electors unless the initiative statute permits amendment or repeal without their approval.").

> In the early 1900s when the initiative [process] was first adopted, there were reasons to fear that legislatures might do all they could to sabotage measures adopted through the initiative process. In actual practice, however, *legislative sabotage has not proved to be a major problem, even in the states where the legislature can easily amend or repeal initiative measures*." [310]

Thus, one could argue that this feature of California's initiative scheme only succeeds in unnecessarily thwarting the Legislature's ability to amend voter-initiated statutes that have not fulfilled their intended missions or are too costly.

d. The sheer volume of voter initiatives in California

California's initiative system also differs from other states' in that no other state puts as many issues before its electorate. [311] As every good citizen of the Golden State knows, California voters have a great deal of studying to do if they are to understand the purposes and effects of the numerous propositions on a given ballot. Since the inception of the voter initiative process in 1911, "the people of California have used the ballot measure process more than any other state to create the laws by which they are governed." [312] Until the 1970s, California's use of the ballot initiative followed the national trend. In the 1970s,

> the state's initiative use began to accelerate well beyond national averages. California has since become the national leader in initiative use. . . . In 1990 alone, eighteen initiatives found their way onto the ballot, twice the total number of California initiatives for the entire 1960s. That record was surpassed by the March 2000 primary election which included twenty state [initiative] propositions. [313]

"Because most voters have limited time, attention, and interest in politics, and because the political realm presents people with complex choices, voter competence depends on the ability to use

310. DUBOIS & FEENEY, *supra* note 252, at 80 (emphasis added).

311. *See id.* at 74 tbl. 19.

312. L. Tobe Liebert, *Researching California Ballot Measures*, 90 LAW LIBR. J. 27, 28 (1998).

313. Becky Kruse, *The Truth in Masquerade: Regulating False Ballot Proposition Ads Through State Anti-False Speech Statutes*, 89 CALIF. L. REV. 129, 137 (2001).

particular pieces of available information as shortcuts for decision making."[314] One of the most important "shortcuts" used by California voters is the Voter Information Guide mailed to all registered voters in the state.[315] Most voters rely heavily on the Voter Information Guide, which includes the Legislative Analyst's fiscal impact statements, in assessing whether the state can afford to adopt and implement new legislation.[316] The statement of fiscal impact prepared by the Legislative Analyst is "for the purpose of suggestion only and shall not have any binding effect on the proponents of the initiative measure."[317]

California Election Code section 9005 provides

> (a) The Attorney General, in preparing a circulating title and summary for a proposed initiative measure, shall,

314. Elizabeth Garrett, *Voting with Cues*, 37 U. RICH. L. REV. 1011, 1012–13 (2003).

315. California Election Code section 9084 requires that the voter ballot pamphlets include

> (a) A complete copy of each state measure; (b) A copy of the specific constitutional or statutory provision, if any, that each state measure would repeal or revise; (c) A copy of the arguments and rebuttals for and against each state measure; (d) A copy of the analysis of each state measure; (e) Tables of contents, indexes, art work, graphics, and other materials that the Secretary of State determines will make the ballot pamphlet easier to understand or more useful for the average voter; (f) A notice, conspicuously printed on the cover of the ballot pamphlet, indicating that additional copies of the ballot pamphlet will be mailed by the county elections official upon request; (g) A written explanation of the judicial retention procedure as required by Section 9083; (h) The Voter Bill of Rights pursuant to Section 2300; (i) If the ballot contains an election for the office of United States Senator, information on candidates for United States Senator. A candidate for United States Senator may purchase the space to place a statement in the state ballot pamphlet that does not exceed 250 words. The statement may not make any reference to any opponent of the candidate. The statement shall be submitted in accordance with timeframes and procedures set forth by the Secretary of State for the preparation of the state ballot pamphlet.; (j) If the ballot contains a question on the confirmation or retention of a justice of the Supreme Court, information on justices of the Supreme Court who are subject to confirmation or retention.; (k) If the ballot contains an election for the offices of President and Vice President of the United States, a notice that refers voters to the Secretary of State's Internet Web site for information about candidates for the offices of President and Vice President of the United States.

CAL. ELEC. CODE § 9084 (West 2009).

316. DUBOIS & FEENEY, *supra* note 252, at 165–69. Pursuant to California Government Code § 12172(b) (2010), the Legislative Analyst is required to

> furnish the Secretary of State with a statement of fiscal impact with respect to the initiative measure within 25 working days after being requested to do so . . . . In the preparation of the statement of fiscal impact, the Legislative Analyst may use the fiscal estimate or the opinion prepared pursuant to Section 9005 of the Elections Code.

CAL. GOV'T CODE § 12172(b) (West 2010).

317. GOV'T § 12172(b).

> in boldface print, include in the circulating title and summary either the estimate of the amount of any increase or decrease in revenues or costs to the state or local government, or an opinion as to whether or not a substantial net change in state or local finances would result if the proposed initiative is adopted;
>
> (b) The estimate as required by this section shall be made jointly by the Department of Finance and the Joint Legislative Budget Committee, who shall deliver the estimate to the Attorney General so that he or she may include the estimate in the circulating title and summary prepared by him or her;
>
> (c) The estimate shall be delivered to the Attorney General within 25 working days from the date of receipt of the final version of the proposed initiative measure from the Attorney General, unless, in the opinion of both the Department of Finance and the Joint Legislative Budget Committee, a reasonable estimate of the net impact of the proposed initiative measure cannot be prepared within the 25-day period. In the latter case, the Department of Finance and the Joint Legislative Budget Committee shall, within the 25-day period, give the Attorney General their opinion as to whether or not a substantial net change in state or local finances would result if the proposed initiative measure is adopted;
>
> (d) A statement of fiscal impact prepared by the Legislative Analyst pursuant to subdivision (b) of Section 12172 of the Government Code may be used by the Department of Finance and the Joint Legislative Budget Committee in the preparation of the fiscal estimate or the opinion.[318]

Despite the summary nature of the Voter Information Guide, a significant time commitment is required to study the issues presented therein. For example, "the 1990 [ballot] pamphlet was 224 pages long."[319] One California study performed in 2000 showed that it

318. ELEC. § 9005. The Department of Finance is part of the executive branch of California's government.

319. Schacter, *supra* note 290, at 142 (discussing California Voter Information Guides). One

would take the average person five hours to read the Voter Information Guide, which averages about 150 pages. This does not include time spent reflecting on the issues or attempting to decipher the initiatives' legalese.[320]

"Most Californians (84%) rank the Voter Information Guide mailed to voters by the Secretary of State as a useful information source in deciding how to vote on state initiatives, . . . [m]ore than half say the Voter Information Guide is 'very useful.'"[321] In another survey, "77.5%[] [of respondents indicated that they] find valuable the legislative analyst's estimate of the fiscal effect of a measure."[322] Despite voters' heavy reliance on the fiscal impact statements in the Voter Information Guide, those statements are not always precise and are subject to manipulation.[323]

As discussed below, the fiscal impact statements do not include any analysis of the proposed initiatives' cumulative effect on the "states' fiscal policy with regard to taxing and spending."[324] It thus appears that voters are relying on the fiscal impact statements in casting their votes, even though those statements are based upon nonbinding estimates as to what the fiscal impact of the new laws could be, without any reference to the cumulative or potential costs associated with a given proposition or initiative.[325]

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study concluded that to read the ballot measures on the ballot between 1970 and 1979 in full, "a voter in California . . . would have needed to read at the sixteenth to eighteenth grade level (bachelor's degree plus two years)." *Id.* at 140.

320. Justin Henderson, Comment, *The Tyranny of the Minority: Is It Time to Jettison Ballot Initiatives in Arizona?*, 39 ARIZ. ST. L.J. 963, 981–82 (2007).

321. SILVA, *supra* note 260, at 24. "By contrast, one in four rank news stories and websites as very useful, and only 11 percent say that paid political commercials are very useful as information sources on initiatives." *Id.*

322. DUBOIS & FEENEY, *supra* note 252, at 168.

323. California Annual Review: Summary: 2008 California Criminal Law Ballot Initiatives, *supra* note 292 (explaining that the Attorney General's Official Summary, including the Legislative Analyst Office's assessment of fiscal effects, of 2000's Proposition 36 which would "'[r]equire[] probation and drug treatment programs, not incarceration, for [various drug offenses]'" only mentioned that the initiative would "'[a]ppropriate[] treatment funds through 2005–2006'" but "'did not include a dollar figure in terms of costs, despite the fact that Proposition 36 unequivocally appropriated sixty million dollars for the first year following its enactment and one-hundred-twenty million dollars thereafter . . . . The summary of likely fiscal effects *only* mentioned the *considerable savings* that would result from decreased prison populations.'" (alterations in original) (first emphasis added)).

324. Levinson & Stern, *supra* note 302, at 696.

325. For example, "[a]lthough [California's three strikes law] was not debated or understood by voters as a budget measure, it had profound budgetary consequences, requiring many new prisons and jails be built and maintained without providing any funding for them. Of course, the

2. Death Penalty Initiatives in California

The history of California's current death penalty scheme began on February 17, 1972, when the California Supreme Court held that the death penalty constituted cruel or unusual punishment under the state constitution.[326] Later that year in *Furman v. Georgia*,[327] the U.S. Supreme Court held that death penalty statutes that allowed for unguided jury discretion in capital cases violated the Eighth Amendment's prohibition against cruel and unusual punishment as applied to the states through the Fourteenth Amendment of the U.S. Constitution.[328]

a. The 1972 initiative amending the California Constitution

On November 7, 1972, nine months after the California Supreme Court decision in *Anderson*,[329] and four months after *Furman*, the California electorate nullified *Anderson* by passing Proposition 17, an initiative that amended the California Constitution

money for prison expansion and operations had to come from somewhere, so it was taken out of other public services, with more vulnerable constituents less able to defend themselves by sponsoring initiatives of their own." William M. Lunch, *Budgeting by Initiative: An Oxymoron*, 34 WILLAMETTE L. REV. 663, 666 (1998).

326. People v. Anderson, 493 P.2d 880, 899 & n.45 (Cal. 1972) ("No longer can it be said that capital punishment is not cruel *per se*, for the whole current of law for centuries justifies its infliction. Although world-wide acceptance of capital punishment at the turn of the century may then have warranted resolving doubts as to its cruelty in favor of its constitutionality, the current has now reversed. It is now, literally, an unusual punishment among civilized nations . . . . Inasmuch as today's decision is fully retroactive, any prisoner now under a sentence of death, the judgment as to which is final, may file a petition for writ of habeas corpus in the superior court inviting that court to modify its judgment to provide for the appropriate alternative punishment of life imprisonment or life imprisonment without possibility of parole specified by statute for the crime for which he was sentenced to death."). All prisoners on California's death row had their sentences commuted to life in prison as a result of the *Anderson* opinion.

See generally John W. Poulos, *Capital Punishment, the Legal Process, and the Emergence of the Lucas Court in California*, 23 U.C. DAVIS L. REV. 157, 169 (1990) ("Dissatisfied with the California Legislature's response to demands for the abolition of capital punishment and for further reform of capital procedures, and undoubtedly encouraged by the success of the civil rights movement and the criminal law revolution, reformers began to raise constitutional challenges to both capital punishment and the procedures used to impose it." (citing McGautha v. California, 402 U.S. 183 (1971); People v. McGautha, 452 P.2d 650 (Cal. 1969); *In re* Anderson, 447 P.2d 117 (Cal. 1968); People v. Seiterle, 420 P.2d 217 (Cal. 1966); People v. Duncan, 334 P.2d 858 (Cal. 1959)).

327. 408 U.S. 238 (1972).

328. Furman v. Georgia, 408 U.S. 238, 239–40 (1972) ("[T]he imposition and carrying out of the death penalty in [cases where it is inflicted discriminatorily upon members of racial minorities] constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.").

329. 493 P.2d 880 (1972).

to provide that the death penalty is *not* cruel or unusual punishment.[330] In the summary explaining the initiative in the Voter Information Guide, next to the "Yes" or "No" boxes, voters were informed of the following as to costs: "Fiscal impact: None."[331] The Legislative Analyst's cost analysis for Proposition 17 explained that "[t]he main purpose of this initiative is to maintain the statutory and constitutional authority for imposition of the death penalty as it existed prior to February 17, 1972. The adoption of this initiative does not involve any significant direct added state or local cost or revenue consideration."[332] Thus, Proposition 17 amended the California Constitution when it was approved by 67.5% of the voters in that election, or 40% of all eligible voters in the state at that time.[333]

b. The 1973 statute: Introduction of 10 "special circumstances"

"In response to the passage of Proposition 17, and in light of the intervening *Furman* decision apparently holding discretionary death penalty schemes unconstitutional, [in 1973] the California legislature adopted a mandatory death penalty to be applied upon proof of first degree murder and one of ten special circumstances."[334] To be death-

330. CAL. SEC'Y OF STATE, GENERAL ELECTION: PROPOSED AMENDMENTS TO CONSTITUTION 42 (1972), *available at* http://traynor.uchastings.edu/ballot_pdf/1972g.pdf. The Voter Information Guide's summary explained that Proposition 17

> [a]mends [the] California Constitution to provide that all state statutes in effect February 17, 1972 requiring, authorizing, imposing, or relating to [the] death penalty are in full force and effect, subject to legislative amendment or repeal by statute, initiative or referendum; and that [the] death penalty provided for under those state statutes shall not be deemed to be, or constitute, infliction of cruel or unusual punishments within the meaning of California Constitution, Article I, Section 6, nor shall such punishment for such offenses be deemed to contravene any other provision of [the] California Constitution. *Fiscal Impact: None*.

Id. (emphasis added).

331. *Id.*

332. *Id.*

333. *California Ballot Propositions (1911–Present)*, HASTINGS LAW LIBRARY, http://library.uchastings.edu/cgi-bin/starfinder/0?path=calprop.txt&id=webber&pass=webber&OK=OK ("Yes: 5,447,165 (67.5%); No: 2,617,514 (32.5%)"). There were 13,322,000 eligible voters in November 1972. CAL. SEC'Y OF STATE, HISTORICAL VOTER REGISTRATION AND PARTICIPATION IN STATEWIDE GENERAL ELECTIONS 1910–2009, at 1 (2009), *available at* http://www.sos.ca.gov/elections/sov/historical-voter-reg/hist-voter-reg-and-part-general-elections-1910-2009.pdf.

334. Steven F. Shatz & Nina Rivkind, *The California Death Penalty Scheme: Requiem for* Furman*?*, 72 N.Y.U. L. REV. 1283, 1307–09 (1997) (citing 1973 Cal. Stat. 719, §§ 1–5; Rockwell v. Superior Court, 556 P.2d 1101, 1116 (Cal. 1976); 1977 Cal. Stat. 316, § 9). Unlike some

eligible, a defendant had to first be convicted of first degree murder,

researchers who consider all felony murder special circumstances—regardless of how long the list of qualifying felony murders is—as just *one* "special circumstance," authors Steven F. Shatz and Nina Rivkind explained in their article *The California Death Penalty Scheme: Requiem for* Furman*?* that

> for purposes of 'counting' special circumstances, the various felony murder special circumstances [should be] counted separately, and the 'prior murder' and 'multiple murder' circumstances [should] also [be] counted separately . . . [because i]n assessing the narrowing function of the special circumstances, it is the number of distinct types of murderers, not the statutory denomination or arrangement of the special circumstances, that is significant.

Id. at 1307 n.141 (citing Poulos, *supra* note 326).

Because we are concerned in the present Article with reviewing the "expansion" of the scope and reach of the death penalty in California, we will use the counting method described and employed by Shatz and Rivkind. Thus, as amended by the 1973 Act, § 190.2 made the following 10 crimes death-eligible:

> [1] (a) The murder was intentional and was carried out pursuant to an agreement with the defendant. "An agreement," as used in this subdivision, means an agreement by the person who committed the murder to accept valuable consideration for the act of murder from any person other than the victim [*financial gain*].
> (b) The defendant personally committed the act which caused the death of the victim and any of the following additional circumstances exist:
> [2] (1) The victim is a *peace officer*, as defined in Section 830.1, subdivision (a) of Section 830.2, or subdivision (b) of Section 830.5, who, while engaged in the performance of his duty, was intentionally killed, and the defendant knew or reasonably should have known that such victim was a peace officer engaged in the performance of his duties.
> [3] (2) The murder was willful, deliberate and premeditated and the victim was a *witness to a crime* who was intentionally killed for the purpose of preventing his testimony in any criminal proceeding.
> (3) The murder was willful, deliberate and premeditated and was committed during the commission or attempted commission of any of the following crimes [*felony murder—5 felonies included*]:
> [4] (i) *Robbery*, in violation of Section 211.
> [5] (ii) *Kidnapping*, in violation of Section 207 or Section 209. Brief movements of a victim which are merely incidental to the commission of another offense and which do not substantially increase the victim's risk of harm over that necessarily inherent in the other offense do not constitute kidnapping within the meaning of this paragraph.
> [6] (iii) *Rape* by force or violence, in violation of subdivision (2) of Section 261; or by threat of great and immediate bodily harm, in violation of subdivision (3) of Section 261.
> [7] (iv) The performance of *lewd or lascivious acts upon the person of a child under the age of 14*, in violation of Section 288.
> [8](v) *Burglary*, in violation of subdivision (1) of Section 460, of an inhabited dwelling house entered by the defendant with an intent to commit grand or petit larceny or rape.
> (4) The defendant has in this [proceeding been convicted] [9 *multiple murder*]
> or in any prior proceeding been convicted [10 *prior murder*] of more than one offense of murder of the first or second degree.
> For the purpose of this paragraph an offense committed in another jurisdiction which if committed in California would be punishable as first or second degree murder shall be deemed to be murder of the first or second degree.

1973 Cal. Stat. 719, 1–5 (codified as amended at CAL. PENAL CODE § 190.2 (West 1979)) (emphasis added).

and then one or more of the ten enumerated "special circumstances" charged in the accusatory pleading had to be found true beyond a reasonable doubt.[335]

In 1976, in *Woodson v. North Carolina*,[336] the U.S. Supreme Court held that mandatory death penalty statutes are unconstitutional because "in capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensible part of the process of inflicting the penalty of death."[337] On December 7, 1976, the California Supreme Court held that California's mandatory scheme in the 1973 statute was unconstitutional because it made death a mandatory punishment for first degree murders encompassed by the special circumstances, without consideration of evidence of

335. Shatz & Rivkind, *supra* note 334, at 1307–09. See also *Rockwell v. Superior Court*, 556 P.2d 1101, 1104 n.1 (Cal. 1976), explaining that:

> [s]ection 190.1 directed that a separate trial on the question of "special circumstances" follow the determination of guilt:
>
> > In any case in which the death penalty is to be imposed as the penalty for an offense only upon the finding of the truth of the special circumstances enumerated in Section 190.2, the guilt or innocence of the person charged shall first be determined without a finding as to penalty. In any such case the person charged shall be represented by counsel. If such a person has been found guilty of such an offense, and has been found sane on any plea of not guilty by reason of insanity, and any one or more of the special circumstances enumerated in Section 190.2 have been charged, there shall be further proceedings on the issue of the special circumstances charged. In any such proceedings the person shall be represented by counsel. The determination of the truth of any or all of the special circumstances charged shall be made by the trier of fact on the evidence presented. In case of a reasonable doubt whether a special circumstance is true, the defendant is entitled to a finding that it is not true. The trier of fact shall make a special finding that each special circumstance charged is either true or not true. . . .
> >
> > If the trier of fact finds, as to any person convicted of any offense under Section 190 requiring further proceedings that any one or more of the special circumstances enumerated in Section 190.2 as charged is true, the defendant *shall suffer the penalty of death*, and neither the finding that any of the remaining special circumstances charged is not true, nor if the trier of fact is a jury, the inability of the jury to agree on the issue of the truth or untruth of any of the remaining special circumstances charged, shall prohibit the imposition of such penalty . . . ."

Rockwell v. Superior Court, 556 P.2d 1101, 1116 (Cal. 1976); Poulos, *supra* note 326, at 173–97 (discussing California statutes, initiatives, and cases dealing with capital punishment and special circumstances requirements).

336. 428 U.S. 280 (1976).

337. Woodson v. North Carolina, 428 U.S. 280, 304 (1976) (internal citation omitted).

mitigating circumstances or a defendant's personal characteristics.[338]

c. The 1977 statute: 12 more death-eligible crimes

In January 1977, Governor Jerry Brown addressed the California Legislature and "said [that] he would refuse, as a matter of conscience, to sign any bill re-establishing the death penalty in California."[339] As one news account explained

> If members of the state legislature decide to push through a death penalty bill they will need to be able to muster a two thirds majority to overcome Mr. Brown's veto, and with the Democrats in control of both houses that may not be easy. As a precaution, therefore, the advocates of capital punishment have promptly begun drafting a popular initiative for the California ballot to coincide with the next . . . election.
>
> Recent opinion polls suggest that more than two thirds of California's voters want the death penalty restored in some form or other. So in making this stand, Mr. Brown is taking a risk.[340]

In response to Governor Brown's address,

> [s]upporters of the death penalty said they expect to take the issue directly to voters in another initiative. But [Governor] Brown's declaration that he would veto a capital punishment bill was praised by both foes and supporters of the death penalty. 'I am very pleased that he has been forthright in making his views known,' said Republican Sen. George Deukmejian, the legislature's leading advocate of the death penalty.[341]

In May 1977, the California Legislature passed legislation intended to restore capital punishment in California in compliance

338. Rockwell v. Superior Court, 556 P.2d 1101, 1116 (Cal. 1976).

339. *California; Brown Still Astonishes*, ECONOMIST, Jan. 29, 1977, at 34.

340. *Id.* As an interesting side note, in the same address to the California Legislature, Governor Brown predicted that California would have a "budget surplus of $1.7 billion by next July, half of which [was] already in hand." *Id.*

341. Doug Willis, ASSOCIATED PRESS, Jan. 6, 1977 "Gov. Edmund Brown Jr. said Thursday he will veto any death penalty bill sent to him by the California Legislature." *Id.* "Democratic Assembly Speaker Leo McCarthy, a death penalty foe, said, 'Knowing full well that the majority of the public is in favor of the death penalty, the statement he just made was one of tremendous courage.'" *Id.*

with the new requirements recently announced in the death penalty cases decided by the U.S. Supreme Court.[342] On May 27, 1977, four hours after the bill reached his desk, Governor Brown vetoed it.[343] The California Senate initiated the override process on June 23, 1977, by voting 27–12 to reject the Governor's veto.[344] On August 11, 1977, the California Assembly overrode Governor Brown's veto and enacted a new death penalty law.[345] "Each vote margin was exactly the two-thirds majority needed to override."[346] It was "the first time since Brown had taken office in 1975 that the [California] [L]egislature had successfully overridden a [Brown] veto and only the third time in 31 years that a California governor had been overridden."[347] In response, the Governor said, "This is their view. I don't agree with it, but as long as I'm governor, I will carry out my oath of office."[348]

The 1977 statute reestablished the death penalty by restoring a separate penalty phase of capital trials and returning discretion to the jury, but limiting that discretion by requiring that the jury first find one of 12 special circumstances existed beyond a reasonable doubt to make a convicted first degree murderer death-eligible.[349] The special circumstances, which were defined in the 1977 statute and contained in Penal Code section 190.2, were substantially similar to the special circumstances in the 1973 statute; they both made the following

342. Roberts v. Louisiana, 428 U.S. 325 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976); ASSOCIATED PRESS, May 27, 1977.

343. *Death Row Population Decreases Reported*, FACTS ON FILE, WORLD NEWS DIGEST, Aug. 6, 1977, 593, at F3; ASSOCIATED PRESS, May 27, 1977. ("'Statistics can be marshaled and arguments propounded but at some point each of us must decide for himself what sort of future he would want,' Brown said in a brief veto message. 'For me, this would be a society where we do not attempt to use death as a punishment.'")

344. *Death Penalty Veto Overridden in Calif.*, FACTS ON FILE WORLD NEWS DIGEST, Aug. 27, 1977, 652, at C2.

345. Bob Egelko, ASSOCIATED PRESS, Aug. 11, 1977.

346. *Death Penalty Veto Overridden in Calif.*, *supra* note 344.

347. *Id.*

348. *Id.*; *see also California; Politics of the Death Penalty*, ECONOMIST, Aug. 20, 1977, at 31 ("Several members [of the California Legislature] acknowledged that they overrode their own consciences as well, and voted for the death penalty because their constituents favoured it. In fact the final debate last week turned primarily on the philosophical point of whether a legislator should heed his own conscience or feel obliged to carry out the public's wishes. Demand for the death penalty has been overwhelming in recent opinion polls.").

349. The principal authors of the measure were Republican Senator George Deukmejian and Democrat Assemblyman Alister McAlister who were rival candidates for the Attorney General's post in the upcoming election. *California; Politics of the Death Penalty*, *supra* note 348, at 31.

crimes death-eligible: (1) murder for financial gain, or contract killings; (2) killing of a peace officer; (3) killing a witness; (4) multiple murders; (5) murder by one who has killed in the past;[350] and murder committed during one of five enumerated felonies—(6) robbery, (7) kidnapping, (8) rape, (9) lewd or lascivious act upon a minor under the age of 14, and (10) burglary.[351] The 1977 Act added two new special circumstances to the list: (11) murder by means of destructive device or explosive and (12) murder by torture, for a total of 12 death-eligible crimes.[352] Additionally, while the 1973 statute had limited capital punishment to defendants who "personally committed the act which caused the death of the victim,"[353] the 1977 statute expanded the scope of the special circumstances to make accomplices death-eligible if they were personally present and "physically" aided in the commission of the act or acts causing death and acted with intent.[354] The 1977 statute brought California's death penalty law into conformity with the requirements of *Woodson v. North Carolina*[355] by creating sentencing standards known as aggravating and mitigating factors,[356] and requiring that the trier of fact, "[a]fter having heard and received all of the evidence . . . take into account and be guided by the aggravating and mitigating circumstances" and determine whether the penalty shall be death or life imprisonment without the possibility of parole.[357]

350. Under the 1977 statute, where the special circumstance alleged was a prior conviction of first or second degree murder, a special circumstance phase of trial was required. CAL. PENAL CODE § 190.1(a) (West 1979); John W. Poulos, *The Lucas Court and Capital Punishment: The Original Understanding of the Special Circumstances*, 30 SANTA CLARA L. REV. 333, 346–48 nn.66–70 (1990). "The obvious reason for making an exception for the prior-murder-conviction special circumstance is to protect the defendant from the prejudice inherent in learning that the defendant has been convicted previously of murder while the trier of fact is deciding the question of the defendant's guilt of first degree murder." *Id.* at 351.

351. Poulos, *supra* note 326, at 180 n.110.

352. *Id.* at 181.

353. This did not include murders for financial gain or contract killings where both the killer and the hirer were death-eligible.

354. CAL. PENAL CODE § 190.3, 1977 CAL. STAT. 316, § 11; Poulos, *supra* note 326, at 181. Accomplice liability did not apply in cases involving murders for hire and murders by destructive device or explosion.

355. 428 U.S. 280, 304 (1976).

356. 1977 CAL. STAT. 316, § 11.

357. *Id.*

d. The 1978 Briggs Initiative: Proposition 7—16 more special circumstances, 28 death-eligible crimes

Despite the significant expansion in the scope of the state's death penalty law provided for under the 1977 statute, by October 1977, efforts were already underway to put an initiative on the ballot in the next election to expand the scope of California's death penalty. State Senator John V. Briggs—a gubernatorial candidate hopeful—began campaigning for support for Proposition 7, an initiative that would "broaden the list of crimes for which capital punishment could be invoked." [358]

Proposition 7 faced no real or organized opposition and thus received little coverage in the press as it was considered non-controversial. Proposition 7, which became known as the Briggs Initiative, proposed adding sixteen special circumstances to those enacted by the Legislature in the 1977 statute [359] to the existing list of

358. Lou Cannon, *GOP Convention in Calif. Haunted by Lingering Differences*, WASH. POST, Oct. 3, 1977, at A2.

359. The proposed special circumstances are set forth as underlined below:

> Section 190.2. (a) The penalty for a defendant found guilty of murder in the first degree shall be death or confinement in state prison for a term of life without the possibility of parole in any case in which one or more of the following special circumstances has been charged and specially found under Section 190.4, to be true:
>
> (1) The murder was intentional and carried out for FINANCIAL GAIN.
>
> (2) The defendant was previously convicted of murder in the first degree or second degree. [PRIOR MURDER] For the purpose of this paragraph an offense committed in another jurisdiction which if committed in California would be punishable as first or second degree murder shall be deemed murder in the first or second degree.
>
> (3) The defendant has in this proceeding been convicted of more than one offense of murder in the first or second degree. [MULTIPLE MURDER]
>
> (4) The murder was committed by means of a [HIDDEN] DESTRUCTIVE DEVICE, BOMB, OR EXPLOSIVE planted, hidden or concealed in any place, area, dwelling, building or structure, and the defendant knew or reasonably should have known that his act or acts would create a great risk of death to a human being or human beings.
>
> (5) The murder was committed for the purpose of AVOIDING OR PREVENTING A LAWFUL ARREST or to perfect or attempt to perfect an ESCAPE FROM LAWFUL CUSTODY.
>
> (6) The murder was committed by means of a [MAILED] DESTRUCTIVE DEVICE, BOMB, OR EXPLOSIVE that the defendant mailed or delivered, attempted to mail or deliver, or cause to be mailed or delivered and the defendant knew or reasonably should have known that his act or acts would create a great risk of death to a human being or human beings.
>
> (7) The victim was a PEACE OFFICER as defined in Section 830.1, 830.2, 830.3, 830.31, 830.35, 830.36, 830.4, 830.5, 830.5a, 830.6, 830.10, 830.11 or 830.12, who, while engaged in the course of the performance of his duties, was intentionally killed, and such defendant knew or reasonably should have known that such victim was a peace officer engaged in the performance of his duties; or the victim was a peace officer as

defined in the above enumerated sections of the Penal Code, or a former peace officer under any of such sections, and was intentionally killed in retaliation for the performance of his official duties.

(8) The victim was a FEDERAL LAW ENFORCEMENT OFFICER or agent, who, while engaged in the course of the performance of his duties was intentionally killed, and such defendant knew or reasonably should have known that such victim was a federal law enforcement officer or agent, engaged in the performance of his duties; or the victim was a federal law enforcement officer or agent, and was intentionally killed in retaliation for the performance of his official duties.

(9) The victim was a FIREMAN as defined in Section 245.1, who while engaged in the course of the performance of his duties was intentionally killed, and such defendant knew or reasonably should have known that such victim was a fireman engaged in the performance of his duties.

(10) The victim was a WITNESS TO A CRIME who was intentionally killed for the purpose of preventing his testimony in any criminal proceeding, and the killing was not committed during the commission, or attempted commission or the crime to which he was a witness; or the victim was a witness to a crime and was intentionally killed in retaliation for his testimony in any criminal proceeding.

(11) The victim was a PROSECUTOR or assistant prosecutor or a former prosecutor or assistant prosecutor of any local or state prosecutor's office in this state or any other state, or of a federal prosecutor's office and the murder was carried out in retaliation for or to prevent the performance of the victim's official duties.

(12) The victim was a JUDGE or former judge of any court of record in the local, state or federal system in the State of California or in any other state of the United States and the murder was carried out in retaliation for or to prevent the performance of the victim's official duties.

(13) The victim was an elected or appointed official or former [OFFICIAL OF THE FEDERAL GOVERNMENT, A LOCAL OR STATE GOVERNMENT OF CALIFORNIA], or of any local or state government of any other state in the United States and the killing was intentionally carried out in retaliation for or to prevent the performance of the victim's official duties.

(14) The murder was especially HEINOUS, ATROCIOUS, OR CRUEL, manifesting exceptional depravity. As utilized in this section, the phrase "especially heinous, atrocious or cruel manifesting exceptional depravity" means a conscienceless, or pitiless crime which is unnecessarily torturous to the victim.

(15) The defendant intentionally killed the victim while LYING IN WAIT.

(16) The victim was intentionally KILLED BECAUSE OF HIS RACE, COLOR, RELIGION, NATIONALITY OR COUNTRY OF ORIGIN. (17) The murder was committed while the defendant was engaged in or was AN ACCOMPLICE [NO INTENT REQUIRED] in the commission of, attempted commission of, or the immediate flight after committing or attempting to commit the following felonies [FELONY MURDER]:

[18] (i) ROBBERY in violation of Section 211.

[19] (ii) KIDNAPPING in violation of Sections 207 and 209.

[20] (iii) RAPE in violation of Section 261.

[21] (iv) SODOMY in violation of Section 286.

[22] (v) The performance of a LEWD OR LASCIVIOUS ACT UPON PERSON OF A CHILD UNDER THE AGE OF 14 in violation of Section 288.

[23] (vi) ORAL COPULATION in violation of Section 288a.

[24] (vii) BURGLARY in the first or second degree in violation of Section 460.

[25] (viii) ARSON in violation of Section 447.

[26] (ix) TRAINWRECKING in violation of Section 219.

[27] (18) The murder was intentional and involved the infliction of TORTURE. For the purpose of this section torture requires proof of the infliction of extreme physical pain no matter how long its duration. [28] (19) The defendant intentionally killed the victim

twelve special circumstances, for a total of 28.[360] The additional circumstances that would make a person convicted of first degree murder eligible for the death penalty can be summarized as follows:

Victim Special Circumstances: (1) federal officer; (2) fireman; (3) prosecutor; (4) judge; and (5) federal or state official.

Felony Murder Special Circumstances: (6) sodomy; (7) oral copulation; (8) arson; and (9) trainwrecking.

"Means" Special Circumstances: (10) destructive device, bomb or explosive through the mail; (11) lying in wait; and (12) poison.

"Motive" Special Circumstances: (13) to avoid arrest or escape; and (14) "hate" motive.

"Catchall" Special Circumstance: (15) murder that was "especially heinous, atrocious, or cruel, manifesting exceptional depravity."

Accomplice Special Circumstance: (16) "eliminate[ed] the 'personal presence' and 'physical aid' requirements generally applicable under the 1977 law."[361]

"[T]he Briggs Initiative [also] substantially broadened the definitions of prior special circumstances, most significantly by eliminating the across-the-board intent to kill requirement of the 1977 law."[362]

In May 1978, Andrew Edward Robertson became the first

> by the administration of POISON.
>
> (b) Every person whether or not the actual killer found guilty of intentionally aiding, abetting, counseling, commanding, inducing, soliciting, requesting, or assisting any actor in the commission of murder in the first degree shall suffer death or confinement in state prison for a term of life without the possibility of parole, in any case in which one or more of the special circumstances enumerated in paragraphs (1), (3), (4), (5), (6), (7), (8), (9), (10), (11), (12), (13), (14), (15), (16), (17), (18), or (19) of subdivision (a) of this section has been charged and specially found under Section 190.4 to be true.

1990 CAL. STAT. 115, § 10 (codified as amended CAL. PENAL CODE § 190.2) (emphasis added), *available at* http://library.uchastings.edu/cgi-bin/starfinder/0?path=calprop.txt&id=webber&pass=webber&OK=OK.

360. CAL. COMM'N ON THE FAIR ADMIN. OF JUSTICE, A REVIEW OF SPECIAL CIRCUMSTANCES IN CALIFORNIA DEATH PENALTY CASES 15 (2008), *available at* http://www.ccfaj.org/documents/reports/dp/expert/Kreitzberg.pdf.

361. Shatz & Rivkind, *supra* note 334, at 1313 n.163 ("With respect to murderers other than actual killers, the prosecution still was required to prove an intent to kill." (citing CAL. PENAL CODE § 190.2(b) (West 1988) (repealed 1990)).

362. *Id.* at 1313. "Under the Briggs Initiative, the majority of the special circumstances, including the felony murder circumstances, were applicable even in the absence of proof that the murder was intentional." *Id.* at 1313 nn.161–62 (citing CAL. PENAL CODE § 190.2(a)(17); 1977 Cal. Stat. 316(c); People v. Anderson, 742 P.2d 1306, 1325 (Cal. 1987) (holding that "intent to kill is not an element of the felony murder special circumstance")).

person sentenced to die under California's 1977 death penalty statute.[363] As noted in the Overview part, *supra*, Mr. Robertson died in prison of natural causes on August 22, 1998, after spending more than 20 years on death row.[364] At the time of his death, his § 2254 Petition for a Writ of Habeas Corpus, filed in 1990, was still pending in the federal district court for the Central District of California.

With no organized opposition, polls showed that as of September 20, 1978, Proposition 7 was "leading 8.3-to-9 percent."[365] The Argument in Favor of Proposition 7 read:

> MURDER. PENALTY—INITIATIVE STATUTE
>
> Argument in Favor of Proposition 7
>
> CHARLES MANSON, SIRHAN SIRHAN, THE ZODIAC KILLER, THE SKID-ROW SLASHER, THE HILLSIDE STRANGLER.
>
> These infamous names have become far too familiar to every Californian. They represent only a small portion of the deadly plague of violent crime which terrorizes law-abiding citizens.
>
> Since 1972, the people have been demanding a tough, effective death penalty law to protect our families from ruthless killers. But, every effort to enact such a law has been thwarted by powerful anti-death penalty politicians in the State Legislature.
>
> In August of 1977, when the public outcry for a capital punishment law became too loud to ignore, the anti-death penalty politicians used their influence to make sure that the death penalty law passed by the State Legislature was as weak and ineffective as possible.
>
> That is why 470,000 concerned citizens signed petitions to give you the opportunity to vote on this new, tough death penalty law.
>
> Even if the President of the United States were

363. ASSOCIATED PRESS, May 3, 1978 (on file with authors) (discussing Gregory Michael Teron Jr.'s sentence and revisions to California's death penalty law). Teron, 24, was sentenced to death before *Robertson*, but the California Supreme Court vacated his sentence because it was based on Teron having committed a prior murder in 1975, before the effective date of California's 1977 statute, August 11, 1977. People v. Teron, 588 P.2d 773, 775 (Cal. 1979).

364. Mr. Robertson is the 26th inmate listed in the Overview's sidebar, *supra* pages S58, S60.

365. Lou Cannon, *Poll Shows Californians Support Controversial Initiatives*, WASH. POST, Sept. 20, 1978, at A1.

> assassinated in California, his killer would not receive the death penalty in some circumstances. Why? Because the Legislature's weak death penalty law does not apply. Proposition 7 would.
>
> If Charles Manson were to order his family of drug-crazed killers to slaughter your family, Manson would not receive the death penalty. Why? Because the Legislature's death penalty law does not apply to the master mind of a murder such as Manson. Proposition 7 would.
>
> And, if you were to be killed on your way home tonight simply because the murderer was high on dope and wanted the thrill, that criminal would not receive the death penalty. Why? Because the Legislature's weak death penalty law does not apply to every murderer. Proposition 7 would.
>
> Proposition 7 would also apply to the killer of a judge, a prosecutor, or a fireman. It would apply to a killer who murders a citizen in cold blood because of his race or religion or nationality. And, it would apply to all situations which are covered by our current death penalty law.
>
> In short, your YES vote on Proposition 7 will give every Californian the protection of the nation's toughest, most effective death penalty law.[366]
>
> A long and distinguished list of judges and law enforcement officials have agreed that Proposition 7 will provide them with a powerful weapon of deterrence in their war on violent crime.
>
> Your YES vote on Proposition 7 will help law enforcement officials stop violent crime—NOW.[367]

Proposition 7 was approved by 71.1% of voters.[368] Passage of the Briggs Initiative amended Penal Code section 190 and did not

366. CALIFORNIA BALLOT PAMPHLET, NOVEMBER 1978, *supra* note 10, at 34.

367. *Id.* The Argument in Favor was signed by State Senator John Briggs, Donald H. Heller, a former federal prosecutor, and the President of the California Sheriffs' Association Duane Lowe. In the Rebuttal to Argument Against Proposition 7 the proponents reiterated that "*[t]his citizen's initiative will give your family the protection of the strongest, most effective death penalty law in the nation*." *Id.* at 35 (emphasis added). The full text of the proposed law, reprinted in the Voter Information Guide, was over five pages in length, single-spaced.

368. Abbreviated Listing, Proposition 7, *California Ballot Propositions (1911–Present)*, http://library.uchastings.edu/cgi-bin/starfinder/17676/calprop.txt (last visited June 4, 2011).

give the legislature authority to amend the section without voter approval.[369] Every change to section 190 must be voted on and passed by the people.[370] In the "Official Title and Summary Prepared by the Attorney General," voters were told: "Financial impact: Indeterminable future increase in state costs."[371] The Fiscal Effect statement on the ballot stated, in part: "We estimate that, over time, this measure would increase the number of persons in California prisons, and thereby increase the cost to the state of operating the prison system. . . . There could also be an *increase in the number of executions as a result of this proposition, offsetting part of the increase in the prison population*."[372]

e. The 1990 initiatives: Propositions 114 and 115—Five more special circumstances, 33 death-eligible crimes

By 1990, there were 279 inmates on death row.[373] While there had been 11 deaths of condemned inmates on death row due to natural causes and suicides between 1980 and 1991, not a single execution occurred during that time period.[374]

On June 5, 1990, voters passed an initiative referred to as Proposition 114. It was the first change to California's death penalty law since the Briggs Initiative was passed.[375] Proposition 114 increased the list of death-eligible crimes to include crimes against an increased number and type of the peace officers originally set forth under the Briggs Initiative.[376] The Fiscal Impact Statement on

369. *See id.*

370. *See* DUBOIS & FEENEY, *supra* note 252, at 79.

371. *Id.* at 32.

372. *Id.* at 33 (emphasis added).

373. *See supra* text accompanying note 239.

374. INMATES EXECUTED, 1978 TO PRESENT, *supra* note 17.

375. 1989 Cal. Stat. 1165, § 16 (codified as amended CAL. PENAL CODE § 190.2(a)(7)), *available at* http://library.uchastings.edu/cgi-bin/starfinder/0?path=calprop.txt&id=webber&pass=webber&OK=OK.

376. The Voter Information Guide explained:

> Since 1978, there have been no changes to the Death Penalty Initiative. The Legislature, however, has amended the Penal Code. These amendments have resulted in some persons being deleted from, and other persons being added to, the definition of a peace officer. These persons include various employees of the state and local governments.
>
> PROPOSAL
>
> By reference, this measure would incorporate the legislative changes in the definition of a peace officer into the provisions of the 1978 Death Penalty Initiative. As

the ballot stated: "This measure increases the number of crimes for which the special circumstances for first degree murder may apply. To the extent these changes result in longer prison terms, there will be unknown increases in state costs."[377] The initiative was approved by 71.12% of the persons who turned out to vote at that election.[378]

Proposition 115 was on the same ballot as Proposition 114.[379] This initiative was known as the Crime Victims Justice Reform Act, and it proposed "mak[ing] numerous significant and complex changes in criminal law and in the judicial procedures that must be followed in criminal cases."[380] Proposition 115 expanded the definition of first degree murder and increased the total number of death-eligible offenses to 33. Section 190.2 was revised to make five new crimes punishable by death: first degree murder when (1) "[t]he victim was a witness to a crime who was intentionally killed for the purpose of preventing . . . testimony in any . . . juvenile proceeding";

> a result, this measure expands the number and types of peace officers the murder of whom would be a special circumstance under the 1978 Death Penalty Initiative.
>
> FISCAL EFFECT
>
> This measure increases the number of crimes for which the special circumstances for first-degree murder may apply. *To the extent these changes result in longer prison terms, there will be unknown increases in state costs*.

CAL. SEC'Y OF STATE, CALIFORNIA PRIMARY ELECTION, JUNE 5, 1990: BALLOT PAMPHLET 28 (1990) (emphasis added), *available at* http://holmes.uchastings.edu/ballot_pdf/1990p.pdf [hereinafter CALIFORNIA BALLOT PAMPHLET, JUNE 1990].

377. *Id.*

378. *California Ballot Propositions (1911–Present)*, *supra* note 333.

379. The text of the proposed bill stated, in part:

> SECTION 1. (a) We the people of the State of California hereby find that the rights of crime victims are too often ignored by our courts and by our State Legislature, that the death penalty is a deterrent to murder, and that comprehensive reforms are needed in order to restore balance and fairness to our criminal justice system.
>
> (b) In order to address these concerns and to accomplish these goals, we the people further find that it is necessary to reform the law as developed in numerous California Supreme Court decisions and as set forth in the statutes of this state. These decisions and statutes have unnecessarily expanded the rights of accused criminals far beyond that which is required by the United States Constitution, thereby unnecessarily adding to the costs of criminal cases, and diverting the judicial process from its function as a quest for truth.
>
> (c) The goals of the people in enacting this measure are to restore balance to our criminal justice system, to create a system in which justice is swift and fair, and to create a system in which violent criminals receive just punishment, in which crime victims and witnesses are treated with care and respect, and in which society as a whole can be free from the fear of crime in our homes, neighborhoods, and schools.
>
> (d) With these goals in mind, we the people do hereby enact the Crime Victims Justice Reform Act.

Id. at 33.

380. *Id.* at 32.

the felony murder occurred during the commission of an additional category of (2) robbery; or (3) kidnapping; the felony murder occurred in the commission of a newly added felony of (4) mayhem, or (5) rape by instrument.[381]

Proposition 115 also

> expanded the liability of felony murder accomplices, eliminating the intent to kill element and requiring only that the accomplice meet the constitutional threshold established by Enmund [v. Florida[382]] and Tison [v. Arizona[383]]: that the accomplice have acted with "reckless indifference to human life and as a major participant" in a special circumstance felony.[384]

The Fiscal Impact Statement on the Voter Information Guide for Proposition 115 stated that

> [t]he net fiscal effect of this measure is unknown. The measure makes several significant changes to the criminal justice system. How the measure will be implemented and interpreted is unknown. There may be only a minor fiscal impact on state and local governments, or there may be a major fiscal impact.[385]

The initiative was approved by 57.03% of voters.[386]

By 1992, two years after Propositions 114 and 115 were passed, there were 345 prisoners on death row.[387] On April 21, 1992, California executed Robert Alton Harris.[388] He was the first prisoner executed following the adoption of the 1978 death penalty initiative.

381. *Id.*; Crime Victims Justice Reform Act, Stats 1989 Cal. Stat. 1165, § 16 (codified as amended CAL. PENAL CODE § 190.2 (West 1990)). In *Raven v. Deukmejian*, 801 P.2d 1077 (Cal. 1990), the California Supreme Court concluded that some provisions of Prop 115, not related to the death penalty, were invalid because they constituted a revision to the California Constitution, rather than an amendment. *Id.* The provisions concerning the death penalty were upheld and remain in effect.

382. 458 U.S. 782 (1982).

383. 481 U.S. 137 (1987).

384. Shatz & Rivkind, *supra* note 334, at 1315 (citing Enmund v. Florida, 458 U.S. 782 (1982), and Tison v. Arizona, 481 U.S. 137 (1987)).

385. CALIFORNIA BALLOT PAMPHLET, JUNE 1990, *supra* note 376, at 33.

386. BALLOTPEDIA, ballotpedia.org (last visited June 4, 2011).

387. *NCJRS Abstract*, NAT'L CRIMINAL JUSTICE REFERENCE SERV., www.ncjrs.gov/App/publications/abstract.aspx?ID=146472 (last visited June 4, 2011).

388. *Capital Punishment*, CAL. DEP'T OF CORR. & REHAB., http://www.cdcr.ca.gov/Capital_Punishment/inmates_executed/robertHarris.html (last visited June 4, 2011).

"With his death, came the lifting of a psychological barrier to the use of capital punishment in California."[389] The following year, on August 24, 1993, David Edwin Mason became the second person executed since 1978, after spending nine years, seven months on death row.[390]

By 1994, the Judicial Council was having difficulty attracting private attorneys to accept capital appeal appointments, and there was a serious "backlog in death penalty appeals" developing, with condemned inmates waiting up to three years for the appointment of counsel to represent them in their automatic appeals.[391] Over the next two years, California added more than 170 prisoners to death row for a total of 461 prisoners in 1996, at which time two more executions were carried out.[392]

f. The 1996 initiatives: Propositions 195 and 196—Three more special circumstances, 36 death-eligible crimes

In 1996, voters passed two initiatives, Propositions 195 and 196, which added three more special circumstances: felony murder carjacking, murder of a juror, and murder by discharging a firearm from a motor vehicle (drive-by shooting). The Fiscal Impact Statement for Proposition 195 in the Voter Information Guide stated that there would be "[p]robably minor additional state costs."[393] The initiative was approved by 85.82% of voters.[394] The Fiscal Impact Statement on the Voter Information Guide discussing Proposition 196 stated that "[a]doption of this measure would result in unknown state costs, potentially ranging into several millions of dollars

389. John H. Culver & Chantel Boyens, *Political Cycles of Life and Death: Capital Punishment as Public Policy in California*, 65 ALB. L. REV. 991, 1006 (2002).

390. INMATES EXECUTED, 1978 TO PRESENT, *supra* note 17.

391. LEGISLATIVE ANALYST'S OFFICE, *supra* note 136. "In January 1994, in an attempt to recruit additional private counsel, the Judicial Council was authorized to pay attorneys based on either an hourly rate or a fixed-fee basis." *Id.*

392. *See* INMATES EXECUTED, 1978 TO PRESENT, *supra* note 17. William George Bonin was executed on February 23, 1996, after 13 years, one month on death row; Keith Daniel Williams was executed on May 3, 1996, after 17 years on death row. *Id. See supra* note 239 (stating that there were 461 inmates on death row in 1996).

393. CAL. SEC'Y OF STATE, CALIFORNIA PRIMARY ELECTION, MARCH 26, 1996: BALLOT PAMPHLET 20 (1996), *available at* http://traynor.uchastings.edu/ballot_pdf/1996p.pdf [hereinafter CALIFORNIA BALLOT PAMPHLET, MARCH 1996].

394. 1995 Cal. Stat. 477, § 1, *available at* http://library.uchastings.edu/cgi-bin/starfinder/0?path=calprop.txt&id=webber&pass=webber&OK=OK.

annually in the long run."[395] The Legislative Analyst explained, however, that since

> state law already permits carjackers or carjack-kidnappers who commit first-degree murder to be charged with robbery or kidnapping, thereby subjecting them to the harsher penalties for special circumstance crimes[,] . . . the changes in the law made by this measure explicitly listing those two crimes as special circumstances are likely to result [only] in minor additional incarceration costs.[396]

Additionally, Proposition 195 stated that "[t]he provision of this measure designating the first-degree murder of a juror as a special circumstance crime is likely to have little fiscal effect because such crimes occur infrequently. In summary, we estimate that the measure would probably result in minor additional state costs."[397]

Earlier in 1996, in an attempt to address the increasingly serious backlog in death penalty appeals, three bills were introduced in the Legislature to overhaul the system for appointing counsel in capital cases, including one bill to establish an Office of Postconviction Counsel that would be charged with "represent[ing] indigent persons convicted and sentenced to death for the purpose of instituting and prosecuting postconviction actions in the state and federal courts and challenging the legality of the judgment or sentence imposed."[398]

395. CALIFORNIA BALLOT PAMPHLET, MARCH 1996, *supra* note 393, at 24.

396. *Id.* at 21.

397. *Id.*

398. S.B. 1533, 1996 Leg., Reg. Sess. (Cal. 1996), *available a*t http://leginfo.ca.gov/pub/95-96/bill/sen/sb_1501-1550/sb_1533_cfa_960709_163253_asm_comm.html. The Legislative Analyst discusses the three bills as follows:

> LEGISLATIVE SOLUTIONS CONSIDERED LAST YEAR
>
> Three bills were introduced last session (one of which was enacted) as vehicles for the Governor's proposal to make significant changes in the handling of death penalty appeals. The proposed changes included procedural changes for the appeal process and changes in the process for appointing counsel.
>
> *Procedural Changes*. Chapter 1086, Statutes of 1996 (AB 195, Morrow), sets forth new statutory guidelines for the trial court record certification process. Trial court records in death penalty cases are often longer than 10,000 pages and can reach 90,000 pages. As Figure 1 shows, currently the process of correction and certification of the record can take up to five years. The changes are intended to expedite the record certification process by setting specific time lines for the completion and correction of the record soon after completion of the trial.
>
> *Attorney Appointment Process.* Two other bills, which were not enacted, would have changed the manner in which counsel are appointed for indigent persons convicted and sentenced to death. These changes would have made the California appointment process similar to the Florida process. Under the proposal, there would

None of the legislation was passed.

In a 1997 report to the Legislature, the Legislative Analyst summarized the "Backlog of Death Penalty Appeals"[399] problem as follows:

> The large number of inmates on death row who are awaiting appointment of defense counsel raises questions about the process by which the state provides legal representation for indigent criminal defendants. Without an attorney, an inmate's appeal to the Supreme Court—which is required under the state's death penalty law—cannot go forward. Although the Legislature considered several bills last year that were designed to reduce the backlog, the budget proposes no comprehensive strategy to reduce the backlog of these appointments in 1997-98. The Legislature will need to consider factors of cost, efficiency, and quality of legal representation when considering alternative solutions for this growing problem.
>
> . . . .
>
> WHAT CAN THE LEGISLATURE DO?
>
> Several potential options are available to the Legislature for reforming the capital appellate process in order to reduce the backlog of inmates on death row without legal representation. Issues concerning the availability of qualified counsel and the cost efficiency of the current appellate services will be important for the Legislature to consider.

have been two separate entities, one for state and federal habeas corpus claims and the other for direct appeals. Senate Bill 1533 (Calderon) would have created a new state agency, the Office of Post Conviction Counsel. The primary responsibility for the office would have been to handle both state and federal habeas petitions, as is done by the Capital Collateral Representative's Office in Florida.

A companion bill, AB 2008 (K. Murray) provided that the primary responsibilities for the SPD would be for automatic appeals of death penalty cases. The intent of this legislation was to expand the SPD's responsibilities to eventually handle all the direct capital appeals so that the hiring of private counsel would no longer be necessary. The proposal included provisions for the SPD to begin a training program for attorneys and also increased pay for private attorneys taking new appointments to $125 per hour. Under the bill, private counsel would have continued to take cases in order to help reduce the growing backlog of cases. The Governor vetoed AB 2008 because SB 1553 was not enacted by the Legislature.

LEGISLATIVE ANALYST'S OFFICE, *supra* note 136.

399. LEGISLATIVE ANALYST'S OFFICE, *supra* note 136.

> The Legislature has been concerned about the backlog of inmates on death row without legal representation. Without an attorney, which is guaranteed by the Constitution, an inmate's appeal to the Supreme Court—which is required under the state's death penalty law—cannot go forward. The current delays in appointing attorneys to these cases place serious burdens on many parties—the inmates, the families of victims, the Attorney General (who handles the appeal for the state), and law enforcement and criminal justice officials who prosecuted the original case.
>
> Reducing the backlog of cases without legal representation will not be easy. This is because the size of the backlog is large. Given that there are only 132 attorneys currently handling these cases statewide, the Legislature should consider options which may attract more attorneys to take cases. This could prove difficult, however, because many attorneys will not meet the Judicial Council's minimum qualifications and most qualified attorneys can only handle one case at a time. In addition, the cases are frequently very long, complex, and generally unattractive.
>
> . . . .
>
> Conclusion: As we indicated earlier, the budget does not contain any proposals to reduce the backlog of inmates on death row without attorneys. There are several options that the Legislature could consider if it wishes to address this problem, including changes in qualifications and pay of attorneys, expansion of existing programs, and creation of new state entities. It is not clear, however, that any option will reduce the backlog in the near term.[400]

By 1998, the "growing backlog of death penalty cases" prompted California Supreme Court Justice Stanley Mosk to "urge[] state senators to approve an amendment to the California Constitution to create two Supreme Courts—one for civil cases, the other for criminal appeals."[401] There was also a significant shortage

400. *Id.*

401. Gerald Uelmen, Commentary, *Bigger Court Won't Be Speedier; Death Appeals: Splitting the State High Court into Two Divisions and Adding Justices Would Create Confusion,*

of qualified counsel to handle death penalty appeals and capital state habeas corpus litigation.[402] "More than 150 of the 500 occupants of California's death row still lack counsel to handle their appeals."[403] The Chief Justice at the time, Ronald M. George, "persuad[ed] the Legislature to fund a new Habeas Corpus Resource Center to expedite the handling of habeas claims concurrently with direct appeals."[404] In 1998, the Legislative Analyst reported that "the Legislature and Governor enacted Chapter 869, Statutes of 1997 (S.B. 513, Lockyer), which changed the process for appointing counsel to death penalty appeals cases and provided for the creation of the [HCRC]."[405] While the Legislature committed additional resources to reducing the backlog of death penalty appeals, the Legislative Analyst recommended that "Continuing Legislative Oversight [Was] Needed":[406]

> We recommend that the Office of the State Public Defender report at budget hearings on its development of attorney training programs and the implementation of automated case management systems and attorney workload standards. In addition, we recommend that the Legislature adopt supplemental report language directing the newly created California Habeas Resource Center to provide the same information.
>
> The Legislature has been concerned about the backlog of inmates on death row without legal representation. Without an attorney, which is guaranteed by the Constitution, an inmate's appeal to the Supreme Court—which is required under the state's death penalty law—cannot go forward. The current delays in appointing attorneys to these cases place serious burdens on many

L.A. TIMES, July 12, 1998, at M5.

402. *Id.*

403. *Id.*

404. *Id.* The Habeas Corpus Resource Center was established in 1998 as a part of the judicial branch of the State of California to accept appointments in state and federal habeas corpus proceedings and to provide training and support for private attorneys who take on these cases. *See* CAL. GOV'T CODE §§ 68660–64 (West 2010).

405. LEGISLATIVE ANALYST'S OFFICE, *supra* note 136.

406. LEGISLATIVE ANALYST'S OFFICE, *Crosscutting: Reforming California's Adult Parole System* (last visited May 30, 2011), http://www.lao.ca.gov/analysis_1998/crim_justice_crosscutting_anl98.html.

> parties—the inmates, the families of victims, and law enforcement and criminal justice officials who prosecuted the original case.[407]

On July 14, 1998, Thomas M. Thompson was executed after 14 years, one month on death row; on February 9, 1999, Jaturun Siripongs was executed after 15 years, nine months on death row; and, on May 4, 1999, Manuel Babbitt was executed after spending 16 years, 10 months on death row, bringing the total number of persons executed in California in the 20 years since 1978 to seven.[408]

g. 1999: Proposed initiative to abolish the death penalty

By the end of 1999, there were 558 prisoners on California's death row, including over 100 who had been on death row for 15 years or longer. A private citizen proposed a constitutional amendment that would abolish the death penalty in California and commute the sentences of those prisoners on death row to "life imprisonment without the possibility of parole."[409] For reasons that are unclear from the legislative record, the initiative failed to qualify and was thus not presented to the voters. It is interesting to note, however, that in analyzing the proposed initiative's effects, the Legislative Analyst addressed cost issues related to the administration of the death penalty in California that it had failed to raise in its prior analyses of other initiatives that expanded the death penalty's scope. In its letter of September 9, 1999, to Attorney General Bill Lockyer analyzing the proposed amendment's fiscal effects, the Legislative Analyst stated:

> This measure would amend the California Constitution to prohibit the imposition of the death penalty as the penalty for any crime punished by the state. The measure also specifies that offenders under a sentence of death at the

407. *Id.* (emphasis omitted).

408. INMATES EXECUTED, 1978 TO PRESENT, *supra* note 17; N.Y. STATE DEFENDERS ASS'N, DEATH PENALTY ARCHIVES 47 (2008), *available at* http://www.nysda.org/08_DeathPenaltyAll.pdf ("In California the federal court's distrust of the state's highest court has resulted in lengthy reviews of death sentences, reducing the number of people executed to a trickle.") (citing *A Failure to Execute: More Than 100 Inmates Have Sat on California's Death Row for 15 Years or Longer*, RECORDER, Dec. 16, 1999).

409. Alex Jacinto, Abolition of the Death Penalty: Initiative Constitutional Amendment, Sec. of State No. 854, Attorney Gen. No. SA1999RF0031 (1999), *available at* http://library.uchastings.edu/library/california-research/ca-ballot-measures.html (follow "California Ballot Initiatives Database" hyperlink)

time of this measure's enactment would not be executed and would instead serve a prison term of life without the possibility of parole.

. . . .

BACKGROUND

. . . .

As of May 1999, 537 offenders had received a death sentence and had been transferred to "death row" at San Quentin State Prison to await execution. By law, death penalty verdicts are automatically appealed to the California Supreme Court; also, such cases ordinarily involve an extensive series of appeals both to state and federal courts.

Both the state and county governments incur costs for murder trials, including costs for the courts, prosecution, and defense of indigent persons charged with murder. The state also incurs costs for death penalty appeals both for prosecution of such cases and for defense of indigent persons. [410]

As of May 1999, the California Supreme Court had affirmed 189 death sentences under the automatic appeal process. Many additional cases remain pending in the courts. Seven persons have been executed since the current death penalty law was enacted in 1978.

FISCAL EFFECT

The measure would have a number of fiscal effects on the state and local governments. The major fiscal effects are discussed below.

Murder Trial Costs. Elimination of the death penalty could result in reduced court time and workload in two ways. First, some murder cases may be resolved by guilty pleas instead of going to trial. Second, for some of those murder cases that do proceed to trial, the time it takes to try them could be shortened. For example, jury selection for

410. Letter from Elizabeth G. Hill to Bill Lockyer, *supra* note 104 (emphasis added). The information in this letter was never seen by the voters because the initiative failed to qualify for the ballot. One wonders, however, why the Legislative Analyst Office never presented such detailed analysis in discussing prior initiatives that proposed *expanding* the scope of the death penalty, instead stating that such costs were "unknown."

some capital cases could be shortened by as much as three or four weeks.

As a result, this measure is likely to result in a reduction in costs to the state for support of the trial courts, as well as a reduction in costs to counties for prosecution and representation of indigent defendants charged with murder. The magnitude of the savings to the state and local governments is unknown, but could potentially range from the millions to the low tens of millions of dollars annually on a statewide basis.

These savings would be offset to the extent that prohibition of the death penalty eliminated an incentive for some offenders to reach plea agreements with county district attorneys in some murder cases. Some murder cases are being resolved with an offender's plea to a murder charge in trade for an agreement by the district attorney not to seek the death penalty. If the death penalty is prohibited and these cases go to trial instead of being resolved through plea agreements, additional state and local governmental costs for support of courts, prosecution, and defense could result. The magnitude of these offsetting costs is unknown.

Prohibition of the death penalty might also reduce expenditures by state and local law enforcement agencies on such cases, in part because law enforcement personnel are often key witnesses in murder trials. The amount of this potential expenditure decrease is unknown.

County Jail Costs. Persons held for trial on murder charges, particularly cases that could result in a death sentence, ordinarily remain in custody in county jail until the completion of their trial and sentencing. As some murder cases are expedited or eliminated due to the prohibition on capital punishment, as discussed above, the transfer of persons convicted of murder from county jail to state prison would be accelerated, thus reducing the costs for operation of county jails. The magnitude of the savings is unknown but could amount to as much as several millions of dollars annually statewide.

Appellate Litigation Costs. Eventually, the measure would likely reduce current annual state expenditures by the

state Department of Justice, the Office of the State Public Defender, the Habeus [sic] Corpus Resource Center, and the Court-Appointed Counsel program for the costs of litigating capital punishment appeals. These costs currently amount to about $35 million annually. However, expenditure of part of this $35 million for capital punishment litigation would probably continue until the courts determined how to procedurally resolve all past and pending cases involving death sentences.

The measure could also eventually result in an unknown reduction in expenditures by the California Supreme Court, potentially in the millions of dollars, by eliminating its workload of death penalty-related appeals. Any savings on the California Supreme Court workload could also be fully or partly offset by an increase in the workload for state appellate courts, which handle appeals of sentences of life without the possibility of parole. That is because there would likely be more such appeals for the appellate courts to handle if this measure were enacted.

State Correctional Costs. The enactment of this measure would result in an increase in state prison operation and construction costs because offenders who would otherwise have been executed would be held in state prisons for a much longer period of time. These additional costs would not occur in the near term because relatively few persons sentenced to death would otherwise have been executed due to the appeal of their cases. However, the net cost of imprisoning offenders for life without the possibility of parole, instead of sentencing them to death, could be significantly larger in the long term if capital cases were to be resolved much more quickly by the appeals courts in favor of allowing executions to proceed. The impact of such future court rulings is unknown.

To the extent that the enactment of this measure expedited murder trials and the transfer of persons convicted of murder from county jail to state prison, there could be a one-time increase in the number of convicted murderers into the state prison system. The operational and fiscal effects of this shift of offenders from county jails to

the state prison system would likely even out over time, however.

The enactment of this measure could also result in a reduction in operational and construction expenditures for the state's prison system because, under prior court rulings, male offenders under death sentence must generally be held in separate cells on death row and cannot share cells with other inmates there. Prohibition of the death penalty might permit the state to move some former death row inmates to prison facilities where they could legally be double-celled with other high-security inmates at a lower security cost. Such a shift could generate significant one-time costs to modify existing prison facilities to hold former death row inmates, but could generate significant ongoing operational savings.

The accomplishment of such a shift would allow the otherwise vacant cells at the former death row to be used for other types of prison inmates, and allow the state to postpone construction of some additional prison space for its growing inmate population. These potential avoided costs are unknown, but could be in the low tens of millions of dollars.

Finally, the enactment of this measure would save the state the actual cost of carrying out executions. These savings would probably not be significant.

Effect on Murder Rate. To the extent that the prohibition on the use of the death penalty has an effect on the incidence of murder in California, the measure could affect state and county government expenditures. The resulting fiscal impact, if any, is unknown and cannot be estimated.

SUMMARY

The enactment of this measure is likely to result in both savings and costs to the state and local governments. When the full impact is realized, we estimate that the measure would probably result in net savings to the state of at least several tens of millions of dollars annually and net savings to local governments in the millions to tens of

millions of dollars annually on a statewide basis.[411]

The letter did not explain the events or factors that permitted the Legislative Analyst to identify and quantify so many aspects of the fiscal effects of the state's capital punishment system, which had been up to then "[i]ndeterminable."[412]

h. The 2000 Initiatives: Propositions 18 and 21—Three more special circumstances, 39 death-eligible crimes

In the 2000 election, voters considered whether to pass Proposition 18, an initiative to amend the California Penal Code to add kidnapping and arson by "lying in wait" to the list of death-eligible offenses. For the first time the Legislative Analyst informed voters that there may be "increased state costs for appeals of additional death sentences."[413] There was no mention, however, of increased trial costs associated with death penalty trials. There was no mention of the millions of dollars spent by the state to litigate capital habeas corpus petitions in state and federal courts, or of the critical shortage of counsel available to represent death row prisoners in the appeals and post-conviction proceedings. Nor was there any discussion of the considerable backlog of death penalty cases in the California Supreme Court; a backlog so severe that, as noted *supra*, Justice Mosk suggested that the California Constitution should be amended to create a separate Supreme Court to handle criminal appeals.

Instead, the "Summary of the Legislative Analyst's Estimate of Net State and Local Government Fiscal Impact" included in the Voter Information Guide stated: "Unknown, probably minor,

411. *Id.*

412. CALIFORNIA BALLOT PAMPHLET, NOVEMBER 1978, *supra* note 10.

413. CAL. SEC'Y OF STATE, CALIFORNIA PRIMARY ELECTION, MARCH 7, 2000: BALLOT PAMPHLET 33 (2000), *available at* http://traynor.uchastings.edu/ballot_pdf/2000p.pdf [hereinafter CALIFORNIA BALLOT PAMPHLET, MARCH 2000] ("This measure amends state law so that a case of first degree murder is eligible for a finding of a special circumstance if the murderer intentionally killed the victim "by means of lying in wait." In so doing, this measure replaces the current language establishing a special circumstance for murders committed "while lying in wait." This change would permit the finding of a special circumstance not only in a case in which a murder occurred immediately upon a confrontation between the murderer and the victim, but also in a case in which the murderer waited for the victim, captured the victim, transported the victim to another location, and then committed the murder. This measure also amends state law so that a case of first degree murder is eligible for a finding of a special circumstance if arson or kidnapping was committed to further the murder scheme.").

additional state costs."[414] In the section setting forth the "Argument Against Proposition 18," voters were told that "[i]t costs California taxpayers $2 million over and above the cost of life imprisonment each time a murderer is sent to Death Row."[415] The initiative was approved by 72.6% of voters.[416]

In that 2000 election, California voters passed another initiative, known as Proposition 21, which "add[ed] gang-related murder to the list of 'special circumstances' that make offenders eligible for the death penalty."[417] In the Voter Information Guide, there was no indication in the fiscal effect analysis of what the state's increased costs would be for the death penalty portion of this initiative, either for increased costs to house inmates on death row, or for the increase in capital litigation certain to follow passage of the measure.[418] The

414. *Id.* at 32. The full Fiscal Effect Statement stated that

> [t]his measure would increase state costs primarily as a result of longer prison terms for the murderers who would receive a life sentence without the possibility of parole. Also, there would be increased state costs for appeals of additional death sentences, which are automatically subject to appeal to the California Supreme Court. The magnitude of these costs is unknown, but is probably minor, because relatively few offenders are likely to be affected by this measure.

Id. at 33.

415. *Id.* at 35. The text of the proposed law stated: "This law proposed by Senate Bill 1878 of the 1997–98 Regular Session (Chapter 629, Statutes of 1998) is submitted to the people in accordance with the provisions of Section 10 of Article II of the California Constitution. This proposed law amends a section of the Penal Code . . . ." *Id.* at 117.

416. *Summary of Votes Cast for Offices and Measures*, *in* CAL. SEC'Y OF STATE, STATEMENT OF VOTE: 2000 PRIMARY ELECTIONS, MARCH 7, 2000 (2000), at xxx, *available at* http://www.sos.ca.gov/elections/sov/2000_primary/sum.pdf.

417. *Id.* at 46 ("This measure increases the extra prison terms for gang-related crimes to two, three, or four years, unless they are serious or violent crimes in which case the new extra prison terms would be five and ten years, respectively. In addition, this measure adds gang-related murder to the list of 'special circumstances' that make offenders eligible for the death penalty."); CAL. SEC'Y OF STATE, *Juvenile Crime. Initiative Statute. Analysis by the Legislative Analyst*, http://primary2000.sos.ca.gov/VoterGuide/Propositions/21analysis.htm (last visited Apr. 1, 2011) ("The fiscal effect of these changes [proposed by the initiative] is unknown.")

418. CAL. SEC'Y OF STATE, *supra* note 417. Proposition 21 had several components. Without specifying what costs would be incurred as a result of more condemned prisoners being housed on death row, and added counsel costs associated with capital litigation, the Fiscal Effect Statement on the voter guide stated that, as to the gang provisions which generally called for longer sentences for gang-related crimes,

> [t]he extra prison sentences added by the measure would result in some offenders spending more time in state prison, thus increasing costs to the state for operating and constructing prisons. The CDC estimates the measure would result in ongoing annual costs of about $30 million and one-time construction costs totaling about $70 million by 2025 to house these offenders for longer periods.

Id.

proposition was approved by 62.1% of voters.[419]

3. Cumulative Effect of Death Penalty Initiatives: What the Voters Were and Were Not Told

"Nowhere is the current need for critical analysis more compelling than in assessing the cumulative effects of initiatives—both direct and indirect—on the process leading to the formulation and implementation of [a] state['s] fiscal policy."[420] Under California's current initiative system there is no effective mechanism for tracking the cumulative effect of multiple individual initiatives passed over a period of many years.[421] "The cumulative effect of what may otherwise be reasonable individual initiative enactments cannot be considered and fine-tuned either easily or reliably. Indeed, because of this characteristic, initiatives present deceptively simple solutions for quite complex problems."[422]

In response to heightened concerns about increased crime in the state, California voters repeatedly embraced what purported to be "get tough on crime" policies at the ballot box, calling for tougher sentencing laws, including the continuous expansion of the list of death-eligible crimes. To the death penalty statute enacted by the California Legislature in 1977, which made 12 crimes "death-eligible," California voters have added through the initiative process an additional 27 crimes punishable by death. In the Voter Information Guide, the electorate was told that the fiscal effect would be:

Proposition 17—"Financial impact: None"[423]

Proposition 7—"Financial impact: Indeterminable future increase in state costs"[424]

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419. *Summary of Votes Cast for Offices and Measures*, *supra* note 416, at xxx.

420. Mildred Wigfall Robinson, *Difficulties in Achieving Coherent State and Local Fiscal Policy at the Intersection of Direct Democracy and Republicanism: The Property Tax as a Case in Point*, 35 U. MICH. J.L. REFORM 511, 514 (2002).

421. *See id.* at 543.

422. *Id.*

423. CAL. SEC'Y OF STATE, *supra* note 330, at 42. This proposition amended the California Constitution to override the California Supreme Court's ruling in *People v. Anderson* that the death penalty constitutes cruel and unusual punishment. *See id.* "The adoption of this initiative does not involve any significant direct added state or local cost or revenue consideration." *Id.*

424. CALIFORNIA BALLOT PAMPHLET, NOVEMBER 1978, *supra* note 10, at 32. The 1978 Briggs Initiative increased the number of special circumstances (or death-eligible) crimes from five to 10. *Id.* The Legislative Analyst stated: "We estimate that, over time, this measure would

Proposition 114—"unknown increases in state costs" [425]

Proposition 115—"only a minor fiscal impact on state and local governments, or there may be a major fiscal impact" [426]

Proposition 195—"probably result in minor additional state costs" [427]

Proposition 196—"unknown state costs, potentially ranging into several millions of dollars annually in the long run" [428]

Proposition 18—"unknown, but . . . probably minor, because relatively few offenders are likely to be affected by this measure" [429]

Proposition 21—"no indication that there would be costs associated with adding gang-related murders to the list of special circumstances in the Fiscal Effect analysis" [430]

In studying what the fiscal effects of these initiatives would be, voters were *not* told that among the far-reaching costs that were "unknown" or "indeterminable" are:

1. Increased costs for trials in which the prosecutor is seeking the death penalty
2. Increased costs for recruiting and training attorneys to represent death row inmates in post-conviction collateral proceedings
3. Increased costs to pay appellate and state habeas corpus counsel
4. Increased costs for state-funded investigation of claims raised in state habeas corpus proceedings
5. Increased costs to house death row inmates
6. Increased costs to pay for additional prison guards to handle the burgeoning death row population
7. Increased costs to build a bigger condemned inmate housing facility
8. Increased costs to hire additional court staff to manage

increase the number of persons in California prisons, and thereby increase the cost to the state of operating the prison system. . . . *There could also be an increase in the number of executions as a result of this proposition, offsetting part of the increase in the prison population.*" *Id.* at 33 (emphasis added).

425. CALIFORNIA BALLOT PAMPHLET, JUNE 1990, *supra* note 376, at 28.

426. *Id.* at 32.

427. CALIFORNIA BALLOT PAMPHLET, MARCH 1996, *supra* note 393, at 21.

428. *Id.* at 24.

429. CALIFORNIA BALLOT PAMPHLET, MARCH 2000, *supra* note 413, at 33.

430. *Id.* at 46.

the California Supreme Court docket of capital cases, including the automatic appeals and state habeas corpus petitions

9. Increased costs to the federal taxpayers for the investigation of claims raised for the first time in federal habeas corpus proceedings filed by state death row inmates
10. Increased costs to pay appointed counsel to represent condemned inmates in federal habeas corpus proceedings
11. Increased costs to hire permanent staff to manage the federal district court dockets of capital habeas cases
12. Increased costs for funding new federal judgeships to handle the increase in caseload caused by habeas corpus proceedings initiated by state death row inmates

California voters who voted in favor of "get tough on crime" death penalty initiatives were not informed of the cost of enforcing these initiatives. These initiatives have expanded the type of crimes that authorize the imposing of capital punishment from 12 crimes in 1978 to the present 39 types of first degree murder criminal conduct. We are persuaded that the electorate has been provided neither with a clear and honest picture of both the cumulative cost of implementing the death penalty in California nor with the role direct voter initiatives have played in creating their state's now defunct system of capital punishment. Our goal in publishing the findings of our research is to assist the electorate in deciding whether to demand reforms from the Legislature or to bring direct ballot initiatives to repair or abolish California's death penalty system.

III. HAZARDOUS CONDITIONS AHEAD: POTENTIAL STATE AND FEDERAL CONSTITUTIONAL ISSUES ARISING OUT OF CALIFORNIA'S CURRENT DEATH PENALTY SCHEME

With the hands of the executive and legislators tied by an initiative process that authorizes voters to enact legislation that cannot be vetoed by the Governor or amended or repealed by the Legislature, the California courts have been called upon to assume an increasingly important role in construing the reach of the California initiative process.[431] If reforms in California's death penalty system

431. The California Supreme Court has been called upon to determine the legality of

are not forthcoming, it is likely that California courts will be asked to determine whether the capital punishment scheme created through the initiative process runs afoul of the California Constitution or the U.S. Constitution or both.

A. Is the Current Death Penalty Scheme What California Voters Intended?

"In construing constitutional and statutory provisions, whether enacted by the Legislature or by initiative, the intent of the enacting body is the paramount consideration."[432] Former Chief Justice George has commented that in reviewing a voter initiative's validity, the Court's "task is simply to interpret and apply the initiative's language so as to effectuate the electorate's intent."[433]

Our research has uncovered no cases in which the California Supreme Court has been asked to determine whether the current death penalty scheme is what the voters "intended." However, in view of the current state of California's capital punishment system—and the manner in which the death penalty laws have been implemented in California over the last 32 years—the answer to whether voters intended to spend $4 billion on a system that has resulted in no more than 13 executions, certainly must be a resounding "No."

"California courts recognize the general principle that an election cannot stand in the face of irregularity or illegality in the election process which affected the result—a departure from legal requirements that 'in fact prevented "the fair expression of popular will."'"[434] "This overriding principle . . . can be viewed as encompassing a concern about fundamental fairness or due process in the election procedures themselves."[435] Deciding whether an

initiatives concerning a broad spectrum of policy issues including affirmative action, term limits, campaign finance reform, immigrant social services, tribal gaming, gay marriage, and mandatory sentences for career offenders ("Three Strikes"). *See e.g.*, Brosnahan v. Brown, 651 P.2d 274, 287–88 (Cal. 1982).

432. *In re* Lance W., 694 P.2d 744, 754 (Cal. 1985).

433. Robert L. v. Superior Court, 69 P.3d 951, 955 (Cal. 2003) (quoting Hi-Voltage Wire Works, Inc. v. City of San Jose 12 P.3d 1068, 1093 (Cal. 2000) (George, C. J., concurring and dissenting)).

434. Horwath v. City of E. Palo Alto, 261 Cal. Rptr. 108, 113 (Cal. Ct. App. 1989) (citing Canales v. City of Alviso, 474 P.2d 417, 422 (Cal. 1970); Davis v. County of Los Angeles, 84 P.2d 1034, 1036 (Cal. 1938); Rideout v. City of Los Angeles, 197 P. 74, 75 (Cal. 1921)).

435. *Id.*

initiative is defective on due process grounds

> will depend on whether the materials, in light of other circumstances of the election, were so inaccurate or misleading as to prevent the voters from making informed choices. . . . [C]ourts should examine the extent of preelection publicity. . . . The ready availability of the text of the ordinance, or the official dissemination and content of other related materials, such as arguments for or against the measure, will also bear on whether the statutory noncompliance rendered the election unfair. Finally, courts should take into account the materiality of the omission or other informational deficiency. Flaws striking at the very nature and purpose of the legislation are more serious than other, more ancillary matters. [436]

"Ballot summaries and arguments may be considered when determining voters' intent." [437]

> Unquestionably, the ballot label, ballot title and summary, and "Fiscal Effect" analysis prepared by petitioner must reasonably inform the voters of the proposed measure's fiscal impacts. To this end, these materials must be true and impartial and not argumentative. *"The main purpose of these requirements is to avoid misleading the public with inaccurate information."* [438]

California Elections Code section 9087 provides that "[t]he Legislative Analyst shall prepare an impartial analysis of the measure describing the measure and including a fiscal analysis of the

436. *Id.* at 115.

437. Legislature v. Deukmejian, 669 P.2d 17, 25 n.14 (Cal. 1983); *see also* Prof'l Eng'rs in California Gov't v. Kempton, 155 P.3d 226, 239 (Cal. 2007) (citing *Deukmejian*, 669 P.2d 17, 25 n.14 (Cal. 1983)); Kennedy Wholesale, Inc. v. Bd. of Equalization, 265 Cal. Rptr. 195, 202 (Cal. Ct. App. 1989) ("The ballot summary, arguments and analysis of Proposition 13 are of limited assistance [because] . . . . 'Read as a whole, these materials present Proposition 13 as a measure concerned with real property tax relief for homeowners.' Although these materials reiterate that a two-thirds vote of the Legislature is required to enact any change in state taxes designed to increase revenues, there is nothing in the ballot arguments or summaries which indicates an intent by the people to limit their existing power to enact tax increases by statewide statutory initiative." (citation omitted)); Estate of Cirone v. Cirone, 200 Cal. Rptr. 511, 512 (Cal. Ct. App. 1984)).

438. Taylor v. Superior Court, No. C064428, 2010 WL 928419, at *3 (Cal. Ct. App. Mar. 16, 2010)) (emphasis added) (citations omitted) (quoting Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization, 583 P.2d 1281, 1284 (Cal. 1978)) (citing CAL. ELEC. CODE § 9087(a), (e) (West 2011)); *see* Horneff v. City & Cnty. of San Francisco, 2 Cal. Rptr. 3d 79, 84 (Cal. Ct. App. 2003)).

measure showing the amount of any increase or decrease in revenue or cost to state or local government"; that the analysis "be written in clear and concise terms, so as to be easily understood by the average voter"; and that it "generally set forth in an impartial manner the information the average voter needs to adequately understand the measure."[439]

While Elections Code section 9092 provides for a preelection challenge to the sufficiency of a petitioner's fiscal analysis,[440] in ruling on such a challenge a respondent court is not vested with a wide range of discretion.[441] Instead, relief may be granted "only upon clear and convincing proof that the [challenged ballot materials] in question [are] false, misleading, or inconsistent with the requirements of this code."[442]

It is clear from our research that, voting on the death penalty initiatives over a period of 32 years, California voters were not properly informed as to what the costs of expanding the imposition of capital punishment would be; nor were they informed of the fact that if the Legislature failed to provide proper funding to carry out those initiatives, it would result in the *de facto* repeal of the death penalty, resulting in what appears to be the weakest, least effective death penalty system in the nation.

Because the California Supreme Court has never addressed this question, it is unclear whether the informational deficiencies in the Voter Information Guides concerning the real costs of implementing the state's death penalty initiatives constitute "[f]laws striking at the very nature and purpose of the legislation, [which] are more serious than other, more ancillary matters."[443]

B. Have California's Death Penalty Laws Created "an Impermissible Impairment of 'Essential Government Functions'"?

In *People v. Frierson*,[444] the defendant argued in his direct appeal from his conviction and sentence of death that "the 1972

439. CAL. ELEC. CODE § 9087 (West 2011).
440. ELEC. § 9092.
441. *See Horneff*, 2 Cal. Rptr. 3d at 83–84.
442. ELEC. § 9092.
443. Horwath v. City of E. Palo Alto, 261 Cal. Rptr. 108, 115 (Cal. Ct. App. 1989).
444. 599 P.2d 587 (Cal. 1979).

initiative measure which adopted section 27[445] [of Article I of the California Constitution] was improper because it constituted a 'revision' of the state charter rather than a mere 'amendment' thereof."[446] Frierson argued that since "section 27 contemplates 'removal of judicial review' of the death penalty from a carefully built state constitutional structure, [it results] in 'a significant change in a principle underlying our system of democratic government and can only be accomplished by constitutional revision.'"[447]

The California Supreme Court rejected that argument, holding that

> "[E]ven a relatively simple enactment may accomplish such far reaching changes in the nature of our basic governmental plan as to amount to a revision . . . ." Section 27 . . . accomplishes no such sweeping result . . . [because *the court] retain[s] broad powers of judicial review of death sentences to assure that each sentence has been properly and legally imposed and to safeguard against arbitrary or disproportionate treatment.* In addition, [the court] possess[es] unrestricted authority to measure and appraise the constitutionality of the death penalty under the federal Constitution, in accordance with the guidelines established by the United States Supreme Court. We are thus led to the conclusion that the constitutional change worked by section 27 is not so broad as to constitute a fundamental constitutional revision.[448]

Three years later, in *Brosnahan v. Brown*,[449] the California Supreme Court was asked to determine the legality of another initiative—Proposition 8 in the 1982 election—known as "The Victims' Bill of Rights." This initiative was broad in scope and "propose[d] many changes in the [California] Constitution and [its] statutory law that would alter criminal justice procedures, and

445. Article I, section 27 declares that "[t]he death penalty . . . shall not be deemed to be, or to constitute, the infliction of cruel or unusual punishments within the meaning of Article I, Section 6 nor shall such punishment for such offenses be deemed to contravene any other provision of this constitution." *Frierson*, 599 P.2d at 612.

446. *Id.* at 613.

447. *Id.* at 614.

448. *Id.* (emphasis added) (quoting Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization, 583 P.2d 1281, 1286 (Cal. 1978)).

449. 651 P.2d 274 (Cal. 1982).

punishments and constitutional rights."[450] As with the numerous death penalty initiatives passed by the voters, in the Voter Information Guide that was circulated prior to election day, the Legislative Analyst indicated that "[t]he net fiscal effect of th[e] measure cannot be determined with any degree of certainty. This is because the fiscal effect would depend on many factors that cannot be predicted . . . [such as] how the criminal justice system reacts to

450. CAL. SEC'Y OF STATE, CALIFORNIA PRIMARY ELECTION, JUNE 8, 1982: BALLOT PAMPHLET 32 (1982), *available at* http://library.uchastings.edu/ballot_pdf/1982p.pdf. Included in this one initiative were major provisions addressing issues including:

- restitution for victims of crimes;
- a measure adding "a section to the State Constitution declaring that students and staff of public elementary and secondary schools have the 'inalienable right to attend campuses which are safe, secure, and peaceful'";
- a measure allowing the "most relevant evidence to be presented in criminal cases, subject to such exceptions as the Legislature may in the future enact by a two-thirds vote";
- a measure "amend[ing] the State Constitution to give the courts discretion in deciding whether to grant bail" except "in felony cases punishable by death when the proof of guilt is evident or the presumption of guilt is great";
- a "measure . . . [adding] to the State Constitution a provision requiring the courts—in fixing, reducing, or denying bail or permitting release without bail—to consider the same factors that they now are required by statute to consider in fixing the amount of bail," making "protection of the public's safety the primary consideration in bail determinations";
- a measure "prohibit[ing] the courts from releasing without bail persons charged with certain felonies";
- a "measure . . . requir[ing] the court to state for the record its reasons for deciding to (a) grant or deny bail or (b) release an accused person without bail";
- a measure "amend[ing] the State Constitution to require that information about prior felony convictions be used without limitation to discredit the testimony of a witness, including that of a defendant";
- a measure "that would increase prison sentences for persons convicted of specified felonies" by increasing the length of sentences for defendants with certain prior offenses;
- a measure "prohibit[ing] the use of evidence concerning a defendant's intoxication, trauma, mental illness, disease, or defect for the purpose of proving or contesting whether a defendant had a certain state of mind in connection with the commission of a crime";
- a "measure . . . requir[ing] that the victims of any crimes, or the next of kin of the victims if the victims have died, be notified of (1) the sentencing hearing and (2) any parole hearing (if they so request) involving persons sentenced to state prison or the Youth Authority";
- a "measure . . . [placing] restrictions on plea bargaining in cases involving specified felonies and offenses of driving while under the influence of an intoxicating substance"; and
- a "measure . . . prohibit[ing] sending to the Youth Authority persons who were 18 years of age or older at the time they committed murder, rape, or other specified felonies."

Id. at 32, 54–55.

the measure."[451] Voters were informed, "however, [that] approval of the measure would result in major state and local costs."[452]

A group of three voters and taxpayers petitioned for writs of mandate or prohibition, objecting "to the expenditure of public funds to implement" the new bill and argued that it was unconstitutional on several grounds.[453] The petitioners argued that the initiative proposed a revision, rather than an amendment, to the California Constitution.[454] The California Supreme Court was asked to determine whether the revision to the California Constitution was

451. *Id.* at 55.

452. *Id.* The ballot pamphlet further stated:

> [The] Department of Corrections estimate[d] that the provisions that would result in longer prison terms for repeat offenders would lengthen the terms of at least 1,200 persons each year . . . [which could increase] annual state prison operating costs . . . by about $47 million (in 1982–83 prices) by the mid-1990s. This cost estimate assumes that the state's prison population would be about 3,600 higher than under existing law. In addition, the state might need to spend up to $280 million (in 1982 prices) to construct facilities to house these additional prisoners. The construction cost estimate assumes that existing standards for prisons would be followed when the new facilities were constructed, and that the custody levels (for example, maximum security) required for the additional inmates would match current housing patterns. To the extent that some of the additional prisoners could be housed by crowding existing facilities, both the estimated operating and construction costs could be reduced.

Id. at 55–56.

453. Brosnahan v. Brown, 651 P.2d 274, 276 (Cal. 1982). First, Petitioners objected to Proposition 8 as being too broad, arguing that it violated the single-subject requirement of article II, section 8, subdivision (d), of the California Constitution. *Id.* at 282–84. The California Supreme Court disagreed. It held that the initiative concerned the single subject of "the right to safety encompassed within article I, section 28, subdivision (c), [and] was intended to be, is aimed at, and is limited to, the single subject of safety from *criminal* behavior." *Id.* at 281. The court also rejected Petitioners' challenge that was grounded on the claim "that the proponents of Proposition 8 failed in several particulars to comply with the constitutionally mandated procedure for amending statutes." *Id.* at 284. Petitioner also argued "that Proposition 8 is such a 'drastic and far-reaching' measure as to constitute a 'revision' of the state Constitution rather than a mere 'amendment' thereof." *Id.* at 288. State constitutional amendments may be passed by voter initiative, whereas constitutional revisions may not. *Id.* (citing Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization, 583 P.2d 1281, 1284 (Cal. 1978); CAL. CONST. art. XVIII) ("[A]lthough the voters may accomplish an amendment by the initiative process, a constitutional revision may be adopted only after the convening of a constitutional convention and popular ratification or by legislative submission to the people."). The court held that "while Proposition 8 does accomplish substantial changes in our criminal justice system, even in combination these changes fall considerably short of constituting 'such far reaching changes in the nature of our *basic governmental plan* as to amount to a revision." *Id.* at 288–89 (quoting *Amador*, 583 P.2d at 1286; McFadden v. Jordan, 196 P.2d 787, 798 (Cal. 1948)).

454. *Id.* at 288; *see* Strauss v. Horton, 207 P.3d 48, 79–80 (Cal. 2009) ("[A]n *amendment* to the California Constitution may be proposed to the electorate either by the required vote of the Legislature or by an initiative petition signed by the requisite number of voters. A *revision* to the California Constitution may be proposed either by the required vote of the Legislature or by a constitutional convention (proposed by the Legislature and approved by the voters).").

"invalid as an impermissible impairment of 'essential government functions.'"[455] The petitioners in *Brosnahan* relied on authorities that "hold as a general proposition that '[t]he initiative . . . is not applicable where "the *inevitable* effect would be greatly to impair or wholly destroy the efficacy of some other governmental power, the practical application of which is essential."[456]

The California Supreme Court rejected the *Brosnahan* petitioners' challenge, holding as follows:

> Petitioners conjure several supposed consequences of Proposition 8 which will severely impair the functioning of the courts, the Department of Corrections and the public school system. As will appear, however, none of these consequences is as inevitable as petitioners suggest. Indeed, we may assume that the courts and other agencies,

455. *Brosnahan*, 651 P.2d at 287. In *Brosnahan v. Brown*, three voter-taxpayers petitioned the California Supreme Court to consider whether there any "constitutional defects in the manner in which Proposition 8 ["The Victims' Bill of Rights"] was submitted to the voters." *Id.* at 276.

> Declaring it "the duty of the court to jealously guard [the] right of the people" [to make and pass laws] . . . the courts have described the initiative and referendum as articulating "one of the most precious rights of our democratic process" . . . . "[It] has long been our judicial policy to apply a liberal construction to this power wherever it is challenged in order that the right be not improperly annulled."

Id. at 289 (quoting Associated Home Builders, Inc. v. City of Livermore, 557 P.2d 473, 477 (1976) (citations omitted)). The court has previously stated that "[t]he rules of construction of initiative enactments are the same as those for legislative enactments. The goal . . . is to determine and effectuate voter intent." Williams v. Superior Court, 111 Cal. Rptr. 2d 918, 925 (Ct. App. 2001).

456. 651 P.2d at 287 (quoting Simpson v. Hite, 222 P.2d 225, 230 (Cal. 1950); citing Birkenfeld v. City of Berkeley, 550 P.2d 1001, 1012 (Cal. 1976)). The court noted that the principles of these cases involve local initiative or referendum measures, rather than statewide initiatives, and assumed, without deciding that the principles "are equally applicable to measures of statewide application." *Id.* In a later case, the California Supreme Court decided that the principle does apply to statewide initiatives. Raven v. Deukmejian, 801 P.2d 1077, 1084 (Cal. 1990) (finding *Brosnahan* controlling when analyzing a statewide initiative).

The *Brosnahan* court emphasized that:

> "it is a fundamental precept of our law that, although the legislative power under our constitutional framework is firmly vested in the Legislature, '*the people* reserve to themselves the powers of initiative and referendum.' It follows from this that, '"[the] power of initiative must be *liberally* construed . . . to promote the democratic process."' Indeed, as we [have] so very recently acknowledged . . . it is our solemn duty jealously to guard the sovereign people's initiative power, "it being one of the most precious rights of our democratic process." Consistent with prior precedent, *we are required to resolve any reasonable doubts in favor of the exercise of this precious right.*

Brosnahan, 651 P.2d at 277 (quoting CAL. CONST. art. IV, § 1 and Amador Valley Joint Union High Sch. Dist. v. State. Bd. of Equalization, 583 P.2d 1281 (Cal. 1978)).

> interpreting and applying the various provisions of Proposition 8, will approach their task with a view toward preserving, rather than destroying, the essential functions of government.
>
> First, petitioners predict that the measure's restrictions upon plea bargaining will have a most damaging effect upon already crowded court calendars. Even assuming that this prediction is accurate, we cannot accept petitioners' underlying premise that an initiative measure which, as a collateral effect, *may* aggravate court congestion is void under the *Simpson* principle.[457] . . . No such constricting effect on court operations is herein presented. While plea bargaining may well be a useful device in reducing court congestion, unlike a courthouse it is really not an *essential* prerequisite to the administration of justice. Moreover, any effect upon the criminal justice system from restrictions upon plea bargaining would be largely *speculative* and would not appear on the face of Proposition 8.[458]
>
> . . . .
>
> Petitioners next predict that Proposition 8's more severe sentencing provisions will increase California's prison population to an extent exceeding the state budget for prison expenditures. Again, the point is entirely conjectural; one might as readily argue that the measure

457. In *Simpson*, the court held that an initiative measure which would have directly prevented a local board of supervisors from designating a site for court buildings was invalid because, among other adverse effects, such an initiative "could interfere with the functioning of the courts by depriving them of the quarters which the supervisors were bound to, and in good faith sought to, furnish." *Simpson*, 222 P.2d at 230; *see also* Geiger v. Bd. of Supervisors, 313 P.2d 545, 548–49 (Cal. 1957) (holding that a referendum to repeal local sales and use tax was invalid); Chase v. Kalber 153 P. 397, 400–01 (Cal. 1915) (holding that a referendum to repeal a street improvement ordinance was invalid).

458. *Brosnahan*, 651 P.2d at 287–88 (first and third emphases added) (internal quotation marks omitted). The court continued:

> That measure's *conditional* prohibition against plea bargaining appears to apply only to the postindictment or postinformation stage, and only with respect to "serious felonies" as defined therein. Bargaining may continue with respect to lesser offenses. Moreover, even as to serious felonies, bargaining may proceed if material witnesses or evidence become unavailable, or if the plea would not substantially reduce the expected sentence. Finally, the Legislature by a two-thirds vote may restore plea bargaining in *all* cases.

Brosnahan, 651 P.2d at 287.

> will deter persons who otherwise might resort to crime, thereby *reducing* the prison population. Either contention *involves pure guesswork* . . . .[459]

The California Supreme Court has not yet been asked to consider whether the effect of California's death penalty initiatives has been to create a law or laws that are "invalid as an impermissible impairment of 'essential government functions.'"[460]

In view of the Court's decision in *Frierson*, upholding the constitutionality of section 27 on the ground that the court "retain[s] broad powers of judicial review of death sentences *to assure that each sentence has been properly and legally imposed* and to safeguard against arbitrary or disproportionate treatment,"[461] an argument could be made that, despite the fact that the California Supreme Court *retains* "the power of judicial review of death sentences," it appears that the Court may no longer be able to fulfill its duty to review death sentences in a manner that respects fundamental due process rights.

The requirement that the California Supreme Court review the hundreds of death penalty appeals and habeas corpus petitions filed by death row inmates has had a significant and deleterious impact on the Court's ability to carry out its duty to review other important constitutional, civil, and criminal matters.[462] The avalanche of death penalty appeals has not only prevented the California Supreme Court from reviewing important civil matters in a timely manner, but the extensive delays have also resulted in at least one condemned inmate—John Post—dying after spending nine years on death row *before* the California Supreme Court completed its review of his automatic appeal.[463] Thus, with respect to the appellate review

459. *Id.* at 288 (final emphasis added).

460. *Id.* at 287.

461. People v. Frierson, 599 P.2d 587, 614 (Cal. 1979) (emphasis added).

462. FINAL REPORT, *supra* note 4, at 147. The enormous toll California's death penalty initiatives have taken on the State Supreme Court has been apparent since at least 1988, when the number of automatic appeals from convictions and judgments of death was so overwhelming that it prompted California Supreme Court Justice Stanley Mosk to comment that: "The tragic fact is that important civil cases are not being heard because of the overwhelming presence of death penalty cases. . . . I think we have to take some drastic step . . . or civil cases will not be heard for years into the future and the development of civil law in California will be a casualty of the death penalty." Lorie Hearn, *Execution Decisions Strain Court; Other Key Issues in State Get Shunted Aside, Experts Warn*, SAN DIEGO UNION-TRIB., Sept. 25, 1988, at A3.

463. *See supra* note 21.

proceedings available to Mr. Post, not only was he denied due process, but the backlog in the state's high court also worked to deny him of *all* process.

Unlike plea bargaining, which the Court held in *Brosnahan* was "not an *essential* prerequisite to the administration of justice" and thus did not serve to impair an "essential government function," it could be argued that the timely review of the direct appeals of condemned inmates who have been sentenced to death *is* an "essential prerequisite to the administration of justice."[464]

Unlike the "speculative" situation before the California Supreme Court in *Brosnahan*, the impending "breakdown" that California's death penalty system is creating is neither "speculative" nor "conjectural." The California Supreme "Court *now faces a crisis*, in which the death penalty backlog is threatening the Court's ability to resolve other statewide issues of law and settle conflicts at the appellate level, which is its primary duty and responsibility."[465] The backlogs are severe and growing worse each month. Despite its best efforts, there is no indication that the California Supreme Court will see an end to the backlog in automatic appeals from judgments of death in the near future. In 2010, the California Supreme Court issued final opinions in 23 automatic appeals, while another 33 prisoners were sentenced to death and added to death row to begin their long wait for appointment of appellate counsel.[466] Even if the California Supreme Court abandoned its review of all other matters and reviewed only death penalty cases, it likely would take a minimum of three to four years to process the existing backlog of death penalty appeals and state habeas corpus petitions.[467]

464. *Brosnahan*, 651 P.2d at 287.

465. FINAL REPORT, *supra* note 4, at 147 (emphasis added).

466. E-mail from Robert Reichman to Paula Mitchell, *supra* note 65. Mr. Reichman reported that since 1978 and as of February 3, 2011, there have been 961 judgments of death entered for which automatic appeals have been filed. *See id.* During that same period the California Court of Appeal has issued final opinions in 549 automatic appeals. *Id.*

467. Testimony of Chief Justice Ronald M. George before the Commission on the Fair Administration of Justice, *supra* note 8, at 18–19. Chief Justice George testified before the Commission that in recent years, the California Supreme Court, which has seven justices, has issued 110 to 120 opinions per year—70 percent more than U.S. Supreme Court with nine justices. *Id.* at 7. Twenty to twenty-five percent of those opinions related to death penalty appeals and habeas corpus petitions. *Id.* Review of capital cases takes more time than reviewing issues presented to the Court in other cases. *Id.* at 7–8. There is an additional burden to review lengthy and complex habeas litigation, most of which do not result in written opinions but give rise to lengthy internal memoranda, which take substantial resources. *Id.* at 8.

C. Is the Denial of Due Process Ever Cruel and Unusual?

1. Direct Appeal

The U.S. Supreme Court has held that "there are important public interests in the process of appellate review."[468] Thus, excessive delays in the appellate process may give rise to a denial of due process.[469] In *Coe v. Thurman*,[470] the Ninth Circuit explained that when "a state guarantees the right to a direct appeal, as California does, the state is required to make that appeal satisfy the Due Process Clause."[471] "If 'there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner,'" a prisoner may seek federal habeas corpus relief without first exhausting the federal constitutional claims in state court.[472] The California Supreme Court has also acknowledged that "excessive appellate delays may sometimes result in a denial of due process."[473] To prevail on an excessive delay claim, a defendant or petitioner must "identify [some] concrete prejudice from the delay, such as an impairment of grounds for appeal."[474] A compelling argument could be made that Mr. Post, who died while awaiting review of his automatic appeal by the California Supreme Court, suffered a "concrete prejudice from the delay."

2. Federal Habeas Corpus Proceedings

> *A petition for writ of habeas corpus is not a game the law affords incarcerated people. It is the sole means to allow one whose very liberty has been deprived to thoroughly challenge both the procedural and substantive process. Because we as a society believe in the fundamental right of liberty of the individual, our system of government*

468. United States v. Loud Hawk, 474 U.S. 302, 313 (1986).

469. *Id.* "[E]xcessive delay in the *appellate* process may also rise to the level of a due process violation." Coe v. Thurman, 922 F.2d 529, 530 (9th Cir. 1990) (citing United States v. Antoine, 906 F.2d 1379, 1382 (9th Cir. 1990)).

470. 922 F.2d 528 (9th Cir. 1990).

471. *Id.* at 530.

472. *Id.* (quoting 28 U.S.C. § 2254(b) (1988)).

473. People v. Anderson, 22 P.3d 347, 389 (Cal. 2001).

474. *Id.*

> *recognizes the values in making certain that a fair process has taken place thus preventing innocent people from forfeiting the right most sacred to them. The initial trial and appeal [have] proven in hundreds of cases not to have been infallible.*[475]

State and federal courts have consistently held that the lengthy delays between capital convictions and executions that condemned inmates experience when seeking review of their convictions and habeas corpus petitions do not violate the Eighth Amendment's prohibition against cruel and unusual punishment.[476] In analyzing these claims, known as *Lackey* claims, courts have concluded that a petitioner facing execution cannot complain that the lengthy delay involved in pursuing post-conviction remedies violates the Eighth Amendment, because such a petitioner is considered responsible for the lengthy delay by virtue of having chosen that path.[477] Indeed, one of the few prisoners to be executed in California, Clarence Allen, made just such an argument before the U.S. Supreme Court, unsuccessfully, on the eve of his execution.[478]

475. Williams v. Lockhart, 862 F.2d 155, 161 (8th Cir. 1988) (Lay, C.J., concurring) (emphasis added).

476. In 1995, Clarence Lackey, an inmate awaiting execution in Texas, raised a novel legal argument claiming that because of his lengthy wait on death row, it would be "cruel and unusual punishment" to execute him. Lackey v. Texas, 514 U.S. 1045, 1045 (1995) (Stevens, J.) (mem. respecting denial of certiorari). The U.S. Supreme Court denied certiorari, but Justice Stevens issued a memorandum suggesting that lower courts examine the issue because there might well be a viable argument. *See id.* at 1046. This particular Eighth Amendment challenge has come to be known as a "*Lackey* claim." It was raised again in a petition for certiorari which was denied in *Elledge v. Florida*, 525 U.S. 944 (1998). In his dissent from the denial of certiorari, Justice Breyer called the claim a "serious one." *Id.* at 944 (Breyer, J., dissenting from denial of certiorari). Similarly, in *Knight v. Florida*, 528 U.S. 990 (1999), Justice Breyer dissented from denial of certiorari commenting that "[w]here a delay, measured in decades, reflects the State's own failure to comply with the Constitution's demands, the claim that time has rendered the execution inhuman is a particularly strong one." *Id.* at 993 (Breyer, J., dissenting from denial of certiorari).

477. *See* cases cited *supra* note 476.

478. *See* Alarcón, *supra* note 3, at 704–05 ("[O]n 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. 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. 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. The district court denied his application the same day it was filed. He filed a notice of appeal to the United States Court of Appeals for the Ninth Circuit on January 13, 2006. He also requested a certificate of appealability and a stay of execution. Both requests were denied on January 15, 2006. The United States Supreme Court denied Mr. Allen's petition for certiorari on January 16, 2006. He was executed the following day." (footnotes

The lengthy state-caused delays created by California's defunct death penalty system, however, visit another type of harm on another group of prisoners: those who have died after languishing for many years on death row under sentences of death while still awaiting review either of their automatic appeals or of their potentially meritorious state or federal habeas corpus claims of constitutional violations. These cases are distinct and apart from those cases in which a condemned inmate has exhausted all of his or her post-conviction remedies and execution is imminent.

The U.S. Supreme Court has held that "since the basic purpose of the writ is to enable those unlawfully incarcerated to obtain their freedom, it is fundamental that access of prisoners to the courts for the purpose of presenting their complaints may not be denied or obstructed."[479] In addition,

> [b]y exercising the right to postconviction review, defendants are availing themselves of procedural protections that ensure the accuracy and reliability of their death sentences. While it is always the inmate who chooses to take part in postconviction litigation, it is the State that provides the terms and is responsible for the conditions of incarceration.[480]

Further,

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omitted)).

In his statement respecting the denial of certiorari in *Johnson v. Bredesen*, 130 S. Ct. 541 (2009), Justice Stevens noted that it was his "strongly held view that state-caused delay in state-sponsored killings can be unacceptably cruel." *Id.* at 542 (Stevens, J., statement respecting denial of certiorari). Each of the petitioners in *Lackey*, *Elledge*, *Knight*, and *Johnson*, who argued that the lengthy delays experienced by death row inmates are cruel and unusual punishment in violation of the Eighth Amendment, had been denied relief in their state and federal habeas corpus proceedings and were facing imminent execution. *See Johnson*, 130 S. Ct. at 542 and cases cited *supra* note 476. The majority of the U.S. Supreme Court does not agree with Justice Stevens that it is "unacceptably cruel" to require a condemned inmate to sit for decades on death row prior to his or her execution. *See Johnson*, 130 S. Ct. at 544.

479. Johnson v. Avery, 393 U.S. 483, 485 (1969).

> Reasonable access to the courts is . . . a right [secured by the Constitution and laws of the United States], being guaranteed as against state action by the due process clause of the fourteenth amendment. In so far as access by state prisoners to federal courts is concerned, this right was recognized in Ex parte Hull, 312 U.S. 546, 549. . . . The right of access by state prisoners to state courts was recognized in White v. Ragen.

Id. at 498 n.24 (Douglas, J., concurring) (quoting Hatfield v. Bailleaux, 290 F.2d 632, 636 (9th Cir. 1961)) (citation omitted).

480. Hannah Robertson Miller, Note, *"A Meaningless Ritual": How the Lack of a Postconviction Competency Standard Deprives the Mentally Ill of Effective Habeas Review in Texas*, 87 TEX. L. REV. 267, 275 (2008).

> state action, whether through one agency or another, [must] be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions and not infrequently are designated as "law of the land." Those principles are applicable alike in all the States and do not depend upon or vary with local legislation.[481]

Our research has not revealed any case in which a court has been asked to decide whether the death penalty as it is currently implemented in California functionally deprives a prisoner of his due process right of access to the courts. Nor have we uncovered any California cases discussing whether there is any scenario in which the prejudice suffered by those prisoners who die after years of waiting on death row, but before their federal constitutional claims have been heard, could constitute cruel and unusual punishment.[482]

Alejandro Gilbert Ruiz, who was convicted and sentenced to death in 1980, filed a petition for a writ of habeas corpus in 1989 in federal court, where it remained for 18 years, and where it was still pending when he died in 2007.[483] Among the claims raised in Mr. Ruiz's petition was the claim that he was incompetent to stand trial.[484] On December 21, 2006, the federal district court scheduled an evidentiary hearing on Mr. Ruiz's claim that he had not been

481. Hebert v. Louisiana, 272 U.S. 312, 316–17 (1926).

482. *But cf.* Jones v. State, 740 So. 2d 520, 524 (Fla. 1999) (holding that a 12-year delay in state competency proceedings violated due process). The court in *Jones* noted that the

> egregious delay . . . brings to mind the criticism by Justice Breyer of the United States Supreme Court, who condemned excessive delays in the processing of death penalty appeals. Although writing in terms of the Eighth Amendment's prohibition against cruel and unusual punishment, his comments are equally pertinent in the instant case.

Id. (citing Elledge v. Florida, 525 U.S. 944 (1998) (Breyer, J., dissenting from denial of certiorari)).

483. At the time of his death, Mr. Ruiz had three remaining federal habeas corpus claims pending before the late Honorable Florence-Marie Cooper in the U.S. District Court for the Central District of California. Judge Cooper's career law clerk, Kathryn Lohmeyer, reported that counsel for the state of California requested that the federal proceedings be stayed because Mr. Ruiz's schizophrenia and brain damage rendered him unable to effectively communicate with his appointed attorneys regarding his claims. On December 20, 2006, Judge Cooper denied the stay and scheduled an evidentiary hearing on the more-than-25-year-old claim that Mr. Ruiz had not been competent to stand trial in 1980. The hearing date was set for April 4, 2007. Ruiz v. Woodford, No. 89–4126 (C.D. Cal. Dec. 21, 2006), ECF No. 264 (minutes in chambers setting evidentiary hearing) [hereinafter Minutes Setting Hearing]. Mr. Ruiz died on January 4, 2007 of natural causes.

484. Ruiz v. Woodford, No. 89-4126 (C.D. Cal. Dec. 20, 2006), ECF No. 263 (order denying motion for stay of federal habeas proceedings as to claim A).

competent to stand trial in 1980.[485] The evidentiary hearing was set for April 4, 2007.[486] Mr. Ruiz died on January 4, 2007, of natural causes.[487]

In other cases, prisoners develop debilitating physical or mental impairments during the decades they spend waiting to learn their fates from the federal courts charged with reviewing their claims of federal constitutional violations. These infirmities effectively render them unable to assist in their own defense, should the federal court grant them a new trial. Ralph International Thomas was convicted and sentenced to death on September 25, 1986.[488] The California Supreme Court denied Mr. Thomas's automatic appeal and affirmed his conviction and sentence on April 23, 1992.[489] While the automatic appeal was pending, Mr. Thomas filed a petition for a writ of habeas corpus in the California Supreme Court, seeking relief on the ground that he had received ineffective assistance of trial counsel during the guilt phase of his trial.[490] This claim was supported by 22 declarations, including those of trial counsel James Chaffee, his law clerk and "second counsel" Susan Walsh, and wound pathology expert Dr. Martin Fackler.[491] The California Supreme Court denied the habeas petition, with neither hearing nor opinion, on September 4, 1991.[492] A petition for writ of certiorari was filed with the U.S. Supreme Court and was denied on January 11, 1993.[493]

In 1993, Mr. Thomas began his federal habeas corpus proceedings.[494] The California Appellate Project filed a pro forma petition on Mr. Thomas's behalf in the federal district court, on February 18, 1993.[495]

485. Minutes Setting Hearing, *supra* note 483.

486. *Id.*

487. *See* Ruiz v. Woodford, No. 89-4126 (C.D. Cal. Mar. 1, 2007), ECF No. 270 (order dismissing case with prejudice).

488. People v. Thomas (Ralph I.), S004729 (Cal. Sept. 29, 1986) (filed certified copy of judgment of death rendered).

489. People v. Thomas, 828 P.2d 101, 105 (Cal. 1992).

490. Amended Petition for Writ of Habeas Corpus at 13, Thomas v. Brown, No. 93–0616 (N.D. Cal. Jan. 30, 2008).

491. *Id.*

492. *Id.*

493. Thomas v. California, 506 U.S. 1063 (1993).

494. Thomas v. Brown, No. 93-0616 (N.D. Cal. Feb. 19, 1993) ECF No. 1 (application for appointment of counsel and request for stay of execution).

495. Amended Petition for Writ of Habeas Corpus, *supra* note 490, at 13.

> On September 3, 1993, the Court appointed Alex Reisman (who had represented [Mr. Thomas] before the California Supreme Court) and William Snyder, Jr., to represent [Mr. Thomas]. Having, for the first time, adequate resources to do so, counsel for [Mr. Thomas] undertook a thorough investigation of the case and uncovered a number of significant, exculpatory witnesses.[496]

Fifteen years later, on January 30, 2008, following state exhaustion proceedings and discovery, Mr. Thomas filed his post-exhaustion amended petition for a writ of habeas corpus in the federal district court.[497] On July 2, 2008, a response was filed to Mr. Thomas's amended petition.[498] On January 8, 2009, Mr. Thomas filed a traverse.[499] On June 16, 2009, counsel for Mr. Thomas informed the federal district court that Mr. Thomas's medical condition had taken "a serious turn for the worse" and requested that the court resolve Mr. Thomas's pending petition "at the Court's very earliest opportunity."[500]

496. *Id.* at 13–14.

497. Thomas v. Brown, No. 93-0616 (N.D. Cal. Jan. 30, 2008), ECF No. 221 (amended petition for writ of habeas corpus).

498. Thomas v. Brown, No. 93-0616 (N.D. Cal. July 2, 2008) ECF No. 232 (response answer to post-exhaustion amended petition for writ of habeas corpus).

499. Thomas v. Brown, No. 93-0616 (N.D. Cal. Jan. 8, 2009) ECF No. 248 (traverse to answer to post-exhaustion amended petition).

500. Thomas v. Brown, No. 93-0616 (N.D. Cal. June 16, 2009) ECF No. 257 (letter from petitioner's counsel regarding petitioner's medical condition). Counsel for petitioner explained:

> Late last week, lead counsel Alex Reisman had a conversation with Mr. Thomas's treating physician, Dr. Michael Rowe. According to Dr. Rowe, Mr. Thomas has had a series of "strokes," and seems to be suffering more generalized seizures as well. Mr. Thomas's motor function is greatly impaired and he is also "fairly demented." (Although he had seen Dr. Rowe many times, Mr. Thomas did not know who he was last Friday morning).
>
> Mr. Thomas is being kept in a rehabilitation facility outside of the prison (Dr. Rowe was not at liberty to reveal where), but Dr. Rowe believes that Mr. Thomas is not strong enough physically or mentally to actually improve through rehabilitation. Rather, he is being held in the rehabilitation facility because he requires more care than can be afforded him in the hospital unit at San Quentin. Dr. Rowe's opinion is that Mr. Thomas will never get better, and will continue to deteriorate.
>
> We were alerted to this problem by Mr. Thomas's family—his mother and sister, who have remained quite devoted to him. It is their fond hope (and Mr. Thomas's, when he is lucid) that he be able to come home before he dies.
>
> The portion of the petition now pending the Court's determination asserts that Mr. Thomas was wrongfully convicted; if the Court finds merit in it, there is at least some real possibility that Mr. Thomas will be able to live his last days with his family. Of course, that fact should not and will not affect the Court's decision on the merits. But if there is anything the Court can do to expedite its decision, that in itself would be a

Twenty-three years after Mr. Thomas was convicted and sentenced to death, on September 9, 2009, the federal district court *granted* Mr. Thomas's petition for a writ of habeas corpus based on his claim that his trial counsel was ineffective in the guilt phase of his trial.[501] The state of California conceded that Mr. Thomas's trial counsel's performance was deficient but argued that he was not prejudiced.[502] The federal district court found that Mr. Thomas was prejudiced by his counsel's deficient performance during the guilt phase of his trial because "the evidence against petitioner was entirely circumstantial and not substantial."[503] The federal district court explained:

> Although the sum of circumstantial evidence presented against petitioner was perhaps sufficient to justify his conviction, it does not follow that his trial would have yielded the same result had a competent investigation been completed. Indeed, had . . . all three [witnesses,] . . . whom the state court conceded would have been found through a competent investigation, testified at trial, there is a reasonable probability that the outcome of trial would have been different.[504]

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great kindness.

We make this request reluctantly, because there is no sense in which this Court has been less than attentive to the case or timely in its rulings. However, there now appears to be a strong possibility that, absent expeditious determination, the case will become either actually or effectively moot.

Id.

501. Order Granting in Part and Denying in Part Amended Petition for Writ of Habeas Corpus at 28, Thomas v. Wong, No. 93-0616 (N.D. Cal. Sept. 9, 2009) [hereinafter Order Granting Petition in Part].

502. *In re* Thomas, 129 P.3d 49, 51 (Cal. 2006).

503. *Thomas*, ECF No. 258, No. 93-0616 (N.D. Cal. Sept. 9, 2009), at 23; *see also supra* note 26 (noting that our research indicates that in the 24 of the 43 cases, relief was granted on the ground that the condemned prisoner's appointed counsel was ineffective; in only five cases during the guilt phase, and in 19 cases during the penalty phase—typically for counsel's failure to investigate mitigating evidence).

504. Order Granting Petition in Part, *supra* note 501, at 24. The district court also explained that Mr. Thomas's trial counsel,

> Chaffee[,] did not follow any of the [Alameda County Public Defender's Office] procedures or make use of the resources available to him. He conducted the investigation himself, and did not make a single request for assistance from an investigator during the six months he spent preparing for trial. As an investigator, he interviewed almost none of the potential witnesses who could have had a decisive impact on the outcome of trial. He declined the opportunity to work with a second chair, until he accepted the help of Susan Walsh, then still a law clerk, who was

The federal court vacated Mr. Thomas's conviction and ordered that the case be remanded to the Alameda County Superior Court for a new guilt phase trial.[505] In a request that Mr. Thomas be released from custody pending the state's appeal of the federal district court's order granting habeas corpus relief, counsel for Mr. Thomas argued as follows:

> Ralph International Thomas has been imprisoned by the State for 24 years, 23 of them on Death Row. The years of confinement have taken not only most of his adult life, but his physical health and mental abilities as well—as a result of a series of strokes, he is now severely demented and cannot perform the basic "activities of daily life," such as dressing himself or keeping himself clean. This Court has determined that the trial which led to Mr. Thomas' imprisonment did not measure up to constitutional standards; even more important, the evidence discussed by the Court suggests at least a significant likelihood that he never committed the crimes for which he has paid so dearly. . . .
>
> Petitioner is so thoroughly debilitated that he could pose no risk of fleeing or of endangering the public, even if he had any inclination to do either of those things. On the other hand, his continued imprisonment by the State would not only cause him the irreparable injury that accrues in every case in which someone is held in violation of the Constitution. Given his terrible medical condition, and the proven deficiencies in the medical care provided in the California prisons, it could very well destroy what is left of his life.[506]

The federal court declined to grant Mr. Thomas's request for

> assigned to petitioner's case in March 1986, the month that trial began. [He] also rejected offers to be relieved of his other cases and duties. Finally, [he] failed to complete even the basic investigative duties that were mapped out at the beginning of the case. For example, he did not conduct a canvass of Rainbow Village, other than talk to a few permanent residents who had no useful information, and did not try to contact anyone in the Grateful Dead community.

Id. at 10–11 (citations omitted).

505. *Id.* at 28. The matter is currently on appeal before the Ninth Circuit Court of Appeals.

506. Petitioner's Request for Release From Custody Pending State's Appeal at 1, Thomas v. Ayers, No. 93-0616 (N.D. Cal. Nov. 2, 2009).

release pending the outcome of the state's appeal from the district court's order, which granted federal habeas corpus relief to Mr. Thomas.[507] As of June 2011, this appeal is pending before the Ninth Circuit Court of Appeals.[508] We express no opinion here as to the merits of this case. We include Mr. Thomas's case in our discussion because it should be noted that based on the records filed in the district court, which are public, Mr. Thomas has been on death row for the last 23 years, maintaining his innocence and attempting to gain meaningful review of his claim—that his federal constitutional right to the effective assistance of counsel during his capital trial was violated.

The courts have not yet been asked to consider whether there is a point at which delays in judicial review of capital cases become cruel and unusual, because such delays effectively deprive many condemned inmates of the opportunity for meaningful review of their claims of constitutional violations. In California, the unavailability of counsel to represent condemned inmates in post-conviction proceedings is coupled with a severe state court capital litigation backlog that results in prisoners dying before their direct appeals—and possibly meritorious claims of constitutional violations—have been reviewed. Considering that habeas corpus relief has been granted by federal courts in 70% of California's death row inmates' cases, a significant number of the inmates who died while their petitions were pending may have had their convictions or death sentences set aside on federal constitutional grounds, but for the unconscionable delay in judicial review.

The U.S. Supreme Court has yet to determine whether the denial of review of federal constitutional claims for decades constitutes a denial of a timely hearing under the Due Process Clause.

D. Is Our View of the Worst of the Worst Overbroad?

Last, some argue that the continuous expansion of special circumstances by voter initiatives has expanded California's death penalty scheme beyond one that is sufficiently narrow to satisfy *Furman*. That case's holding, in effect, requires that states adopt

507. Thomas v. Brown, No. 93-0616 (N.D. Cal. Nov. 24, 2009), ECF No. 283 (order granting respondent's motion for order staying retrial pending appeal and denying petitioner's request for release pending appeal).

508. Ralph Thomas v. Robert Wong, No. 09-99024.

procedures that limit the death-eligible pool to those convicted murderers particularly deserving of the penalty.[509] The holding in *Furman*, as explained by the U.S. Supreme Court in *Gregg v. Georgia*,[510] was that the imposition and carrying out of the death penalty constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments unless "discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, [and] that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action."[511]

In *Gregg*, Justice White, writing for himself, the Chief Justice, and Justice Rehnquist, explained the Court's expectations:

> As the types of murders for which the death penalty may be imposed become more narrowly defined and are limited to those which are particularly serious or for which the death penalty is peculiarly appropriate . . . it becomes reasonable to expect that juries—even given discretion *not* to impose the death penalty—will impose the death penalty in a substantial portion of the cases so defined. If they do, it can no longer be said that the penalty is being imposed wantonly and freakishly or so infrequently that it loses its usefulness as a sentencing device.[512]

Over 15 years ago, Judge Alex Kozinski of the Ninth Circuit Court of Appeals cautioned:

> The key to a solution, if there is to be one, lies in the hands of the majority [of the electorate], precisely those substantial numbers in our midst who strive for the

509. *See* Furman v. Georgia, 408 U.S. 238, 239–40 (1972). We note that Petitioner Troy Ashmus, who has been on death row since 1986, has a petition for writ of habeas corpus currently pending in federal court, which raises precisely this challenge. We express no opinion as to the merits of such a claim. We include this in our discussion simply to inform the electorate that California's death penalty laws are under constitutional fire on the ground that the reach of these voter initiated laws is too broad and "simply ignore[s] the U.S. Supreme Court ruling that states must limit the breadth of their death penalty laws by legislatively guiding the discretion of prosecutors and judges." Uelmen, *supra* note 63, at 1E ("In that challenge, brought by the California Habeas Corpus Resource Center, the lawyer who drafted the initiative that gave California our death penalty law in 1978 testified that the marching orders he received from state Sen. John Briggs were essentially to open the floodgates.").

510. 428 U.S. 153 (1976) (plurality opinion).

511. *Id.* at189.

512. *Id.* at 222 (White, J., concurring).

> application of the death penalty to an ever-widening circle of crimes. The majority must come to realize that this is a self-defeating tactic. Increasing the number of crimes punishable by death, widening the circumstances under which death may be imposed, obtaining more guilty verdicts, and expanding the population of death rows will not do a single thing to accomplish the objective, namely to ensure that the very worst members of our society—those who, by their heinous and depraved conduct have relinquished all claim to human compassion—are put to death. . . .
>
> . . . .
>
> The Supreme Court already requires the states and the federal government to differentiate between murderers who deserve the death penalty and murderers who do not, and that directive has proved difficult to implement. Further differentiating only the most depraved killers would not be an easy task; it would not be pleasant; it would require some painful soul-searching about the nature of human evil. But it would have . . . very significant advantages. First, it would ensure that, in a world of limited resources and in the face of a determined opposition, we will run a machinery of death that only convicts about the number of people we truly have the means and the will to execute. Not only would the monetary and opportunity costs avoided by this change be substantial, but a streamlined death penalty would bring greater deterrent and retributive effect. Second, we would ensure that the few who suffer the death penalty really are the worst of the very bad—mass murderers, hired killers, terrorists. This is surely better than the current system, where we load our death rows with many more than we can possibly execute, and then pick those who will actually die essentially at random. [513]

Examining the federal death penalty system alongside California's provides an interesting comparison for purposes of understanding how narrowing the death penalty in California could work. The federal system punishes defendants throughout the nation who have

513. Kozinski & Gallagher, *supra* note 36, at 29–31 (footnotes omitted).

been convicted of federal capital crimes and sentenced to death in a federal court. Like California, which has 39 death-eligible crimes,[514] the federal system has 41 death-eligible crimes.[515] Unlike California's bloated death row, which now houses over 700 condemned inmates, however, "[s]ince the reinstatement of the federal death penalty in 1988, *68* defendants have been sentenced to death . . . ."[516] Of these 68 condemned federal prisoners, "3 have been executed and 7 have had their death sentence removed."[517]

In the federal system, the U.S. Department of Justice, Criminal Division, has created a Capital Case Unit that is "charged with overseeing the Department's capital prosecutions. The purpose of the [Capital Case Unit] is to promote consistency and fairness in the application of the death penalty throughout the United States . . . ."[518]

The nature of the murders for which many of the 58 current condemned federal inmates received death sentences strongly suggests that the U.S. Department of Justice is seeking the death penalty primarily in those cases in which the defendants represent the worst of the worst. For example, 11 of the 58 condemned inmates on federal death row were convicted of murders that demonstrate that

514. ROBERT SANGER ET AL., DEATH PENALTY FOCUS, THE REPORT OF THE FOXES: ANALYSIS OF "PROSECUTORS' PERSPECTIVE ON CALIFORNIA'S DEATH PENALTY" 3 (2003).

515. *See Federal Laws Providing for the Death Penalty*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/federal-laws-providing-death-penalty (last visited Mar. 17, 2011); *see also* ELIZABETH BAZAN, CONG. RESEARCH SERV., CAPITAL PUNISHMENT: AN OVERVIEW OF FEDERAL DEATH PENALTY STATUTES 3–15 (2005), *available at* http://www.fas.org/sgp/crs/RL30962.pdf (listing capital offenses).

516. *List of Death Row Prisoners*, DEATH PENALTY INFO. CENTER, http://www.deathpenaltyinfo.org/federal-death-row-prisoners#list (last visited May 30, 2011).

517. *Id.* The following three men have been executed under the federal death penalty system: Timothy McVeigh (sentenced to death in June 1997 for the bombing of the Oklahoma City federal building in 1995), Juan Raul Garza (sentenced to death in August 1993 in Texas for the murders of three other drug traffickers), Louis Jones (sentenced to death in November 1995 in Texas for the kidnap and murder of Private Tracie Joy McBride, a young female soldier). *Id.* The average time between conviction and execution in these three cases was six-and-a-half years. *See id.* It should be noted, however, that Timothy McVeigh waived his final appeals, which shortened the delay in his case to four years. OKLA. CITY NAT'L MEM'L & MUSEUM, LESSONS FROM THE OKLAHOMA CITY BOMBING 9 (2010), *available at* http://www.oklahomacitynationalmemorial.org/uploads/documents/OKCNM_Bkgd%20Invest%20Pros%20Timeline.pdf.

518. *USDOJ: CRM: Capital Case Unit (CCU)*, POLITIFI (July 12, 2010) (on file with authors); *see also List of Death Row Prisoners*, *supra* note 516 (listing inmates on federal death row and indicating that they were convicted and sentenced to death under federal law in the following states: Arizona (1); Arkansas (2); California (2); Florida (2); Georgia (3); Idaho (1); Illinois (2); Indiana (1); Iowa (2); Louisiana (1); Maryland (2); Massachusetts (1); Michigan (1); Missouri (7); New York (1); North Carolina (3); North Dakota (1); Ohio (1); Oklahoma (2); South Carolina (2); Tennessee (1); Texas (12); Vermont (1); and Virginia (6)).

the perpetrators cannot be safely incarcerated for the duration of their sentences without posing a risk of serious harm or death to others: murdering fellow inmates (7); murdering a prison guard (1); and murdering while in the course of escaping from prison (3). Another 16 of the 58 condemned inmates on federal death row were convicted of murdering law enforcement officers or others charged with maintaining order in a civilized society: murder of law enforcement officers (3); murder of persons on military bases (2); murder of federal workers (2); murder of guards or others employed by federally insured banks (4); murder of witnesses (3); and murder on federal property (2). Another 12 of the 58 federal death row inmates were convicted of multiple murders.[519] Thus, 64% of the prisoners on federal death row have been convicted of crimes that come within a very narrowly defined set of circumstances.[520]

As discussed in the Commission's *Final Report*, a broad consensus of a blue-ribbon bipartisan commission composed of members of the criminal justice community, assembled by the Constitution Project, have agreed that there are five special circumstances that represent circumstances that should render murder cases death-eligible.[521] Those circumstances, known as the "Mandatory Justice" factors, are: (1) murder of a peace officer in the performance of his or her official duties; (2) murder of any person occurring at a correctional facility; (3) multiple murders involving an intent to kill or knowledge that the defendant's actions would cause, or create a strong probability of, death or great bodily harm to one or more of the victims; (4) murder involving torture; and (5) murder by a person suspected or convicted of a felony or the murder of anyone involved in the investigation, prosecution, or defense of that crime, e.g., witnesses, jurors, judges, prosecutors, and investigators.[522] These Mandatory Justice factors seem consistent with the focus and application of the death penalty in the majority of federal death penalty cases.

519. *See List of Death Row Prisoners*, *supra* note 516.

520. *Id.* The remaining prisoners on federal death row have been convicted of murders falling largely into the following categories: murder(s) in connection with illegal narcotics trafficking or other drug transactions (8); carjacking (3); and other felony murders (10). *Id.*

521. FINAL REPORT, *supra* note 4, at 138–39 & n.86 (citing THE CONSTITUTION PROJECT, MANDATORY JUSTICE: THE DEATH PENALTY REVISITED, at xxiv–xxv (2005 update), *available at* http://www.constitutionproject.org/pdf/30.pdf).

522. *Id.* at 138; THE CONSTITUTION PROJECT, *supra* note 521, at xxiv–xxv.

The Commission undertook a review of 822 death penalty judgments in California and determined that one of the Constitution Project's five so-called Mandatory Justice factors was found in 55% of those cases.[523] The Commission's researchers also identified a growing trend in a narrowing of the use of California's special circumstances to mirror the Mandatory Justice factors:

> Our analysis of the special circumstances found by juries in California death penalty cases shows a growing trend in the percentage of cases where at least one Mandatory Justice factor is found. Compare 1980, where only 37% of the cases that year had at least one Mandatory Justice factor, with 2007, where 79% of the cases had at least one factor. Since 1998, a Mandatory Justice factor has been found in at least 59% of the cases each year—most years over 65% of the total cases. However, there is significant disparity from county to county with several counties falling far below the state average.[524]

Narrowing the list of California's special circumstances to bring it in line with the Mandatory Justice factors, and commuting the death sentences to sentences of life without the possibility of parole for those death row inmates convicted of murders not falling within the narrower scope, would address the issue of whether, under *Furman*'s narrowing requirement, California's death penalty is overbroad in its reach. Narrowing the list would ensure that those criminals eligible for the death penalty in California truly comprise the worst of the worst convicted murderers. It would also save taxpayers money because it would reduce California's current death row population by approximately 55%[525] and would significantly slow its population growth.

IV. THE ROAD NOT TAKEN: *REMEDIES* REVISITED

In *Remedies*, we identified some of the systemic problems that have caused the delay—now approaching 30 years—in the

523. FINAL REPORT, *supra* note 4, at 139.

524. *Id.* at 139–40 (quoting KREITZBERG ET AL., CAL. COMM'N ON THE FAIR ADMIN. OF JUSTICE, THE DEATH PENALTY: A REVIEW OF SPECIAL CIRCUMSTANCES IN CALIFORNIA DEATH PENALTY CASES 10 (2008)).

525. This assumes commutation of the sentences of those condemned inmates not convicted of murder involving a Mandatory Justice factor.

processing of direct appeals and state and federal capital habeas corpus petitions in California death penalty cases. We also proposed procedural solutions to address these unacceptable delays. We concluded that, unless the California Legislature is willing to take action, including authorizing increased funding for attorneys representing condemned inmates on direct appeal and in post-conviction collateral attacks, the present delays may result in a determination by the U.S. Supreme Court that decades of incarceration on death row without access to the courts is in itself cruel and unusual punishment in violation of the Eighth Amendment of the U.S. Constitution.[526]

A year later, in June 2008, the Commission published its *Final Report*, which summarized the flaws that render California's death penalty system dysfunctional and made specific recommendations as to what is needed to repair it.[527] In its *Final Report*, the Commission warned that "doing nothing would be the worst possible course."[528]

526. Alarcón, *supra* note 3, at 725–26.

527. A year after the publication of *Remedies*, the California Commission on the Fair Administration of Justice issued its *Final Report* and Recommendations on the Administration of the Death Penalty in California. FINAL REPORT, *supra* note 4. The Commission was charged with the following mission:

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

S. RES. 44, 2004 Leg., Reg. Sess. (Cal. 2007), *available at* http://www.leginfo.ca.gov/pub/07-08/bill/sen/sb_0001-0050/sr_10_bill_20070301_introduced.pdf.

528. FINAL REPORT, *supra* note 4, at 115. The distinguished individuals responsible for the fine work reflected in the *Final Report* are: former California Attorney General John K. Van De Kamp, Chair; distinguished San Francisco litigator John Streeter, Vice Chair; Professor Gerald F. Uelmen, Executive Director; the following Commissioners: Diane Bellas, Alameda County Public Defender; Harold "Bosco" Boscovich, former Director of the Victim/Witness Assistance Division of the Alameda County District Attorney's Office; William J. Bratton, Los Angeles Chief of Police and former chief of the Boston and New York police departments; Edmund G. "Jerry" Brown, then-Attorney General of California; Gerald Chaleff, Bureau Chief and Commanding Officer of the Consent Decree Bureau of the LAPD; Ron Cottingham, President of the Peace Officers Research Association of California; Glen Craig, former Sheriff of Sacramento County and former President of the California Peace Officer's Association; Pete Dunbar, Chief of the Pleasant Hill Police Department; James P. Fox, former President of the California District Attorneys' Association and current president of the National District Attorneys' Association; Rabbi Allen I. Freehling, Executive Director of the Human Relations Commission of Los Angeles; Janet Gaard, Director of Legislative Affairs for the California Department of Justice; Michael Hersek, State Public Defender; Sheriff Curtis Hill, Officer with the State Sheriffs and former Sheriff of Benito County; Bill Ong Hing, Professor of Law at UC Davis; Michael P.

Former Chief Justice Ronald M. George told the Commission that if steps are not taken to remedy the backlog in post-conviction proceedings, they will continue to grow in number "until the system falls of its own weight."[529]

In *Remedies*, we drew attention to several specific areas in urgent need of legislative action to promote fairness and to ensure that California's death penalty complies with federal constitutional standards.[530] In its *Final Report*, the Commission supported or adopted several of the recommendations that we had made in *Remedies*.[531]

Despite the startling findings reported in these and other recent studies, the California Legislature has failed to respond to the urgent calls for relief made by the Commission that it had appointed to study the critical issues concerning the fair administration of criminal justice in California. The Governor's office has also failed to recommend solutions to the constitutional crisis confronting California in its processing of capital litigation. As a result, the

Judge, Chief Public Defender for Los Angeles County; George Kennedy, Santa Clara County District Attorney; Michael Laurence, Executive Director of the Habeas Corpus Resource Center; Alejandro Mayorkas, former U.S. Attorney for the Central District of California; Judge John Moulds, Magistrate Judge for the Eastern District of California; Kathleen "Cookie" M. Ridolfi, Professor of Law and Co-Founder of the Northern California Innocence Project at Santa Clara University; Douglas R. Ring, Real Estate Investor and Attorney; Gregory D. Totten, Ventura County District Attorney; and staff member Chris Boscia. *Id.* at 1–9.

529. *Id.* at 115. Moreover as recently as 2010,

> [Chief Justice George] said one of his biggest regrets was that he had been unable to speed up the resolution of death penalty cases in California, which usually are in the courts for two to three decades after trial. "It isn't fair to those involved, including the families of the victims," he said.
>
> Capital punishment cannot function without adequate funding, he said, but supporters of the death penalty don't want to provide the money, and opponents are happy with the slow pace.
>
> Californians, he observed, also have mixed feelings about the death penalty. "They like to have it on the books, but they are not prepared to have one or two executions every week like they do in some places[]" . . . .

Maura Dolan, *He's Happy to Be Calling It a Career*, L.A. TIMES, Dec. 2, 2010, at AA4.

530. Alarcón, *supra* note 3, at 745–49.

531. FINAL REPORT, *supra* note 4, at 118 ("The Commission recommends that . . . serious consideration be given to a proposed constitutional amendment to permit the California Supreme Court to transfer fully briefed pending death penalty appeals from the Supreme Court to the Courts of Appeal . . . [and] changes [be made] to California statutes, rules and policies . . . to encourage more factual hearings and findings in state habeas proceedings in death penalty cases, including a proposal to require petitions be filed in the Superior Court, with right of appeal to the Courts of Appeal and discretionary review by the California Supreme Court"); *id.* at 137 (recommending continuity of representation by encouraging the same attorney for state and federal habeas claims).

dysfunctional condition of California's death penalty system worsens.

The following discussion is intended to build on the Commission's work, and on our previous article, to provide an updated view of what California's capital punishment scheme is costing taxpayers. We also offer additional ideas for addressing those costs. We will briefly summarize some of the specific recommendations made in both *Remedies* and the *Final Report*, which the California Legislature has ignored.

A. Automatic Review by the California Court of Appeal

As of October 26, 2010, 356 direct appeals from judgments of death were pending before the California Supreme Court.[532] As of 2008, approximately 80 of them had been fully briefed and were awaiting oral argument.[533] The average opening brief in an automatic appeal from a judgment of death is between 250 and 350 pages long and includes 30 to 40 claimed errors, not including those pro forma challenges raised in every brief, i.e., that the death penalty law violates the Constitution.[534]

Despite its best efforts, there is no indication that the California Supreme Court will see an end to the backlog in automatic appeals from judgments of death in the near future. For example, in 2010 the court decided 23 cases, while another 33 prisoners were sentenced to death and added to death row to begin their long wait for appointment of appellate counsel.[535]

Then–Chief Justice Ronald M. George testified before the Commission on January 10, 2008. He stated:

> The basic statistics I have recited demonstrate that even if the Supreme Court were to become solely a death penalty court and were to completely put aside proceedings related to all civil and criminal matters other than capital appeals

532. Summary of Post-Conviction Capital Litigation in the California Supreme Court, *supra* note 129.

533. FINAL REPORT, *supra* note 4, at 131, 147 (stating that 80 direct appeals were fully briefed and awaiting oral argument as of June 1, 2008); *see* Uelmen, *supra* note 63, at 1E. From 2004 to 2008, Gerald F. Uelmen served as executive director of the CCFAJ, which undertook a comprehensive review of California's death penalty law. Gerald F. Uelmen is a professor of law at Santa Clara University School of Law. *Id.*

534. Telephone Interview with Robert Reichman, *supra* note 121.

535. *Id.*

> and related habeas corpus petitions, it probably would take a minimum of three to four years to process the existing backlog of death-penalty-related appeals and habeas corpus petitions. During that time, petitions for review in other types of cases would continue to be filed, and additional death penalty and other cases would become fully briefed. The backlog would continue to grow, and the systemic costs of this narrow focus on death penalty cases would be profound.[536]

We recommended in *Remedies* that the California Legislature remove the impossible burden on the California Supreme Court of having to review automatically every direct appeal from a judgment of death. This could be accomplished by amending the California Constitution to shift this burden to the justices of the six districts of the California Court of Appeal, with discretionary review by the California Supreme Court to correct any erroneous rulings or to resolve conflicts between the various districts and divisions of California's intermediate appellate courts.[537]

On November 20, 2007, then–Chief Justice Ronald M. George announced that, after months of study and consideration, the California Supreme Court justices had unanimously endorsed a proposal to seek amendment of California Constitution, article VI, section 12, to permit transfer of capital appeals from the California Supreme Court to the California Court of Appeal.[538] On March 25, 2008, however, the Chief Justice announced that in view of California's budget situation, the court would defer pursuing its proposal to amend the California Constitution to permit transferring

536. Testimony of Chief Justice Ronald M. George, *supra* note 8, at 18–19.

537. Alarcón, *supra* note 3, at 727. We noted that "[t]his 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." *Id.*

In *Remedies*, we also recommended that appellate counsel should be appointed according to a triage system. *Id.* at 733–34. Under such a system, trial counsel would be required to prepare a brief appellate memorandum for submission to the clerk of the superior court clerk within 30 days of the judgment of guilt, setting forth each of the anticipated alleged errors to be considered on appeal; the reviewing court would then appoint appellate counsel with regard to the likelihood of success on appeal as to the question of guilt. *Id.* at 734. We renew that suggestion here and additionally note that this task could also be performed by the courts of appeal.

538. News Release No. 76, Judicial Council of Cal., Lynn Holton, Supreme Court Proposes Amendments to Constitution in Death Penalty Appeals 1–2 (Nov. 20, 2007), *available at* http://www.courts.ca.gov/xbcr/cc/NR76-07.PDF.

capital appeals to the California Court of Appeal.[539]

In its *Final Report*, "the Commission majority recommend[ed] adoption of the [California Supreme Court's] proposed constitutional amendment," provided that other recommendations—concerning adequate funding for the appointment of both appellate and habeas counsel in death cases and adequate staffing for the California Court of Appeal—also be adopted.[540]

On February 11, 2010, Senate Constitutional Amendment (SCA) 27 was introduced in the Senate Committee on Public Safety to amend the California Constitution "to provide that the Supreme Court may transfer a death sentence case to an appellate court and therefore the Supreme Court will no longer have the sole appellate jurisdiction over death penalty cases."[541] On February 25, 2010, SCA 27 was sent to the Committee on Public Safety and the Committee on Elections, Reapportionment and Constitutional Amendments. At the April 20, 2010, hearing on SCA 27, the proponent of the amendment, State Senator Tom Harman, cited *Remedies* and the California Supreme Court's press release of November 19, 2007, in support of his proposed constitutional amendment.[542] Several questions were raised as to whether the proposed amendment was an appropriate reform without additional funding for counsel and other recommendations to reform the death penalty. SCA 27 failed to pass in committee.[543]

B. State Habeas Petitions Filed First in the Trial Courts

As of October 10, 2010, the number of fully briefed habeas corpus petitions awaiting review by the California Supreme Court was 89.[544] In *Remedies*, we recommended that the California Legislature pass laws relieving the California Supreme Court of its duty to review every petition for state habeas corpus relief by requiring that original petitions for a writ of habeas corpus in capital

539. FINAL REPORT, *supra* note 4, at 148.

540. *Id.*

541. S. 27, 2010 Leg., Reg. Sess. (Cal. 2010), *available at* ftp://leginfo.public.ca.gov/pub/09-10/bill/sen/sb_0001-0050/sca_27_cfa_20100419_135824_sen_comm.html (unenacted bill analysis). The Judicial Council and Crime Victims United of California supported the amendment. *Id.*

542. *Id.*

543. *Id.*

544. Uelmen, *supra* note 63, at 1E.

cases be filed in the first instance in the superior court that had entered the judgment of death.[545] We recommended that the trial court be required to issue a reasoned decision explaining its disposition of the claims.[546] This change would not require a constitutional amendment because California Constitution, article VI, section 10, already provides that "[t]he Supreme Court, courts of appeal, superior courts, and their judges have original jurisdiction in habeas corpus proceedings."[547] As we explained in *Remedies*, however,

> there is a strong financial incentive [for condemned inmates] to file in the Supreme Court [because i]f a death row inmate is indigent, [and almost all are,] the California Supreme Court will . . . [only] "compensate counsel for the filing of any other motion, petition, or pleading in [its own court and not in] any other California or federal court or court of another state."[548]

On February 21, 2008, California State Senator George Runner introduced Senate Bill (S.B.) 1471.[549] It would have required that habeas petitions in death penalty cases be filed within one year in the superior court. The bill died on April 15, 2008, when it failed to pass in the Senate Public Safety Committee.

On February 11, 2010, California State Senator Tom Harman introduced S.B. 1025, which would have "require[d] the Supreme Court to develop necessary rules and procedures for initiating habeas corpus proceedings in the superior court, as specified" in death penalty cases.[550] The bill was supported by Crime Victims United of California and, if amended, by the California Judges Association.[551]

545. Alarcón, *supra* note 3, at 743.

546. *Id.*

547. *Id.* at 736, 737 & n.230.

548. *Id.* (quoting CAL. SUPREME COURT, SUPREME COURT POLICIES REGARDING CASES ARISING FROM JUDGMENTS OF DEATH 5–6 (1989), *available at* http://www.courtinfo.ca.gov/courts/supreme/aa02f.pdf).

549. S.B. 1471, 2008 Leg., Reg. Sess. (Cal. 2008), *available at* http://leginfo.public.ca.gov/pub/07-08/bill/sen/sb_1451-1500/sb_1471_bill_20080221_introduced.html.

550. S.B. 1025, 2010 Leg., Reg. Sess. (Cal. 2010), *available at* http://leginfo.ca.gov/pub/09-10/bill/sen/sb_1001-1050/sb_1025_bill_20100211_introduced.pdf.

551. S.B. 1025, 2010 Leg., Reg. Sess. (Cal. 2010), *available at* http://leginfo.ca.gov/pub/09-10/bill/sen/sb_1001-1050/sb_1025_cfa_20100419_141607_sen_comm.html (unenacted bill analysis).

SB 1025 failed to pass in committee, with two votes in favor and five votes against.[552]

C. Increase Funding for Capital Appellate and Habeas Counsel

1. Direct Appeals

As of November 3, 2010, there were 99 prisoners on death row awaiting the appointment of counsel for their automatic appeals.[553] Attorneys who are appointed to represent condemned inmates in death penalty appeals and habeas corpus proceedings must possess highly specialized qualifications.[554] To address the shortage of qualified capital appellate counsel, we recommended in *Remedies* that the California Legislature increase funding to compensate qualified counsel who are appointed to handle death penalty cases.[555] While a modest $5-per-hour increase in authorized compensation for appellate and post-conviction counsel was subsequently adopted, an hourly rate of $145 remains far short of what could reasonably be considered fair compensation.[556]

In 2008, the Commission similarly concluded that the California Legislature must increase public funding for the Office of the State Public Defender to address the backlog of cases awaiting

552. S.B. 1025, 2010 Leg., Reg. Sess. (Cal. 2010), *available at* http://www.leginfo.ca.gov/pub/09-10/bill/sen/sb_1001-1050/sb_1025_vote_20100420_000003_ sen_comm.html (unofficial ballot).

553. E-mail from Michael Laurence to Authors, *supra* note 125; *see also* FINAL REPORT, *supra* note 4, at 133 (listing the number of inmates awaiting counsel as of 2008 at 79).

554. Rule 8.605(b) of the 2010 California Rules of Court requires that counsel appointed in death penalty appeals and habeas corpus proceedings "[have] demonstrated the commitment, knowledge, and skills necessary to competently represent the defendant . . . [and] be willing to cooperate with an assisting counsel or entity that the court may designate." CAL. RULES OF COURT 8.605(b) (Judicial Council of Cal. 2011), *available at* http://www.courtinfo.ca.gov/rules/documents/pdfFiles/title_8.pdf.

555. In addition to authorizing funds to increase the hourly rate paid to appointed counsel, we recommended in *Remedies* that the California Legislature help increase the number of lawyers qualified to represent death row inmates by providing grants to law schools to train students and lawyers who wish to specialize as appellate advocates and/or habeas corpus counsel in capital cases. Alarcón, *supra* note 3, at 734–35.

556. Since 2006, when *Remedies* was written, the hourly rate an appointed attorney in a capital case receives to represent a death row inmate in an automatic appeal or in state post-conviction proceedings was increased from $140 per hour to $145 per hour. *See* Uelmen, *supra* note 64, at 499. Compensation for counsel representing state capital defendants in federal habeas corpus proceedings has increased from $160 to $178 per hour since 2006. *See* U.S. COURTS, supra note 139, § 630.10.10(a), at 7–8. CJA Panel attorneys, however, are only reimbursed for time billed pursuant to the district court's approved budgeting procedures.

appointment of counsel to handle direct appeals.[557] With regard to private counsel, the Commission concluded that "[d]elays in the appointment of counsel to handle direct appeals are attributable to the small pool of qualified California lawyers willing to accept such assignments."[558] The Commission noted that "[m]any of the experienced appellate lawyers who have handled [the appellate review of] California death cases [have] retir[ed] or decline to take new cases that will tie them up for ten or twelve years."[559] Because the California Legislature has refused to authorize a fair payment to private lawyers who accept an appointment in direct appeals of death penalty cases, "at least twenty of the lawyers handling California death penalty appeals can no longer afford to live in California, and are currently residing in other states."[560]

As a result of the California Legislature's failure to authorize additional funding for capital appellate counsel, the absence of available competent counsel continues to "prejudice the right to a fair trial for those prisoners [who are entitled to a new trial due to] trial court errors in the admission of evidence or in its jury instructions, prosecutorial misconduct, or state and federal constitutional violations."[561]

557. FINAL REPORT, *supra* note 4, at 133. With regard to trial counsel, the Commission recommended that California counties provide adequate funding for the appointment and performance of trial counsel in death penalty cases in full compliance with ABA Guidelines 10.7 (A), 9.1(B)(1), 3.1(B), and 4.1(A)(2). *Id.* While the issue of trial counsel in capital cases is beyond the scope of this article, we note that the requirement for the provision of competent counsel for indigents is constitutionally mandated. *See* Powell v. Alabama, 287 U.S. 45, 68–69 (1932) (holding that defendants subject to the death penalty are entitled to counsel).

558. FINAL REPORT, *supra* note 4, at 132.

559. *Id.*

560. *Id.*

561. Alarcón, *supra* note 3, at 751; *see also* FINAL REPORT, *supra* note 4, at 133, 135 (discussing the need to increase funding for counsel handling direct appeals and habeas corpus cases for death row inmates).

2. State and Federal Habeas Corpus: The Need for Continuity of Counsel

The shortage of available, qualified counsel to represent condemned inmates in the filing of their state habeas corpus petitions remains at a crisis level.[562] At publication, 324 prisoners await the appointment of counsel to file their state habeas corpus petitions.[563] Once state habeas counsel is finally appointed, there remains a serious shortfall in state funding to those attorneys appointed to investigate the claims that are or should be raised in habeas corpus petitions filed in state courts.[564] The shortage of counsel has resulted in condemned inmates waiting many years before counsel is appointed to represent them in their state habeas corpus proceedings. As a result, on August 30, 2010, the California Supreme Court had to decide whether to allow a capital prisoner who had been on death row for 13 years without habeas counsel to file a "cursory one-claim habeas corpus petition, which lacks any supporting exhibits,"[565] also known as a "shell petition." The court had allowed the shell petition

562. Letter from Michael Laurence to Honorable Arthur L. Alarcón, *supra* note 180 (discussing "crisis" cases where prisoners are at risk of losing access to federal court because they must comply with the strict one-year statute of limitation required under AEDPA).

563. E-mail from Michael Laurence to Authors, *supra* note 125.

YEAR	NUMBER OF INMATES AWAITING APPOINTMENT OF STATE HABEAS COUNSEL	DATA SOURCE
2006	156	Memorandum from the Habeas Corpus Research Ctr., Law Firm Appointments in Capital State Habeas Corpus Proceedings 1 (Mar. 6, 2006) (on file with authors).
2008	291	FINAL REPORT, *supra* note 4, at 133.
2009	303	HCRC ANNUAL REPORT (2008–2009), at 9 (on file with authors).
2010	324	*Supra* note 125.

See also Uelmen, *supra* note 63, at 1E (estimating that "[m]ore than 40 percent of the 713 inmates on California's death row are still waiting for the appointment of a lawyer to handle the habeas corpus reviews to which they are constitutionally entitled").

564. As the Commission noted in its *Final Report*, the maximum funding authorized for the investigation of a condemned inmate's habeas corpus claims filed in the state courts was increased recently from $25,000 to $50,000. FINAL REPORT, *supra* note 4, at 135. This remains severely deficient as "expenses for a habeas investigation and the retaining of necessary experts can easily exceed this maximum." *Id.* "For the successful habeas petition in *In Re Lucas*, the law firm of Cooley Godward LLP provided 8,000 hours of pro bono attorney time, 7,000 hours of paralegal time, and litigation expenses of $328,000." *Id.* at 135 n.71 (citation omitted).

565. *In re* Morgan, 237 P.3d 993, 994 (Cal. 2010).

practice in the past, without addressing its procedural correctness, because it was the only means by which a capital inmate could preserve his right to file a completed petition once the California Supreme Court had "appoint[ed] habeas corpus counsel and . . . that attorney has had a reasonable opportunity to investigate various factual and legal matters that may lead to additional claims for relief, [which can] be presented in an amended petition."[566] The California Attorney General opposed the shell petition procedure and urged the California Supreme Court to deny the pending petition as meritless. The supreme court granted the petitioners' request. The court explained:

> Ideally, the appointment of habeas corpus counsel should occur shortly after an indigent defendant's judgment of death. An expeditious appointment would enable habeas corpus counsel to investigate potential claims for relief and to prepare a habeas corpus petition at roughly the same time that appellate counsel is preparing an opening brief on appeal. This would ensure the filing of a habeas corpus petition soon after completion of the briefing on the appeal.
>
> But our task of recruiting counsel has been made difficult by a serious shortage of qualified counsel willing to accept an appointment as habeas corpus counsel in a death penalty case. Quite few in number are the attorneys who meet this court's standards for representation and are willing to represent capital inmates in habeas corpus proceedings. The reasons are these: First, work on a capital habeas petition demands a unique combination of skills. The tasks of investigating potential claims and interviewing potential witnesses require the skills of a trial attorney, but the task of writing the petition, supported by points and authorities, requires the skills of an appellate attorney. Many criminal law practitioners possess one of these skills, but few have both. Second, the need for qualified habeas corpus counsel has increased dramatically in the past 20 years: The number of inmates on California's death row has

566. *In re Morgan*, 237 P.3d at 994; *see also In re Morgan*'s companion case *In re* Jimenez, 237 P.3d 1004 (Cal. 2010) (holding that, under extraordinary circumstances, petitioner be granted leave to amend his previously submitted cursory habeas corpus petition).

increased from 203 in 1987 to 670 in 2007.

California does have a Habeas Corpus Resource Center (HCRC), which the California Legislature established in 1998 to represent indigent capital inmates in postconviction habeas corpus matters. But, as has been observed, "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."[567]

Although hundreds of indigent death row inmates already have been provided with appointed habeas corpus counsel, approximately 300 of these inmates still lack such counsel. *The search for qualified counsel can take eight to 10 years or longer. Here, petitioner still does not have habeas corpus counsel after 13 years on death row*.

In filing a cursory one-claim habeas corpus petition now rather than awaiting this court's appointment of habeas corpus counsel who could file a more thorough petition at some future date, petitioner's apparent purpose is to preserve his right to seek habeas corpus relief in the federal courts. Remedies in state court must be exhausted before a state prisoner can seek habeas corpus relief in the federal courts, which require that the habeas corpus petition be filed within *one year* from "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." A judgment of death is "final" upon the United States Supreme Court's denial of a capital inmate's petition for writ of certiorari after our affirmance of the judgment, or upon expiration of the time in which the inmate may seek certiorari in the federal high court. To permit the inmate to exhaust state remedies as to claims that must be raised in a habeas corpus petition rather than on appeal, the federal statute of limitations is tolled while there is pending in state court a "properly filed application for State post-conviction or other collateral review."

If consideration of the current habeas corpus petition is

567. *In re* Morgan, 237 P.3d at 996–97 (footnotes omitted) (citations omitted) (quoting Alarcón, *supra* note 3, at 739).

> deferred as petitioner has requested, and if that petition is ultimately denied in this court, presumably petitioner will then seek habeas corpus relief in federal court challenging his state court conviction and judgment of death, and asserting the tolling of the federal statute of limitations during the pendency of his current petition in our court. To date, no published federal court decision has addressed this specific tolling issue under federal law. We express no view on this issue, observing only that a denial of the *current* habeas corpus petition, a result advocated by the Attorney General, would immediately stop the tolling of the federal statute of limitations.[568]

Thus, in *In re Morgan* and *In re Jiminez*, the California Supreme Court sanctioned in published opinions what it had been allowing as an "unofficial practice" since December 2001, when it permitted the petitioner to do so in the case of *In re Taylor*.[569]

The scarcity of available, qualified counsel to represent condemned inmates in their state habeas corpus proceedings is compounded by the fact that almost all prisoners currently are appointed separate counsel for their state and federal habeas corpus petitions.[570] We recommended in *Remedies* that the Legislature act to provide for continuity of state and federal habeas counsel, which would promote fairness and efficiency in the system by facilitating a fuller and more complete investigation into a petitioner's claims

568. *Id.* at 997 (first emphasis added) (footnotes omitted) (citations omitted) (quoting 28 U.S.C. § 2244(d)(1)(A), (d)(2) (2006)).

569. *See id.* at 1000 (Corrigan, J., concurring and dissenting) ("The first shell petition filing was allowed in December 2001, in the case of *In re Taylor*, S102652. Taylor's habeas counsel had withdrawn relatively late in the proceedings, and the Habeas Corpus Resource Center (HCRC) refused to accept an appointment unless we allowed it to file a shell petition. After informal discussions with HCRC and with no input from the Attorney General, [the Court] agreed to accept a placeholder, or 'shell,' petition in that *one* case.").

570. Both the state and federal systems have rules mandating that attorneys appointed to capital habeas representations possess certain specialized experience. *See* CAL. RULES OF COURT 8.605(e) (West 2011). Rule 8.605 (f) of the 2010 California Rules of Court provides for "alternate qualifications" for attorneys who do not meet the requirements of (d) or (e) but who have other qualifications that the court deems appropriate. *Id.* 8.605(f).

In the federal system, "[d]ue to the complex, demanding, and protracted nature of death penalty proceedings, judicial officers should consider appointing at least two attorneys. . . . Under 18 U.S.C. § 3599(c), at least one of the attorneys appointed must have been admitted to practice in the court of appeals for not less than five years, and must have had not less than three years experience in the handling of appeals in felony cases in the court." U.S. COURTS, *supra* note 139.

years earlier than the practice under the current system.[571]

The proposition that continuity of state and federal habeas corpus counsel would promote fairness by significantly reducing the delay experienced in the full and fair investigation into alleged federal constitutional violations has long been supported by numerous authorities, including judges, legislators, and policymakers. The Ad Hoc Committee on Federal Habeas Corpus in Capital Cases for the Judicial Conference of the United States, known as the Powell Committee, concluded in 1989 that

> [o]ur present system of multi-layered state and federal appeal and collateral review has led to piecemeal and repetitious litigation, and years of delay between sentencing and judicial resolution as to whether the sentence was permissible under the law. . . . *The lack of coordination between the federal and state legal systems often results in inefficient and unnecessary steps in the course of litigation.* Prisoners, for example, often spend significant time moving back and forth between the federal and state systems in the process of exhausting state remedies. . . . Capital cases should be subject to one complete and fair course of collateral review in the state and federal system, free from the time pressure of impending execution, and with the assistance of competent counsel for the defendant.[572]

571. Alarcón, *supra* note 3, at 744. In *Remedies*, we noted that

> [t]he 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.

Id. at 748.

Then–Chief Justice Ronald M. George testified before the Commission that he fully supported Judge Alarcón's call for providing continuity between state and federal habeas corpus proceedings. Testimony of Chief Justice Ronald M. George, *supra* note 8, at 18–19.

572. AD HOC COMM. ON FEDERAL HABEAS CORPUS IN CAPITAL CASES, REPORT ON FEDERAL HABEAS CORPUS IN CAPITAL CASES, at S24694–95 (Aug. 23, 1989) [hereinafter POWELL COMMITTEE REPORT] (emphasis added). Similarly, in 1995, in a report on death penalty representation prepared by the Committee on Defender Services, Judicial Conference of the United States, the Subcommittee on Death Penalty Representation concluded that

> [w]hen the same attorney represents the inmate in both state and federal post-conviction proceedings, both time and money is saved. Assuming that the state system has provided adequate resources for the investigation, preparation, and litigation of a case, the attorney representing the inmate in the state proceeding is in the best position expeditiously to prepare the case for federal court. On the contrary, when the federal

In 2005, the California Federal-State Judicial Council unanimously adopted a joint recommendation "endors[ing] the concept that the same counsel should represent petitioners in both state and federal capital habeas corpus proceedings."[573] On November 29, 2005, then–Chief Justice Ronald George wrote to U.S. Senator Dianne Feinstein, explaining that (1) insufficient resources to recruit qualified death penalty attorneys are a primary cause of the delay in processing capital habeas corpus litigation; and (2) the capital habeas caseload burdens on the California Supreme Court prevent it from providing comprehensive opinions in capital habeas cases; and (3) having the same attorney handle a capital inmate's habeas corpus petitions at both the state and federal levels would expedite the process and reduce costs.[574]

On December 8, 2005, Senator Feinstein recommended to then–California Governor Arnold Schwarzenegger that

> the California legal system be allocated adequate resources to ensure the effective and timely functioning of capital appeals. . . . The failure to provide counsel for those on death row compromises our justice system by introducing lengthy and unnecessary delays that deny justice to victims, the accused, and society. . . . [M]aintaining continuity of counsel throughout the capital habeas process would expedite appeals and reduce costs.[575]

The Commission also agreed that "continuity of representation by the same attorney for state and federal habeas claims be encouraged" and that "the unmet need for habeas counsel be met by expanding HCRC."[576] In response to the *Final Report*, then–

> court must appoint new counsel, time and money are wasted while the new attorney rereads the record, re-investigates the case, and redrafts the pleadings.

COMM. ON DEFENDER SERVICES, REPORT ON DEATH PENALTY REPRESENTATION 5 Appendix A (1995) (on file with authors).

573. Letter from Dianne Feinstein, U.S. Senator, to Arnold Schwarzenegger, Governor of Cal. (Dec. 8, 2005) (on file with authors).

574. Letter from Ronald M. George, Chief Justice of Cal. Supreme Court, to Dianne Feinstein, U.S. Senator (Nov. 29, 2005) (on file with authors).

575. Letter from Dianne Feinstein, U.S. Senator, to Arnold Schwarzenegger, Governor of Cal., *supra* note 573. There is no response on record from the Governor Schwarzenegger's office in connection with Senator Feinstein's request.

576. FINAL REPORT, *supra* note 4, at 137. The Commission recommended that the need for additional habeas counsel be met by legislative action expanding the HCRC to an authorized strength of 150 lawyers, phased in over a five year period, which would require a five-fold increase over the current $14.9 million annual budget of HCRC. *Id.* at 135.

California Attorney General Edmund G. Brown, Jr., stated that

> [m]aintaining consistency between state and federal habeas corpus representation can substantially reduce delay in the federal review process. The appointment of substitute counsel in federal court frequently causes further delay because new counsel asserts additional claims that must first be developed in state court. However, no such delay should be necessary if qualified counsel is appointed on state habeas. It should be anticipated that such counsel will raise all claims in state court and then continue to represent the defendant in federal court without the interruption of litigation of new claims in state court. Given that all claims must be fully exhausted in state court before seeking federal relief, and given the one year limitation period for filing in federal court established by 28 U.S.C. § 2244(d)(1), it is also in the best interest of the inmate to insure as much as possible continuity of habeas counsel. [577]

A year later, in 2009, Steve Asin, Deputy Chief, Administrative Offices of the U.S. Courts, Defender Services Division, indicated that "[i]t is Judicial Conference policy, based in part on the Powell Committee Report, that continuity of counsel is needed in capital habeas corpus proceedings." [578] Similarly, Michael Laurence, Executive Director of the HCRC, also indicated that

577. CAL. COMM'N ON FAIR ADMIN. OF JUSTICE, STATEMENT OF DANE R. GILLETTE, CHIEF ASSISTANT ATTORNEY GENERAL, OFFICE OF THE CALIFORNIA ATTORNEY GENERAL 11–12 (2008), *available at* http://www.ccfaj.org/documents/reports/dp/expert/AG%27sWrittenStatement.pdf.

578. Notes of Conference Call Regarding Continuity of Counsel in California Capital Post-Conviction Relief Proceedings in State and Federal Courts (July 16, 2009) (on file with the authors). See also U.S. COURTS, *supra* note 139, § 620.70,which provides:

> Continuity of Representation:
> (a) In the interest of justice and judicial and fiscal economy, unless precluded by a conflict of interest, presiding judicial officers are urged to continue the appointment of state post-conviction counsel, if qualified under Guide, Vol 7A, § 620.60, when the case enters the federal system.
> (b) Section 3599(e) of Title 18, U.S. Code. provides that, unless replaced by an attorney similarly qualified under Guide, Vol 7A, § 620.60 by counsel's own motion or upon motion of the defendant, counsel "shall represent the defendant throughout every subsequent stage of available judicial proceedings," including: pretrial proceedings; trial; sentencing; motion for a new trial; appeals; applications for writ of certiorari to the Supreme Court of the United States; all post-conviction processes; applications for stays of execution and other appropriate motions and procedures; competency proceedings; and proceedings for executive or other clemency.

Id.

> there are significant problems stemming from the inability or unwillingness of state counsel to continue representing death-row inmates in federal proceedings, the inefficiency that results when new federal counsel replicates many of the tasks that state counsel performed, and the need for exhaustion proceedings because the initial state habeas corpus petition did not contain all potentially meritorious claims for relief. Funding an entity, such as the HCRC, to provide continuity of counsel between state and federal court and ensuring that all potentially meritorious constitutional claims for relief are presented in the first state habeas corpus petition would significantly increase the timely review of such claims and reduce the inefficient use of scarce resources. [579]

Mr. Laurence explained by way of example that as of August 2009 the HCRC had been appointed by the federal district courts in three cases for which the HCRC had filed the initial state habeas corpus petition. Of these three cases, only one case was remanded for the filing of an exhaustion petition. The exhaustion petition in that case contained "limited claims resulting from the discovery of a document in state post-conviction discovery proceedings and from changes in the law that occurred after the filing of the state petition." [580]

D. Roadblocks, Detours and Dead Ends: The Legislature's Failure to Repair the System

Despite the consensus of state and federal officials supporting the call for Congress, the California Legislature, and the Governor to implement the necessary changes to provide for continuity of state and federal capital habeas counsel, no action has been taken to address this complete breakdown in the system. [581]

There have been no fewer than 13 bills introduced in the

579. Letter from Michael Laurence to Honorable Arthur L. Alarcón, *supra* note 180.

580. *Id.*

581. On February 11, 2010, SB 1025, which would have "remove[d] the limitation on the number of attorneys who may be employed by the California Habeas Corpus Resource Center," was introduced in the California State Senate by Senator Tom Harman. S.B. 1025, 2010 Leg., Reg. Sess. (Cal. 2009), *available at* http://leginfo.ca.gov/pub/09-10/bill/sen/sb_1001-1050/sb_1025_bill_20100211_introduced.pdf. When the bill was amended on April 8, 2010, this provision was removed. S192, Reg. Sess. B, at 1 (Cal. 2010).

California Legislature since 2005 that have proposed various reforms to the administration of the death penalty in California, including moratoriums, capital trials, appeals, habeas proceedings, or housing of death row inmates. All have either died in committee or failed to pass. [582]

2005

(1) S.B. 378: Bill would have: (1) created a new expedited post-conviction review eliminating state habeas corpus for capital cases, filed within six months; (2) reduced standards for appointed counsel to five years of State Bar membership and three years' experience in appeals or post-conviction felony proceedings (requirements do not need to be met if court has good cause); (3) added personnel to State Public Defender and Attorney General; (4) added two new members to the existing five HCRC Board members; and (5) had each member be appointed by each Justice of the California Supreme Court. *Failed passage in committee.*

(2) A.B. 1121: Bill would have placed moratorium on carrying out executions under particular circumstances until the California Commission for the Fair Administration of Justice (CCFAJ) had finished its report or until January 1, 2009. This bill was allowed to "die quietly" because Democrats were split on it. [583] FISCAL EFFECT: "As this measure does not add, reduce or delay legal appeals, costs/savings are limited for the period of the moratorium. Assuming a delayed execution every two months in 2007 and 2008, the increased [] cost of housing these inmates would be in the range of $400,000." *Died in committee (Jan. 31, 2006), pursuant to article IV, section 10(c) of the California Constitution.*

(3) A.B. 2266: Bill would have placed moratorium on imposition of the death penalty until the Legislature could consider CCFAJ recommendations and enact legislation ending or extending the moratorium. Moratorium would only have been effective if submitted to and approved by California voters. FISCAL EFFECT: "As this measure does not add, reduce or delay legal appeals, costs/savings are limited to the cost of housing additional inmates for the period of the moratorium. Assuming a delayed execution every 3

582. Information concerning all of the failed bills can be found at Official California Legislative Information, http://www.leginfo.ca.gov.

583. *See* Jim Sanders, *State's Death Penalty on Hold; The Legal Wrangling May Last Most of the Year, Official Says*, SACRAMENTO BEE, Feb. 23, 2006, at A1.

months, the increased [] cost of housing these inmates would likely exceed $150,000." *Died: received in committee without further action (Nov. 30, 2006).*

2006

(4) S.B. 1119: Bill would have required "the Board of Parole Hearings (BPH) to conduct clemency hearings whenever an inmate sentenced to death submit[ted] a written request for a hearing, and [would have] require[d] the Supreme Court to appoint counsel to represent indigent defendants consistent with the competency standards used by the Judicial Council and the Supreme Court for appointed counsel representing death penalty defendants in direct appeals and habeas corpus proceedings." This bill also would have: (1) authorized the Supreme Court to compensate appointed clemency counsel during clemency proceedings at a rate of at least $125 per hour and required the Supreme Court to set limits on investigative and other expenses for clemency petitions (in the same manner as required in death penalty cases and post-conviction proceedings); (2) provided that if the superior court sets a public session to set an execution date and clemency counsel has not been appointed at least 90 days prior to the public session, the California Supreme Court or any other court must stay the public session and execution date; (3) required that any material regarding the facts of the case that is received by the Governor or BPH must be furnished without delay to the opposing party. FISCAL EFFECT: (1) Minor costs to the BPH for required clemency hearings, likely in the range of $40,000, assuming three to five clemency hearings per year; (2) minor absorbable costs to the Judicial Counsel and the Supreme Court to adopt competency standards for appointment of counsel in clemency cases, similar to standards currently required for direct death penalty appeals and habeas corpus proceedings; (3) minor costs for appointed clemency counsel, assuming in most cases such counsel would be appointed with or without this bill. *Died in Assembly without further action (Nov. 30, 2006).*

(5) S.B. 294: Bill would have provided: (1) that a prisoner may move the California court that imposed his or her sentence to vacate, set aside, or correct the sentence if he or she claims the judgment is subject to collateral attack on any habeas corpus ground (prior to enactment of this bill); (2) that the court will offer counsel to a

prisoner sentenced to death after entry of judgment in the trial court; (3) that appointed counsel will meet capital habeas case qualifications, unless court has established different qualifications specifically for counsel appointed; (4) that either party may appeal court's decision on motion to the court; (5) that the initial motion in capital cases will be filed within one year of the order entered (and within one year of the date the prisoner retained or was appointed counsel, or within five years of the judgment in noncapital cases); (6) that an untimely motion shall be dismissed when filed, unless the court finds that the defendant is actually innocent of the crime for which he or she was convicted (a voluntary intoxication claim, a mental disease claim, or a claim that goes only to sentence is not a claim of innocence for this purpose); (7) that an application for writ of habeas corpus will not be considered on bases of claim that was or could have been considered under this section; (8) that it is a California policy to qualify the federal law 28 U.S.C. §§ 2261–2266; and (9) that the California Supreme Court and Judicial Council will adopt rules as necessary to achieve and maintain this chapter's qualifications. It will apply to all cases in which judgment is entered after the effective date and all cases in which judgment was entered earlier but no application for habeas corpus had been filed by the effective date. If a habeas petition is pending under the effective date of this section, the court may convert it to a motion under this section and transfer it to the court that imposed the sentence. *Failed passage in committee*.

(6) S.B. 1257: Bill would have provided that: (1) the Legislature declare that all capital appeals should be decided expeditiously; (2) counsel for the defendant on appeal will be appointed within one year of the pronouncement of judgment (for cases in which a death sentence has been imposed on or after July 1, 2006); (3) for cases in which a death sentence was imposed prior to July 1, 2006, and no counsel has been appointed for the defendant, counsel will be appointed within one year of the effective date of this legislation; (4) the record on appeal will be certified and transmitted to the California Supreme Court within one year after the appointment of counsel; (5) appellant's opening brief on appeal must be filed within one year after the record is certified and transmitted to the supreme court; and (6) any attorney who accepts appointments to represent indigent appellants before any District Court of Appeal must be

available to be appointed as appellate counsel before the California Supreme Court in capital cases. *Failed in committee*.

2007

(7) S.B. 315: Bill would have provided that: (1) attorneys who accept appointments for indigent parties must take capital appeals, regardless of their qualifications; (2) appellate counsel must be appointed for a death penalty inmate within one year of conviction; and (3) certification of record on appeal must be done within one year of appointment of counsel. FISCAL EFFECT: "unknown." *Failed passage in committee*.

(8) S.B. 636: Bill would have: (1) created a new type of post-conviction review of capital cases instead of habeas corpus; (2) changed the standards for counsel in capital cases; (3) added personnel to the State Public Defender and the Attorney General; and (4) made changes to the board of the HCRC. *Failed passage in committee*.

2008

(9) S.B. 1471: Bill would have: (1) required habeas petitions in death penalty cases to be filed within one year; (2) changed the standards for competent counsel; and (3) provided that habeas petitions in capital cases be filed in superior court. Legislative analysis discusses fiscal consequences resulting from prison overcrowding, which sometimes results in significant medical costs. *Failed passage in committee*.

(10) PROPOSITION 9: VICTIM RIGHTS AND PROTECTION ACT (early draft proposed using California Court of Appeal for death penalty direct appeals). The proposition was revised and the provision was removed. *Proposition 9 was passed by voters in 2008.*

2009

(11) A.B. 633: An act to amend section 190.4 of the Penal Code, relating to the death penalty. In cases in which the defendant has been found guilty of first-degree murder by a jury, and the jury has been unable to reach a unanimous verdict that one or more of the special circumstances exist, the court will dismiss the jury and impose a punishment of confinement in state prison for 25 years. This bill would provide for the submission of its provisions to the

voters for approval. *Hearing cancelled in committee at author's request. (May 13, 2009).*

(12) A.B. 1359: Housing of Death Row Inmates. This bill would have authorized the CDCR to house death row inmates (at the time there were 641; design capacity was 636) in any Level IV security prison, rather than solely at San Quentin, though executions would continue to take place only at San Quentin. Specifically, this bill would: (1) require that when a condemned inmate is housed in a Level IV prison, procedures relating to privileges and classification provided to condemned inmates at San Quentin must be similarly instituted; such classification procedures would include the right to review the classification no less than every 90 days and the opportunity to petition for a return to San Quentin; (2) attorney-client access procedures provided to death row inmates at San Quentin would be provided to condemned inmates housed in any Level IV prison; (3) require condemned inmates housed in a Level IV prison to be returned to San Quentin when appellate counsel is appointed for an inmate's automatic appeal; (4) increase the number of condemned inmates CDCR may house at the California State Prison in Sacramento (New Folsom), as specified, from 15 to 30 (currently there are two); (5) delete provisions of law requiring female condemned inmates to be housed in the Central California Women's Facility (Chowchilla) (currently there are 15). *Passed in Committee*: (Apr. 14, 2009); *Hearing postponed in committee* (May 28, 2009).

FISCAL EFFECT: (1) Significant one-time and ongoing costs, potentially in the tens of millions of dollars, depending on how many condemned inmates are moved to what would in effect be a series of presumably smaller death rows at Level IV prisons. For example, in 2003 CDCR estimated it would cost about $30 million in one-time costs to move death row to California State Prison Sacramento. To the extent CDCR opted to move death row inmates to multiple facilities, economies of scale would diminish and costs would increase. One-time costs include significant retrofitting to accommodate special law libraries, visitation, attorney access, separate exercise yards, egress and ingress, and multiple security renovations. Ongoing costs include increased security staffing and special transportation to multiple prisons, and to San Quentin when condemned inmates are assigned their appellate attorneys. (2) The 2003 estimate also identified a $175 million cost to build a new

1,024-cell prison for Level IV inmates who would be displaced and relocated. That figure would be closer to $250 million in 2010, largely due to cost increases in materials. CDCR anticipates a Level IV–bed deficit of about 1,200 by 2012. (3) If the administration opted to abandon the approved and budgeted CIC project and pursue the death row strategy authorized by this bill, there could be significant one-time savings. Aside from about $20 million in CIC spending that cannot be recouped, there would be about $335 million in lease-revenue bonds available to fund the retrofitting referenced above, and to replace the Level IV capacity lost to death row housing. Moderate ongoing cost increases, largely for staffing and transportation, would continue with multiple death rows. The administration, however, has indicated no interest in halting the CIC project, and siting/community issues related to relocating death row may make these savings difficult to achieve.

2010

(13) S.B. 1025: On February 11, 2010, SB 1025 was introduced in the California State Senate; it would have removed the limitation on how many attorneys the HCRC may employ. When the bill was amended on April 8, 2010, this provision was removed.

As predicted, the Legislature's failure over the last four years to implement any of the recommendations made in *Remedies*, including those that were later adopted in the *Final Report*, has resulted in a *de facto* moratorium on the fair administration of the death penalty in California. The Legislature's refusal to correct the causes for the unconscionable delay continues to burden the taxpayers who have already spent billions of dollars to fund a death penalty system that does not work.

E. Alternate Routes Available: When Legislatures Lead and Governors Govern—Investigation and Public Debate Concerning the Cost of the Death Penalty in Other States

Justice Stevens remarked in 2008 that "[t]he time for a dispassionate, impartial comparison of the enormous costs that death penalty litigation imposes on society with the benefits that it produces has surely arrived." [584] Several states that authorize capital

584. Baze v. Rees, 553 U.S. 35, 81 (2008) (Stevens, J., concurring).

punishment in homicide prosecutions are currently weighing their death penalty statutes' effectiveness against the cost of carrying out capital punishment.[585] Some states have concluded that capital punishment is not justified by the costs of enforcing the death penalty. Instead, they have either abolished or reduced the application of the death penalty based on a cost-benefit analysis. Of the states that have undertaken cost-benefit analyses to determine whether the death penalty's benefits outweigh its costs, California outspends them all by an order of magnitude. And yet, the California Legislature continues to keep the public in the dark about the current cost of administering the death penalty in the state, as well as would-be additional costs to taxpayers to implement reforms necessary to create a system that is both fair and effective.

1. New Jersey

In 2005, the New Jersey Legislature authorized the New Jersey Death Penalty Study Commission to study all aspects of the death penalty as currently administered in the state, including its costs. On January 2, 2007, the commission reported its findings and recommendations to the Governor and the New Jersey Legislature.[586] The New Jersey Commission found that "[t]he costs of the death penalty are greater than the costs of life in prison without parole, but it is not possible to measure these costs with any degree of precision."[587] The New Jersey Commission recommended "that the

585. The following states have the death penalty: Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, and Wyoming. The following states are undergoing cost studies: Colorado, Connecticut, Indiana, Kansas, Missouri, Montana, Nebraska, Nevada, New Hampshire, North Carolina, Oregon, and Tennessee.

586. *See* N.J. DEATH PENALTY STUDY COMM'N, NEW JERSEY DEATH PENALTY STUDY COMMISSION REPORT (2007), *available at* http://www.njleg.state.nj.us/committees/dpsc_final.pdf. This study explains that

> [t]he Office of the Public Defender estimated that, given its current caseload of 19 death penalty cases (as of August 2006), elimination of the death penalty would result in a cost savings of $1.46 million per year . . . . The Department of Corrections estimated that eliminating the death penalty would save the State $974,430 to $1,299,240 per inmate over each inmate's lifetime. . . . The A[dminsitrative] O[ffice] [of the] C[ourts] estimated that each proportionality review costs an average of $93,018 in additional salary costs for court staff.

Id. at 31–32.

587. *Id.* at 31.

death penalty in New Jersey be abolished and replaced with life imprisonment without the possibility of parole, to be served in a maximum security facility."[588] The New Jersey Commission also recommended to the Legislature "that any cost savings resulting from the abolition of the death penalty be used for benefits and services for survivors of victims of homicide."[589] On December 17, 2007, Governor Jon S. Corzine signed into law a measure repealing New Jersey's death penalty. He also commuted the sentences of death row inmates to life imprisonment without the possibility of parole.

2. New Mexico

In 2007, the New Mexico Supreme Court stayed prosecution of a death penalty case based on its ruling that the state's failure to make adequate funds available for defense counsel violated the defendants' Sixth Amendment right to effective assistance of counsel.[590] The Legislature failed to respond and adjourned for the year.[591] A trial judge then ruled that the state could not pursue the death penalty in a homicide prosecution, and the Attorney General's Office concurred, thus halting capital prosecutions in that state.[592] A bill was introduced in the House Assembly to abolish the death penalty.[593] The fiscal impact report for the bill abolishing the state's death penalty concluded that the death penalty amounted to a net expense to the state and the taxpayers.[594] Death penalty opponents have argued that it costs New Mexico between $3 million and $4 million per year even though there had only been one execution in the state since 1960.[595] Citing costs, among other reasons, on March 18, 2009, Governor Bill Richardson signed legislation to repeal the

588. *Id.* at 2.

589. *Id.*

590. State v. Young, 172 P.3d 138, 144 (N.M. 2007) (staying prosecution in death penalty case where defense counsels' compensation was inadequate).

591. Scott Sandlin, *Death Penalty out in Guard Killing*, ALBUQUERQUE JOURNAL, Apr. 4, 2008, *available at* http://www.abqjournal.com/news/state/298432nm04-04-08.htm.

592. *Id.*

593. N.M. H.R., FISCAL IMPACT REPORT, H.B. No. 285, Regular Session, at 2–3 (2009).

594. *Id.*

595. Joline Gutierrez Krueger, *New Mexico Courts Taking Death Penalty into Their Own Hands*, ALBUQUERQUE TRIB., Jan. 8, 2008, http://www.abqtrib.com/news/2008/jan/08/new-mexico-courts-taking-death-penalty-their-own-h/.

death penalty.[596] This made New Mexico the second state to enact such legislation.[597]

3. Maryland

The Maryland Commission on Capital Punishment studied the cost of administering that state's death penalty.[598] On December 12, 2008, the commission issued its final report to the General Assembly.[599] The commission relied heavily on a study conducted in 2008 by the Urban Institute's Justice Policy Center. The study concluded that the death penalty would cost Maryland more than a term of life in prison without the possibility of parole would cost.[600]

The study estimated that the average cost to Maryland taxpayers for reaching a single death sentence is nearly $2 million more than the cost of a non–death penalty case. (This estimate includes investigation, trial, appeals, and incarceration costs.) The study examined 162 capital cases that were prosecuted between 1978 and 1999 and found that those cases had cost a total of $186 million more than what they would have cost had the death penalty not existed as a punishment.[601]

The Maryland study concluded that capital murder cases cost more than noncapital murder cases.[602] Of the 162 capital cases, there were 106 cases in which a death sentence was sought by the prosecution but not imposed.[603] Those cases cost the state $71 million more than did non–death penalty cases.[604] The ultimate outcome in those cases was a life sentence or a long-term prison sentence. Maryland taxpayers spent $22.4 million above the cost of imprisonment on appeal litigation for 56 people sentenced to death

596. Associated Press, *Death Penalty Is Repealed in New Mexico*, N.Y. TIMES, Mar. 19, 2009, at A16; *Citing Cost, States Consider End to Death Penalty*, N.Y.TIMES, Feb. 24, 2009, http://www.nytimes.com/2009/02/25/us/25death.html.

597. *Id.*

598. MD. COMM'N ON CAPITAL PUNISHMENT, FINAL REPORT TO THE GENERAL ASSEMBLY (2008).

599. *Id.*

600. *See* JOHN ROMAN ET AL., THE COST OF THE DEATH PENALTY IN MARYLAND 2 (2008), *available at* http://www.urban.org/UploadedPDF/411625_md_death_penalty.pdf.

601. *Id.* at 3.

602. *Id.* at 2.

603. *Id.* at 3.

604. *Id.*

since 1978.[605]

The Maryland Commission recommended that capital punishment be abolished.[606] The recommendation was not adopted. However, based on the report's findings, Maryland Governor Martin O'Malley signed a bill on May 7, 2009, that has restricted the application of the state's death penalty. Thus, Maryland now has one of the most "narrowly crafted" death penalty laws in the nation.[607] The new law is expected to save the state hundreds of millions of dollars, as it restricts capital punishment to murder cases with biological evidence such as DNA, videotaped evidence of a murder, or a videotaped confession.[608] The Governor said the bill will "help us prevent the possibility of ever putting an innocent person to death."[609]

4. Illinois

On January 31, 2000, Governor George Ryan concluded that the imposition of capital punishment was "fraught with error" and imposed a moratorium on executions.[610] On March 9, 2000, a special Governor's Commission was appointed to study how the death penalty system in Illinois could be reformed.[611] Governor Ryan

605. Tim Jones, *Capital Punishment Is on the Decline in the U.S.*, L.A. TIMES, Apr. 15, 2007, at A16.

606. *See* MD. COMM'N ON CAPITAL PUNISHMENT, *supra* note 598, at 9.

607. Laura Smitherman, *O'Malley Signs Contested Bills*, BALT. SUN, May 8, 2009, at 3A (quoting Maryland Governor Martin O'Malley).

608. *Id.*

609. *Id.* (quoting Maryland Governor Martin O'Malley).

610. Press Release, George H. Ryan, Governor Ryan Declares Moratorium on Execution, Will Appoint Commission to Review Capital Punishment System (Jan. 31, 2000). Thirteen people who had been condemned to Illinois's Death Row were subsequently determined to be innocent. *Id.*; *see* Exec. Order No. 24 Ill. Reg. 7439 (May 12, 2000), *available at* 2000 WL 635067.

611. *See* GOVERNOR'S COMM'N ON CAPITAL PUNISHMENT, REPORT OF THE COMMISSION ON CAPITAL PUNISHMENT 1 (2002), *available at* http://www.idoc.state.il.us/ccp/ccp/reports/commission_report/index.html.

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

pardoned four death row inmates and issued a blanket commutation of the death sentences of 167 other condemned prisoners to life imprisonment.[612] Governor Ryan's successor, Rod R. Blagojevich, kept the moratorium on the imposition of the death penalty in effect.[613] Notwithstanding the moratorium on executions, Illinois continued to pursue the death penalty, trying more than 500 death penalty cases in the last 10 years and adding 15 men to Illinois's death row.[614]

On January 6, 2011, the Illinois House approved legislation to abolish the state's death penalty by a vote of 60–54.[615] On January 11, 2011, the state Senate passed the legislation by a vote of 32–25, sending the bill to outgoing Governor Patrick J. Quinn for signature.[616] On March 9, 2011, Governor Quinn signed the bill into law.[617]

Robert M. Sanger, *Comparison of the Illinois Commission Report on Capital Punishment With the Capital Punishment System in California*, 44 SANTA CLARA L. REV. 103, 104 (2003) (footnotes omitted).

The state of Connecticut did a very similar study in 2003. STATE OF CONN. COMM'N ON THE DEATH PENALTY, STUDY PURSUANT TO PUBLIC ACT NO. 01-151 OF THE IMPOSITION OF THE DEATH PENALTY IN CONNECTICUT (2003). The Commission was unfunded and was limited to 14 topics presented by the legislature. *Id.* at 1–2. Nevertheless, the Connecticut Commission came to the same conclusions as the Illinois Commission on several issues. *See, e.g.*, *id.* at 35 (recommending that preliminary decisions to seek the death penalty be reviewed by a statewide committee comprised of State's Attorneys, similar to Illinois recommendation 30), *id.* at 56–62 (recommending changes to police procedures to ensure "best practices" in criminal investigations, similar to Illinois recommendations 1 through 19).

612. *Illinois Governor's Blanket Pardon Spares Lives of 167 Condemned Inmates*, FOXNEWS.COM, Jan. 11, 2003, http://www.foxnews.com/story/0,2933,75170,00.html.

613. Associated Press, *Illinois Keeps a Moratorium on Executions*, N.Y. TIMES, Apr. 25, 2003, at A26.

614. Editorial, *The Senate's Turn*, CHI. TRIB., Jan. 10, 2011, at C12.

615. Ray Long & Todd Wilson, *House Votes to Repeal Illinois Death Penalty*, CHI. TRIB., Jan. 7, 2011, at C6.

616. Monica Davey, *Illinois Bill Eliminating Death Row Is Approved*, N.Y. TIMES, Jan. 12, 2011, at A12.

617. A bill to abolish the death penalty passed the House Committee on March 5, 2009, and was re-referred to the House Rules Committee April 3, 2009. On December 1, 2010, "[o]n a partisan vote, an Illinois House committee Wednesday narrowly approved a bill that would abolish the death penalty in Illinois." Doug Finke, *Committee OKs Call to Abolish Death Penalty*, STATE J.-REG. (Springfield, Ill.), Dec. 1, 2010, http://www.sj-r.com/top-stories/x1384148524/Committee-OKs-call-to-abolish-death-penalty-in-Illinois ("Four Democrats on the House Judiciary-Criminal Law Committee voted for Senate Bill 3539, while three Republicans on the committee opposed it."); Martha Neil, *Illinois Senate OKs Ban on Death Penalty; Gov Now Decides Whether to Sign*, A.B.A. J. (Jan. 11, 2011 4:16 PM), http://www.abajournal.com/news/article/illinois_senate_oks_ban_on_death_penalty_state_gov_now_must_decide_whether_/; John Schwartz & Emma G. Fitzsimmons, *Illinois Governor Signs Capital Punishment Ban*, N.Y. TIMES, Mar. 9, 2011 ("'Since our experience has shown that there is no way to design a perfect

V. ROADMAP FOR REFORM

> *"Like so many pressing issues in California, putting limits on the death penalty has been taken off the legislative table. Since we enacted our death penalty law by popular initiative, the only way we can limit it or abolish it is with another initiative."* [618]

We have demonstrated that the California Legislature's failure to implement the reforms needed to reduce the delays and costs associated with administering the state's death penalty has resulted in the quiet expenditure of $4 billion on a system of capital punishment that has yielded only 13 executions since a majority of California voters restored the death penalty in 1978. There is no indication of an end to this long-standing legislative paralysis anywhere in sight. If California continues on its current path, by the year 2030, taxpayers will have spent more than $9 billion for the execution of approximately 25 death row inmates, while more than 125 prisoners will have died on death row of other causes. [619]

The solution to this untenable situation now rests in the hands of the electorate. The voters must decide whether to spend the additional money required to make the needed reforms to the current

death penalty system, free from the numerous flaws that can lead to wrongful convictions or discriminatory treatment, I have concluded that the proper course of action is to abolish it,' Mr. Quinn said in a statement.")

618. Uelmen, *supra* note 63, at 1E.

619. We have calculated the actual costs (1978 to 2010) and projected costs over the next 20 years (2011–2030) for California's death penalty, assuming there are no changes to the current system, to be *$9.64 billion*, for a total of 23 executions (estimated); and 126 other deaths (estimated). Our calculation is based on the following:

Costs 1978–2010: $4.04 billion.

$4 billion [trial, appeals, state post-conviction, partial federal habeas, housing], plus *$619 million* [cost to process remaining federal habeas for judgments of death imposed 1978–2010. Total Executions 1978–2010: 13; Other Deaths: 76.

Projected Costs 2011–2030 [assuming no reforms are made to the current system]: $5.04 billion.

$3.4 billion [assumes 20 new death sentences per year, 400 new condemned inmates total; based upon costs per year as of 2009 of $170 million for trial, appeals, state post-conviction, housing], plus *$443 million* [cost to process federal habeas corpus proceedings for judgments of death imposed 2011–2030 (assumes CJA Panel Attorneys and FPD represent condemned prisoners in 200 cases each)]; construction of new Condemned Inmate Complex: *$1.2 billion* [estimated cost to build and operate over the next 20 years]. Total prisoners on death row by 2030: 1058 [714 + 400 = 1114 (minus executions (estimated to be 10 based upon current rate of execution) and other deaths (estimated to be 50 based upon current rate of mortality) 1114 – 60 = 1054.] Total executions by 2030: 23 [13 + 10 (estimated if current rate continues) = 23]; Other Deaths: 126 [76 + 50 (estimated if current rate of other deaths continues) = 126]. *Total Cost 1978–2030: $9.64 billion.*

system, limit or narrow the current system, or end capital punishment in California and replace the death penalty with the sentence of life imprisonment without the possibility of parole.[620] The voters can initiate these changes at the ballot box by weighing in on proposed direct initiatives. To offer guidance to the electorate, we offer the following proposed initiatives for consideration. The failure to implement these or similar reforms will result in the continued wasted expenditure of billions of dollars in the decades to come, on an ever-increasing scale, until "the system falls of its own weight."[621] We urge the voters to consider the following options and choose among them.

A. Propositions 1 and 2*: Reform the Death Penalty But Leave Its Current Scope Unchanged*[622]

If Californians want the application of and current scope of the death penalty to remain unaltered (i.e., have it apply to 39 separate crimes), the voters must initiate legislation that will direct the Legislature to eliminate the waste of taxpayer dollars and to remedy the fatal flaws undermining the current system. The present poorly administered scheme compromises the system's integrity and has resulted in the expenditure of billions of taxpayer dollars on the costly incarceration of condemned inmates who languish for decades on death row, after which time they are—in large numbers—dying before review of their automatic appeals and/or post-conviction petitions has taken place.

620. Alternatively, the voters could pass an initiative to amend California Constitution, article II, section 10(c), which permits the Legislature to amend or repeal an initiative statute by another statute "only when approved by the electors unless the initiative statute permits amendment or repeal without their approval," to permit the California Legislature to amend or repeal a death penalty statute enacted through a voter initiative as the Legislature deems appropriate.

621. Former Chief Justice George told the Commission that if nothing is done to reform the system, the backlogs in post-conviction proceedings alone will continue to grow "until the system falls of its own weight." FINAL REPORT, *supra* note 4, at 115.

622. While the voters could choose to pass one but not both Propositions 1 and 2, these propositions operate best in tandem. For example, if the voters were to pass Proposition 1, but not Proposition 2, the delays resulting from the bottleneck created by the automatic appeal to the California Supreme Court would still exist. Similarly, if the voters were to pass Proposition 2, but not Proposition 1, the delays resulting from the shortage of qualified counsel would not be addressed, and the waste of resources associated with the backlogs in the system would thus continue.

PROPOSITION 1: DIRECTS THE LEGISLATURE TO REPAIR THE DYSFUNCTIONAL DEATH PENALTY IN CALIFORNIA AND HOLDS THE LEGISLATURE ACCOUNTABLE FOR KEEPING THE ELECTORATE INFORMED ABOUT COSTS OF THE DEATH PENALTY.

This proposed initiative would direct the California Legislature to take four steps toward addressing the most serious problems in the administration of the death penalty: (1) provide funding for counsel representing condemned inmates in appeals and post-conviction proceedings; (2) create an agency that will provide for continuity of counsel in state and federal proceedings; (3) publically disclose how much taxpayers are spending annually on the administration of the death penalty; and (4) accurately inform voters what the actual costs will be should there be future proposals to further expand the death penalty to apply to more crimes.

FISCAL IMPACT: The current sum of $184 million per year that is being expended on the death penalty is a wasteful use of the state's limited resources caused by the Legislature's failure to bring about needed reforms. Assuming the reforms proposed in this initiative are implemented, and the anticipated reductions in the delays in the system are realized, the annual cost to implement the death penalty in California will increase initially by at least $85 million per year, and then will begin to reduce over time. The annual cost of incarcerating condemned inmates would decrease from the present amount as a function of the reduced delays brought about by more efficient procedures throughout the system.

The Legislature Should Be Required to Provide Adequate Funding for the Appointment of Qualified Counsel; Including Increasing the Staff of the HCRC and the OSPD to Represent Condemned Inmates in Their Direct Appeals and State Habeas Corpus Proceedings and Raising the Hourly Rate for Appointed Counsel in State Proceedings, with Periodic Increases Scheduled to Keep Pace with Inflation and the Rising Cost of Living.

The current lack of adequate funding for the appointment of qualified counsel results in the significant waste of taxpayer funds because condemned inmates are warehoused for many years on California's costly death row, waiting for counsel to be appointed to represent them in their appeals. The state must, at a minimum, match

the $175 per hour provided by the federal government to CJA Panel attorneys representing death row inmates in federal proceedings if it is to attract qualified counsel in sufficient number to decrease the current backlog in the direct appeals of death row inmates. FISCAL IMPACT: $85 million per year. [623]

The Legislature Should Be Required to Create an Agency to Ensure Continuity of Post-Conviction Counsel for Death Row Prisoners and for the Adequate Investigation of Condemned Inmates' Claims of Federal Constitutional Violations to Be Raised in Their State Petitions for Writs of Habeas Corpus.

The scarcity of available, qualified counsel to represent condemned inmates in their state habeas corpus proceedings is compounded by the fact that almost all prisoners currently are appointed separate counsel for their state and federal habeas corpus petitions. Additionally, under the current dysfunctional system, federal taxpayers are forced to finance the investigation of these claims because they are not adequately funded in the first instance by the state of California. The delays compromise the system's integrity because, among other reasons, prisoners are dying in large numbers before their claims of federal constitutional violations have been fully reviewed by the federal courts.

To reduce the delay facing the 141 current inmates in state habeas proceedings to the 10-to-12-year national average, and to avoid an increase in the backlog due to the additional inmates who arrive on death row each year, the HCRC should be expanded (or a separate agency should be created—including perhaps a combination of HCRC and FPD CHU resources) to represent indigents on death row in both state and federal court, to provide for continuity of

623. In reaching this figure, we accept the Commission's recommendations that in order to reduce the delay in adjudicating death row cases to the national average of 10 to 12 years, the budget for the OSPD must be increased one-third, by *$6 million* per year; the budget for the HCRC must be increased to five times its current level, by *$70 million* per year; the funds allocated to the Attorney General for litigating capital cases must be increased by *$6 million*; and the California Supreme Court's budget for review of capital appeals (which may, at least in part, be reallocated to the California Court of Appeal pursuant to Proposition 2) must be increased by *$3 million* per year for the appointment of qualified counsel. *See* FINAL REPORT, *supra* note 4, at 116–17, 146. We note that, while increasing the hourly compensation for appointed private counsel to the federal rate of $175 per hour may reduce competition with the federal government for appointments in habeas proceedings, in light of the complexity, difficulty, time-consuming nature, and expertise required in death row representation, as well as the significantly greater compensation received by many private attorneys in other contexts, this modest increase may be insufficient to attract qualified counsel for these appointments.

counsel, and to reduce the delay in investigating federal constitutional violations not litigated during state court proceedings.

Streamlining the process would provide petitioners with a fairly and fully funded investigation into their claims in a timely manner. It would also maximize the efficient use of resources. More importantly, meritorious claims warranting grants of relief would be heard and ruled on earlier, whether in state or federal proceedings. This would save the state the cost incurred for the lengthier time prisoners currently spend on death row awaiting review of their claims of federal constitutional violations. Additionally, counsel who are familiar with petitioners' claims can more efficiently present those claims in state and federal courts.

Federal taxpayers currently foot the bill for the cost of ameliorating the California Legislature's failure to provide funding for the proper investigation of petitioners' claims of federal constitutional violations alleged to have occurred in California state proceedings. Much, if not all, of the expense associated with investigating these claims ought rightfully be borne by California taxpayers, rather than by the federal government. FISCAL IMPACT: Several million dollars per year. [624]

The Legislature Should Be Required to Disclose the Actual Costs to Taxpayers of the Current Death Penalty System on an Annual Basis.

624. An exact figure is difficult to calculate for the reasons discussed in this Article, e.g., failure of the state to track what costs are incurred at the various stages of capital post-conviction proceedings. For purposes of calculating that it will cost several millions of dollars per year to fund an agency that ensures continuity of post-conviction counsel for death row prisoners, we have assumed that this expenditure is in addition to the allocation of the $70 million in funding to increase the size of the HCRC for the provisions of adequate counsel proposed in Proposition 1.

We have also considered the Commission's conclusion that the $50,000 currently available to appointed counsel for purposes of investigation of constitutional claims in state habeas proceedings is grossly insufficient and accept the statement of Mr. Millman, Executive Director of the California Appellate Project, that an average adequately performed investigation is likely to cost between $250,000 and $300,000. *See* FINAL REPORT, *supra* note 4, at 135. Thus, to fund an adequate investigation for each of the 141 current inmates in state habeas proceedings, and the 324 inmates currently without representation, it will cost the state $132 million [$300,000 per case x 465 inmates = $139.5 million], rather than the $22 million currently budgeted [$50,000 per case x 465 inmates = $23 million]. To reduce the delay facing these inmates in their state habeas proceedings, and to avoid an increase in the backlog due to the additional inmates who arrive on death row each year, the state must allocate additional funds for purposes of the investigation of habeas claims at the state level alone. If this agency successfully reduces the delays in the system attributable to delays in post-conviction proceedings, the total cost of incarcerating condemned inmates would be reduced considerably as a function of their shorter tenure on death row.

The Director of Finance should be directed to prepare and present to the Legislature on an annual basis a detailed estimate of the costs incurred to house and guard condemned prisoners on death row and the costs incurred by the taxpayers in providing qualified counsel for condemned prisoners. The report should include an accounting by the Attorney General reporting on the yearly cost of employing counsel to represent the State of California in all the stages of state and federal post-conviction proceedings in capital cases. FISCAL IMPACT: $120,000 per year. [625]

The Legislature Should Be Required to Direct the Legislative Analyst to Prepare, and Include in Voter Information Guides, a Detailed Estimate of the Cost of Adding to the List of Circumstances Under Which Prosecutors May Pursue the Death Penalty ("Special Circumstances") Each Time Such an Initiative Is on the Ballot.

The Legislative Analyst's failure to inform the voters in the past of the actual costs of implementing legislation that expands the death penalty's scope has resulted in voters casting their ballots based on misleading information concerning the cost issue. The Legislature should be directed to provide a detailed estimate to voters which reflects the actual costs of capital punishment, including trial court costs, reimbursement of public defenders and appointed private counsel, prosecution expenses, reimbursement of counsel appointed for the direct appeal and state habeas corpus proceedings, and the cost of investigating state and federal constitutional claims. FISCAL IMPACT: none. [626]

625. This is the amount typically incurred by the Department of Finance to hire a contractor to compile information and submit a report to the legislature. *See, e.g.*, CAL. DEP'T OF FIN., Department of Finance Bill Analysis (AB 10), *available at* http://www.dof.ca.gov/legislative_analyses/LIS_PDF/07/AB-10-20080727013028PM-AB00010.pdf.

626. Provided the Legislature complies with the requirement that it fully disclose on an annual basis the actual costs to taxpayers of the death penalty system (listed as 3 above), this data should be readily available and easily included in the Voter Information Guides.

PROPOSITION 2: AMENDS THE CALIFORNIA CONSTITUTION TO PROVIDE FOR THE REVIEW BY THE CALIFORNIA COURT OF APPEAL OF THE DIRECT APPEALS OF CONDEMNED INMATES IN THE FIRST INSTANCE.

This Proposed Initiative Would Amend the California Constitution, Article VI, Section 12, to Provide That the California Supreme Court No Longer Has Exclusive Jurisdiction over Appeals Involving Judgments of Death to Relieve the Seven Justices of the California Supreme Court of Their Present Duty to Review the Direct Appeals of All Prisoners Who Have Been Sentenced to Death.

There is no indication that the California Supreme Court will see an end to the backlog in automatic appeals from judgments of death in the near future. Amending the California Constitution to shift this burden to the justices of the six districts of the California Court of Appeal, with discretionary review by the California Supreme Court to correct any erroneous rulings or to resolve conflicts between the various districts and divisions of California's intermediate appellate courts, will address this issue. FISCAL IMPACT: As compared to the costs of the current system, this initiative would eventually result in a net savings over time of *hundreds of millions of dollars*, due to condemned inmates spending fewer years on death row awaiting review of their automatic appeals.

B. Propositions 3 and 4*: Reform the Death Penalty by Narrowing the Number of Death-Eligible Crimes*

Voters could also choose to address the problems in the current system by narrowing the death penalty's scope. [627]

Because the electorate has not been properly informed of the cost of administering capital punishment or of expanding the list of death-eligible crimes prior to voting on past initiatives, it is possible that such knowledge would have affected voters' decisions to vote

627. If the voters elect to limit the death penalty—as suggested in Propositions 3 and 4 set forth below, the reforms suggested in Proposition 1would likely still need to occur, though on a modified scale. Accordingly, if the electorate were to favor narrowing the scope of the death penalty as suggested in Propositions 3 and 4, the voters ought to authorize the Legislature to modify the reforms proposed in Proposition 1 to provide for a scaled down version that will effectively and efficiently remedy the problems relating to lack of available qualified counsel, and the shortage of funding for investigations.

for or against expanding capital punishment in California. In view of the disclosure of the actual costs of administering the death penalty in California, both in terms of exorbitant costs incurred and the compromised effectiveness of the now-bloated system wherein few executions occur, consideration should be given to proposing initiatives that would permit the electorate to determine whether narrowing the list of crimes for which the death penalty applies would be a wiser use of the state's resources. Additionally, while the Commission found no credible evidence that any wrongfully convicted person has ever been executed in California, the Commission acknowledged that it could not "conclude with confidence that the administration of the death penalty in California eliminates the risk that innocent persons might be convicted and sentenced to death."[628] This concern could be addressed, at least in part, by limiting the death penalty to prosecutions in which there is (1) biological or DNA evidence that conclusively links the defendant to the murder; (2) a videotaped, voluntary interrogation of and confession by the defendant to the murder; or (3) a video recording that conclusively links the defendant to the murder. This is the system now employed in Maryland.[629]

PROPOSITION 3: REVISES CALIFORNIA PENAL CODE SECTION 190.2 TO REDUCE THE NUMBER OF DEATH-ELIGIBLE CRIMES SO THAT CAPITAL PUNISHMENT APPLIES ONLY TO THOSE CRIMINALS WHO REPRESENT THE WORST OF THE WORST.

This proposed initiative would revise California Penal Code section 190.2 to impose the death penalty only in the following five special circumstances: (1) murder of a peace officer in the performance of his or her official duties; (2) murder of any person occurring at a correctional facility; (3) multiple murders involving an intent to kill or knowledge that the defendant's actions would cause, or create a strong probability of, death or great bodily harm to one or more of the victims; (4) murder involving torture; and (5) murder by a person who is under investigation for, or who has been charged with or convicted of a crime that would be a felony, or the murder of

628. FINAL REPORT, *supra* note 4, at 126.

629. MD. CODE ANN., CRIM. LAW § 2-202(3) (West 2009); *see* Part IV.E.3, *supra*.

anyone involved in the investigation, prosecution, or defense of that crime, e.g., witnesses, jurors, judges, prosecutors, and investigators.[630]

Narrowing the death penalty's scope in this manner ensures that it is applied to fewer crimes and is limited to those criminals who truly represent the worst of the worst. The decision whether the sentences of those condemned inmates not convicted of murder involving one of these five factors should be commuted to life without the possibility of parole would be left to the Governor's discretion in the exercise of his clemency power.

FISCAL IMPACT: An immediate net savings of at least $55 million per year. This initiative would result in reducing the number of death penalty trials by about half, saving taxpayers an estimated $20 million per year. Additionally, reducing the death row population to those whose death judgment is based on one or more of these five special circumstances, assuming the Governor were to commute those sentences to life imprisonment without the possibility of parole, would immediately reduce the size of California's death row by half, which would save taxpayers over $35 million per year in death row housing costs and $27 million per year in direct appeals and state habeas corpus costs (assuming a 45% reduction in those caseloads).[631] "A 45% reduction in the size of death row would also reduce the otherwise necessary expansion of the State Public Defender, the Habeas Corpus Resource Center, and the Court staffing needed."[632] Some of the reforms outlined in Proposition 1 would still be needed to address the shortage of counsel, however, offsetting the savings from the reduced caseloads of the State Public Defender and the HCRC.[633]

630. These are the Mandatory Justice factors and appear to be consistent with the focus and application of the death penalty in the majority of federal death penalty cases. CONSTITUTION PROJECT, MANDATORY JUSTICE: THE DEATH PENALTY REVISITED, at xxiv-xxv (2005 update) (2001), *available at* www.constitutionproject.org/pdf/30.pdf.

631. FINAL REPORT, *supra* note 4, at 141–42.

632. *Id.* at 142 (citing Kreitzberg study).

633. *Id.* at 146 (concluding that "[t]he reduction of the backlog by adopting the narrowing proposal would reduce these enhanced budgets [as set forth *supra* in Proposition 1] by 45%, to a total of $68 million.").

PROPOSITION 4: NARROWS THE DEATH PENALTY TO THOSE CASES IN WHICH THE PROSECUTION PRESENTS SCIENTIFIC OR VIDEOGRAPHIC EVIDENCE OF GUILT OR IN WHICH THERE IS A RECORDED CONFESSION.[634]

This proposed initiative would narrow the death penalty's scope in California by revising California Penal Code section 190.2 to limit the imposition of the death penalty to prosecutions in which there is (1) biological or DNA evidence that conclusively links the defendant to the murder; (2) a videotaped, voluntary interrogation of and confession by the defendant to the murder; or (3) a video recording that conclusively links the defendant to the murder.

FISCAL IMPACT: An immediate net savings of tens of millions of dollars per year. This initiative would result in fewer death penalty trials, appeals, and post-conviction proceedings, which would save taxpayers millions of dollars per year over time. Additionally, if the Governor were to commute to life imprisonment without the possibility of parole the death sentences of those prisoners whose convictions were not based on the specific evidence set forth in this initiative, California's death row population would be immediately and dramatically reduced to a fraction of its current size. This would result in a savings to taxpayers of an additional tens of millions of dollars per year in death row housing costs.

C. Proposition 5: Abolish the Death Penalty and Replace It with the Punishment of Life Imprisonment Without the Possibility of Parole

Alternatively, voters can choose to end capital punishment in California and replace the death penalty with the sentence of life imprisonment without the possibility of parole. Under the current costly yet dysfunctional death penalty law, many more prisoners have died of natural causes on death row than have been executed. Thus, many—if not most—death sentences in California are in reality sentences of lifetime incarceration. Voters can elect to end the

634. By choosing to pass both initiatives, the death penalty's scope would be significantly reduced such that it only applied to those five types of crimes set forth in Proposition 3, and to crimes for which the prosecution was able to present the types of evidence set forth in Proposition 4. The reforms in these combined propositions (3 and 4) would dramatically reduce the cost of implementing the death penalty in California from its current level.

death penalty based on cost considerations alone, regardless of their views on whether the death penalty is an effective or morally acceptable means of punishment, by voting in favor of an initiative like Proposition 5.

PROPOSITION 5: ABOLISHES CAPITAL PUNISHMENT AND REPLACES IT WITH THE PUNISHMENT OF LIFE IMPRISONMENT WITHOUT THE POSSIBILITY OF PAROLE.

This proposed initiative would abolish the death penalty in California by amending or repealing section 190.2, and those other sections of the California Penal Code that provide for the imposition of the death penalty as the punishment for certain first degree murders, and revising those other sections necessary to provide for the punishment of life imprisonment without the possibility of parole for those crimes formerly subject to punishment by death.

Article II, section 10(c), of the California Constitution prohibits the Legislature from abolishing or otherwise limiting the death penalty laws in California, all of which have been enacted by voter initiative, unless approved by another voter initiative. If passed, this proposition would effectively abolish the death penalty in California by amending or repealing relevant sections of the California Penal Code, by direct voter initiative, as required under the California Constitution.

FISCAL IMPACT: This initiative would save taxpayers billions of dollars and eliminate the risks of wrongful executions entirely. An immediate net savings of $170 million per year would be realized—assuming the Governor were to commute the sentences of those prisoners currently on death row to sentences of life imprisonment without the possibility of parole—and a savings of $5 billion over the next 20 years. [635]

635. Our research indicates that the annual cost of the death penalty in 2009 in California was $184 million—$170 million from state taxpayers and $14 million from federal taxpayers. *See supra* note 249. The Commission concluded that abolishing the death penalty and replacing it with LWOP could result in additional LWOP trials, due to the lack of incentive for defendants to enter into plea deals without the threat of the death penalty looming over them. The Commission estimated that these added trials would cost approximately $11.5 million per year. FINAL REPORT, *supra* note 4, at 145–46.

VI. CONCLUSION

Despite more than 200 years of debate, capital punishment has been the subject of heated discussion among people from all camps with firmly held beliefs. Rather than weigh in on the debate over the proper application of or morality of the death penalty, our purpose in writing this Article is to educate the voters on the costs in tax dollars of implementing the death penalty under California's present laws and procedures. By revealing what are, in some instances, rather shocking figures concerning the costs incurred in administering the death penalty, we do not suggest that the answer lies in cutting budgets or in spending less money. To the contrary, the message appears to be that maintaining the death penalty in California will initially require that the taxpayers contribute more, not less, to reform the present broken system. California has approached the implementation of its death penalty system with caution and, as a result, no evidence has been presented that the prosecution of persons accused of capital crimes has resulted in the execution of someone who was innocent. Requiring the presentation of scientific evidence or a video of the commission of a homicide or a video of a voluntary confession as a condition to imposing a death sentence would ensure that the execution of an innocent person would not occur.

Some voters view costs as irrelevant in protecting society from the worst of the worst. One state's attorney, testifying at a public hearing of the commission appointed by the Maryland Legislature to study the cost of the death penalty in that state, commented that "[j]ustice is not a cost-benefit analysis. Justice is doing the right thing, no matter how much it costs."[636] The truth is that California's administration of the death penalty has produced unconscionable and avoidable delay—not justice. It is unjust to incarcerate condemned prisoners on death row for decades without reviewing their federal constitutional claims while many who may have been entitled to release or to a new trial or sentence proceeding die.

California's voters must decide whether the death penalty system should be reformed or abolished because the cost of

636. John Gramlich, *Death Penalty: Will Other States Follow NJ?*, STATELINE (Dec. 10, 2008), http://www.stateline.org/live/details/story?contentId=361331 (quoting Joseph Cassilly, a state's attorney in Harford County, Maryland, from his testimony at a public hearing of the Maryland study commission).

maintaining the current system without reform is insupportable. We urge those who have in the past voted in favor of capital punishment—because they believe it is an appropriate retribution for, or deterrent to, the killing of innocent victims—to determine whether any of our suggested reforms should be implemented to address the wasteful spending of billions of dollars and to mitigate or eliminate the unacceptable delays in enforcing the law. There may also be those who have in the past voted against the death penalty in California because it is overly broad, or because the manner in which it has been administered is ineffective and wastes the state's resources, but who would be in favor of a narrower law if it were to be applied to a much smaller category of first degree murderers—the worst of the worst.

Maintaining the death penalty's current scope will require, at least initially, the expenditure of tens of millions of dollars more per year in state funds to implement the reforms needed to address the unconscionable delays currently in the system. Over time, those costs will reduce as the delays and backlogs reduce. Narrowing the death penalty's scope will result in the immediate savings of millions of dollars to the state, while ensuring that those murderers who represent the worst of the worst remain subject to execution for their crimes. Abolishing the death penalty will result in the immediate savings of millions of dollars per year and a savings of billions of dollars over the next 20 years.[637] We hope that California voters, informed of what the death penalty actually costs them, will cast their informed votes in favor of a system that makes sense.

637. Former California Attorney General John Van de Kamp commented recently that in his view, "there's . . . a strong economic argument for doing away with capital punishment. With California facing its most severe fiscal crisis in recent memory—with draconian cuts about to be imposed from Sacramento that will affect every resident of the state—it would be crazy not to consider the fact that it will add as much as $1 billion over the next five years simply to keep the death penalty on the books." Van de Kamp, *supra* note 31.