

California District Attorneys Association

# Prosecutors' Perspective on California's Death Penalty



*Produced in collaboration with  
the Criminal Justice Legal Foundation*

MARCH 2003

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## *Executive Summary*

American society this last year has seen heightened attention to the imposition and application of the death penalty. A significant number of death-penalty cases have been accepted for review by the United States Supreme Court; departing Governor George Ryan of Illinois caused uproar by making a midnight, blanket commutation of 167 death sentences; Maryland Governor Parris Glendening imposed a two-year moratorium on the death penalty just before leaving office at the beginning of this year; and New York federal district court Judge Jed S. Rakoff held the death penalty unconstitutional – and promptly was overruled by the Second U.S. Circuit Court of Appeals. While ongoing challenges to and scrutiny of capital punishment are certainly nothing new, recent events and the exceedingly high level of interest at present necessitate a thorough look at the death penalty, particularly as applied in California.

### **WHO GETS THE DEATH PENALTY IN CALIFORNIA**

Listed alphabetically, the following individuals are representative, though not all inclusive, of murderers who have been sentenced to death in California.

- **Clarence Ray Allen** – While serving a life sentence for ordering the murder of a young girl who “snitched” on him, he ordered the murder of the witnesses who testified against him. During a “hit” on a witness, three young people were killed. He was convicted of triple murder, conspiracy to murder seven people, and three special circumstances, including witness-killing, prior murder, and multiple murder.
- **William George Bonin** – Kidnapped, sodomized, molested, tortured, and murdered more than 20 young boys over a 12-year period.
- **Richard Allen Davis** – While on parole, he kidnapped at knifepoint a 12-year-old girl from her home as she played with two young friends in her bedroom. He then drove her miles away and killed her. Her dumped, strangled, and decomposed body was found months later.
- **Robert Alton Harris** – Murdered two young boys, ages 15 and 16, who were sitting in their car having lunch. He then stole their car, ate their lunch, and robbed a bank.
- **Robert Lee Massie** – Convicted of multiple violent crimes and sentenced to death for fatally stabbing a woman in 1965. His sentence was commuted in 1972 to life in prison, and he was paroled in 1978. While on parole eight months later, he robbed and murdered the proprietor of a liquor store.
- **Giles Albert Nadey** – Working as a carpet cleaner, he tricked a young pastor’s wife into an empty home. He viciously stabbed and sodomized her and then slashed her throat, severing her jugular vein and causing her death.
- **Darrell Keith Rich** – Brutally attacked and raped nine young women during a three-month period. Four of his victims died from their injuries.
- **Arturo Juarez Suarez** – Shot his two brothers-in-law in the head and buried them in a grave he dug earlier. He then attacked his sister-in-law, tied her up, wrapped duct tape around her face, and raped her. Finally, he took her two young children, ages three and five, hit them over the head with a shovel, and buried them alive in the same grave as their uncles – ultimately killing them.

- **David Allen Westerfield** – Kidnapped his seven-year-old neighbor from her bedroom in her home, killed her, and dumped her tiny body on the side of a rural road – where it was found badly decomposed 25 days later.
- **Brandon Wilson** – Attacked then murdered a nine-year-old boy in a beachside restroom, slashing his throat deep enough to tear his voice box and expose his neck vertebra. He then stabbed the boy an additional five to six times in the back.

## **A BRIEF HISTORY OF THE DEATH PENALTY IN CALIFORNIA**

Since California first achieved statehood in 1850, it has consistently authorized the death penalty for certain offenses. The Crimes Act of 1850 prescribed death for murder with malice. The Penal Code, drafted in 1872, provided for either death or life imprisonment for first-degree murder. Aside from minor changes, the alternative punishments for first-degree murder and the procedure for imposing death remained constant for 100 years.

In 1972, both the California Supreme Court and the United States Supreme Court struck down the death penalty, albeit for different reasons. A 6-1 decision in *People v. Anderson* by California’s high court found that the death penalty violated the state constitutional provision against cruel and unusual punishment.<sup>1</sup> The court in *Anderson* reasoned that capital punishment was cruel in part due to the “dehumanizing effects of the lengthy imprisonment prior to execution” and unusual because so many other civilized countries of the world had rejected it. Several months later, in the highly fractured *Furman v. Georgia* opinion, the United States Supreme Court also struck down the death penalty; the Court’s 5-4 decision produced nine separate opinions – and no agreements among the majority as to why the death sentences at issue were unconstitutional.<sup>2</sup> The scope of the Court’s holding in *Furman*, extracted from the concurring opinions of Justices Potter Stewart and Byron White, focused on the perceived arbitrary imposition of the death penalty. Accordingly, the states were required to provide standards for determining the sentence in capital cases or more narrowly define the crimes for which it could be imposed.

Predictably, the variety of opinions in *Furman* resulted in great confusion among the states. California opted in 1973 to renovate its capital statutes by enacting a law that provided death as the sole punishment for first-degree murder with a special-circumstance finding. Four years later, the California Supreme Court found the state’s mandatory death-penalty scheme to be unconstitutional.<sup>3</sup> The Legislature and the electorate responded immediately, passing both a new statute and the so-called Briggs Initiative to establish a procedure by which a death sentence could be imposed. Both the 1977 statute and the 1978 Briggs initiative have been consistently upheld as constitutional.

## **SAFEGUARDS IN DEATH PENALTY TRIALS PROTECT DEFENDANTS**

A review of the inmates on California’s Death Row quickly reveals that only the worst of the worst are given the death penalty. Of the 10 men executed in California since 1992, not one

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<sup>1</sup> *People v. Anderson* (1972) 6 Cal.3d 628.

<sup>2</sup> *Furman v. Georgia* (1972) 408 U.S. 238.

<sup>3</sup> *Rockwell v. Superior Court* (1976) 18 Cal.3d 420.

successfully raised doubt of his guilt in the heinous murder(s) committed. And among the more than 600 inmates currently on Death Row, not one has demonstrated innocence.

California effectively protects defendants against errors and prevents prosecutions of innocent persons by providing copious protections in death-penalty trials.

### **Eligibility**

Only 21 types of murder involving so-called “special circumstances” can qualify in California for capital punishment. As such, most murderers are simply not eligible for the death penalty, no matter how egregious or premeditated their killings.

### **Screening**

Prosecutors carefully and thoroughly screen each potential capital defendant to determine whether death is an appropriate sentence. The Penal Code sets forth 11 categories of factors to be evaluated, called “aggravating” or “mitigating” circumstances. The trial prosecutor examines and balances all factors relating to the aggravating and mitigating circumstances and makes an initial decision about whether to seek a death sentence. The prosecutor's decision is then reviewed by his or her immediate supervisor(s), followed typically by a review from a special committee of experienced senior prosecutors. Finally, the case is presented to the county District Attorney, or the District Attorney's designate, who makes the ultimate decision.

### **Defense Attorneys**

Once the decision to seek death is solidified, the court and defense counsel are immediately notified. If a defendant does not have private defense counsel, an experienced criminal-defense attorney is appointed. California law also authorizes the judge to appoint a second defense attorney – at taxpayers' expense – for the defendant. These attorneys are paid much higher fees than appointed attorneys in noncapital cases. Capital-case defense counsel also receive significantly more funding for investigators and other experts – and frequently spend thousands of dollars on psychiatrists, forensic scientists, criminalists, jury-selection experts, penalty-phase coordinators, and other specialists to ensure that no stone is left unturned. Defense attorneys also routinely file all manner of motions and objections to protect their clients from conviction. Attorneys know their trial tactics will be thoroughly scrutinized on appeal, so every effort is made to avoid error, ensuring yet another level of protection for the defendant.

### **Jury Protections**

Arguably, the absolute safeguard in the trial process is the trial-by-jury, where guilt must be proven beyond a reasonable doubt. Only jurors who demonstrate they can remain objective and fairly evaluate the various aggravating and mitigating factors are qualified to serve on a capital jury.

### **Judicial Safeguards**

The last trial-level safeguard for the defendant is the judge. In addition to having a duty to fairly and impartially apply the law to each case, judges are responsible for properly instructing the jury on the law and preventing the jury from hearing anything improper throughout the trial. Moreover, the trial judge in a California capital-murder case has a special power to protect the

defendant by modifying the verdict. That is, under Penal Code section 190.4(e), even if the jury votes unanimously for death, the trial judge can in certain circumstances reduce the sentence to life in prison without the possibility of parole. Only in death-penalty cases does this added protection for the defendant exist.

## **CALIFORNIA’S PROCEDURE FOR CAPITAL CASE REVIEW IS FAIR AND THOROUGH**

### **State Appellate/Habeas Corpus Process**

In addition to the many safeguards afforded the defendant at trial in a capital case, California also provides for fair and thorough state appellate review. Every defendant sentenced to death gets an automatic direct appeal to the California Supreme Court, which cannot be waived. A prisoner further may petition for a writ of habeas corpus where he or she may present new evidence or testimony. These appeals are separate and distinct and run on different tracks with different deadlines. The defendant is entitled to different attorneys for each appeal, and the California Supreme Court personally supervises the recruitment of both the appellate attorney and the habeas attorney. The California Rules of Court specify strict qualifications for these attorneys to ensure only highly experienced death-penalty attorneys handle these appeals.

Once appointed, the defendant's appellate attorneys and the state's Attorney General make sure the record on appeal is properly compiled. Because of the current five- to six-year delay in appointing defense counsel, correction and certification of the record on appeal is a lengthy endeavor. Nonetheless, upon certification by the trial court that the record is complete and accurate, the California Supreme Court notifies the parties of the briefing deadlines for the direct appeal. Usually during this time the defendant also prepares and files a habeas corpus petition, which is heard separately.

When briefing is complete, the California Supreme Court hears oral argument on the appeal and must render a decision within 90 days. Ordinarily, upon decision, a petition for rehearing is filed. If rehearing is denied, the decision on appeal is considered final. Final decisions may be appealed to the United States Supreme Court as a petition for writ of certiorari; these petitions, however, are rarely granted.

### **Federal Habeas Corpus Review**

Not only does a capital defendant have the safeguard of state appellate review, he or she also has the protection of federal appellate review. If the United States Supreme Court denies a petition for writ of certiorari, the defendant has one year to file a petition for writ of habeas corpus in a United States District Court. Once again, the defendant may request appointment of counsel – and a stay of execution – both of which are routinely granted. Thereafter, the new federal appellate lawyers file a habeas petition claiming the prisoner's conviction and sentence violate the Constitution of the United States.

A recurring issue in federal habeas corpus cases is the tension between the presumption that the state court decision is “final” and the prisoner’s desire to reopen and relitigate the entire case. The United States Supreme Court has repeatedly proclaimed that the state trial is the “main

event” and not just a “tryout on the road” for subsequent federal habeas corpus proceedings.<sup>4</sup> Accordingly, a prisoner is not entitled to raise claims in federal court that were not properly raised in state court. Substantial litigation is devoted to whether a prisoner did raise claims and whether the prisoner should be excused from this requirement to follow state procedures. Either the prisoner or the Attorney General may appeal the district court’s disposition of the habeas corpus petition to the Ninth Circuit Court of Appeals. The Ninth Circuit has acquired a reputation for being one of the most frequently reversed circuits in the country. The Ninth Circuit has also been criticized for the expense and slowness of its handling of capital cases. Consequently, the court has refined its specific rules for handling death-penalty appeals. Unlike ordinary appeals, once briefing is complete, a particular panel of three judges is chosen to handle all matters pertaining to the case, although the Ninth Circuit rules still gives any single judge on the court the power to stay imminent executions.

After the three-judge panel issues its opinion, the losing party may petition for a rehearing *en banc*, requesting a larger panel of the court to rehear the case. Due to the large size of the Ninth Circuit (28 judges), Congress has authorized it to conduct *en banc* hearings with a panel of only 11 judges. A majority of six of those 11 judges may decide an issue that binds all 28 judges of the Ninth Circuit. While the court could sit as a full *en banc* with all the judges, this has never occurred.

After completion of the appeal in the Ninth Circuit, either party may again petition for writ of certiorari to the United States Supreme Court. A response is required, although, again, these petitions are rarely granted. When the United States Supreme Court denies certiorari, the original sentencing court sets an execution date, and the defendant begins his or her last-minute pleadings.

Finally, the defendant may seek clemency from the Governor. Although there is no right to counsel in these proceedings, California does provide representation to capital prisoners seeking clemency. While the clemency process is occurring, the prisoner ordinarily starts a second series of habeas corpus petitions, called successive petitions. Litigation often continues until just hours before the scheduled execution.

### **Last-Minute Proceedings and Litigation Leading to Execution**

The successive-petition litigation usually begins in the California Supreme Court and is subject to strict limitations. If the California Supreme Court denies the successive petition, a prisoner cannot file a new petition in the federal district court. Rather, a request to file the successive petition must be made to the Ninth Circuit Court of Appeals, which is subject to tight restrictions enacted by Congress. If the Ninth Circuit finds that the prisoner has met these requirements, it will grant the prisoner permission to file the petition in district court and a new habeas corpus process will begin. If the Ninth Circuit denies the request, the prisoner may still file an original petition for writ of habeas corpus in the United States Supreme Court and request a stay of execution. Frequently, this litigation occurs just hours or even minutes before the scheduled execution and these last-minute pleadings are ordinarily denied.

Other last-minute pleadings include claims that execution constitutes cruel and unusual

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<sup>4</sup> *Coleman v. Thompson* (1991) 501 U.S. 722, 746.

punishment under the Eighth Amendment of the United States Constitution, or that the defendant is incompetent or retarded.

## **DEBUNKING COMMON FALLACIES AND MISINFORMATION**

### **Innocent Prisoners Are Not Being Executed, and Claims Of Wrongful Convictions Are Based on Misleading, Exaggerated Data**

Despite the myriad of safeguards afforded to defendants in capital cases, death-penalty opponents falsely claim that numerous innocent persons have been sentenced to death, only narrowly escaping that ultimate punishment by subsequent exoneration.

The Death Penalty Information Center (DPIC)'s innocence list ("*Innocence: Freed from Death Row*") [hereinafter referred to as "DPIC List" or "List"] is frequently cited as support for the claim that 102 innocent prisoners have been released from Death Rows across the nation. The List is uncritically accepted as definitive. An examination of its premises and sources, however, raises serious questions about whether many of the allegedly innocent prisoners named on the DPIC List are actually innocent at all.

A case-by-case analysis of each prisoner on the List (as of September 2002) suggests an exaggerated number of inaccurate convictions. For example, the DPIC counts as "innocent" those whose convictions were reversed as a result of a change in the law by the Supreme Court and who were then either acquitted at retrial or had charges dismissed because the passage of time had eliminated necessary evidence and witnesses. The List also includes other cases in which the conviction was reversed because of legally insufficient evidence or because the prisoner ultimately pled to a lesser charge. It further includes any cases in which a governor grants an absolute pardon. Such standards as a whole are inadequate and misleading.

Arguably, at least 68 of the 102 defendants on the List should not be on the List at all – leaving 34 released defendants with claims of actual innocence – which is less than one-half of one percent of the 7,096 defendants sentenced to death between 1973 and 2001.

Three of the individuals on the DPIC List are from California. No reasonable doubt exists as to the guilt of any of them.

- **Jerry Bigelow:** Convicted of robbery, kidnapping, and murder. His conviction and death sentence were reversed for reasons unrelated to guilt. On retrial, the jury convicted him of robbery and kidnapping and found that either he or an accomplice committed the murder during the crime. Under California law, the jury found true beyond a reasonable doubt all the facts necessary to convict Bigelow of first-degree murder but did not actually convict him of a separate charge of first-degree murder. Hence, the jury rendered an "inconsistent verdict" that could not be appealed by the prosecutor. The factual distinction between actual perpetrator and accomplice is not proof of actual innocence.

- **Patrick Croy:** Convicted of murdering a police officer in Yreka, California despite a defense of intoxication. The California Supreme Court reversed his murder conviction for instructional error, but affirmed his conviction for conspiracy to commit murder. On retrial, Croy made a new and inconsistent claim of self-defense and was acquitted. There was never any dispute that Croy killed the police officer, thus he cannot be deemed actually innocent.
- **Troy Lee Jones:** Sentenced to death for shooting a woman in an attempt to keep her from testifying against him in the strangulation-murder of an elderly burglary victim. Several witnesses testified as to Jones's involvement in the murder. After 15 years of appeals, the California Supreme Court vacated his conviction for ineffective assistance of counsel. Prosecutors opted not to retry him because evidence and witnesses were no longer available, not because Jones was actually innocent.

Two specific defects in the DPIC study are the time frame used and the confusion of “legal innocence” with “actual innocence.” First, the time period studied is overly inclusive. The DPIC List arbitrarily begins its study in 1970, prior to the 1972 *Furman* decision and prior to the states rewriting their death-penalty statutes and the U.S. Supreme Court's 1976 decision approving new standards that permitted consideration of mitigating evidence. To the extent that the DPIC List includes defendants convicted and condemned under old statutes that did not meet the Court's 1976 standards, those defendants are irrelevant in terms of assessing contemporary capital-punishment statutes and should be excluded from the List.

In addition, the United States Supreme Court has from time to time invalidated other state death-penalty statutes or issued rulings that would have affected the penalty procedures in various states. To the extent that those changes affected the eligibility for or selection of the penalty, it is inappropriate to include inmates who may not have had the benefit of those procedures.

The other major flaw in the DPIC List is the confusion of “actual innocence” and “legal innocence.” The former is when the defendant is simply the “wrong person,” not the actual perpetrator of the crime or otherwise culpable for the crime. The latter form of innocence means that the defendant cannot be legally be convicted of the crime, even if that person was the actual perpetrator or somehow culpable for the offense. The available information from the case material and media accounts that the DPIC List relies upon indicates that many defendants on the List were not “actually innocent.”

Legally insufficient evidence to convict a defendant or an acquittal does not mean the defendant did not commit the crime. It means the prosecutor could not convince the jury beyond a reasonable doubt that the defendant did commit the crime. Defendants are acquitted for many reasons, the least likely being innocence. A defendant may be acquitted if even one juror harbors a lingering doubt. A defendant may be acquitted if critical evidence of guilt is inadmissible because the police violated the Constitution while obtaining it. A jury may acquit because it sympathizes with the defendant, even though the evidence clearly proves guilt.

Due to the Double Jeopardy Clause, once the jury finds the defendant not guilty, the prosecutor

cannot appeal the conviction or retry the case, even if new evidence is discovered or new witnesses come forward. Similarly, if an appellate court reverses a conviction because the evidence was legally insufficient to prove guilt beyond a reasonable doubt, Double Jeopardy prevents the state from retrying the case. Frequently, appellate courts are legally compelled to reverse such cases, even if the evidence signals strongly that the defendant is guilty. The defendant is “legally innocent,” but not “actually innocent.”

As noted in some of the cases on the DPIC List, certain states have their own unique and more demanding standards for sufficiency of evidence or double jeopardy. Accordingly, a reversal in one state is not dispositive of the case under the United States Constitution or other states' laws. In other words, a prisoner may have had his or her case reversed for insufficient evidence in one state when that conviction might have been upheld in federal court or another state.

Finally, a prosecutor's decision whether to retry a case that has resulted in a “hung jury” or has been reversed on appeal (for reasons other than lack of sufficient evidence) is not necessarily motivated by a prosecutor's personal belief that a defendant is guilty or innocent. Prosecutorial discretion is an integral part of the criminal-justice system. The decision not to retry is not ipso facto a concession that the defendant is actually innocent. Rather, it frequently represents the prosecutor's professional judgment that there simply is not enough evidence to persuade an entire jury that the defendant is guilty beyond a reasonable doubt.

This critique of the death penalty reviews the crime and trial history each of the defendants on the DPIC List. This thorough examination of the DPIC List and available supporting materials reveals that at least 68 defendants should be stricken out of the 102 allegedly innocent defendants “freed from Death Row.” An analysis of the List in July 2002 by the United States District Court for the Southern District of New York in *United States v. Quinones* found that 40 defendants belonged on the DPIC List.<sup>5</sup> When cross-referenced with this analysis, only 17 defendants truly belong on the List.

Death-penalty opponents are fond of comparing the 102 alleged innocents with the number of convicts actually executed, concluding that one innocent Death Row inmate is released for every seven inmates executed. Of course, comparing a “sentenced to death” rate with an execution rate is like mixing apples and oranges because there is no claim that any innocent defendants have actually been executed. Being sentenced to death is not the same as then being executed. This 7:1 ratio is a nonsensical public-relations statistic that creates the misimpression of an epidemic of wrongful convictions.

The proper comparison is between the total number of death sentences and the number of innocent Death Row inmates actually released from Death Row. Even using the dubious 102 alleged innocents, out of 7,096 convicts sent to Death Row between 1973 and 2001, just 1.4 percent of all inmates sentenced to death have been released because of innocence. Using the more reliable number from this study of 34 exonerated prisoners, the percentage falls to 0.4 percent. When the *Quinones* analysis and this critique are combined to remove all but 17 names from the List, the result is that two-tenths of 1 percent or 0.2 percent of the 7,096 prisoners were released on actual-innocence grounds.

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<sup>5</sup> *United States v. Quinones* (2002) 205 F. Supp.2d 256.

The microscopic percentage of defendants who may have been wrongly convicted and sentenced to death can be considered a testament to the accuracy of our modern capital-punishment system in filtering out and punishing the actual perpetrators of our most heinous crimes.

### **“Error Rate” Study Is Riddled With Errors of Its Own**

In addition to the exaggerated claims of the DPIC's exonerated list, much attention has been given to a pair of reports by opponents of capital punishment, claiming to show that the system of capital trials is “broken” because of the large number of verdicts reversed on appeal. Both reports [hereinafter referred to collectively as “Liebman Report”], authored largely by Columbia Law School Professor James Liebman, have been widely criticized for not supporting their conclusions and stating data in misleading ways.

The fact that a large percentage of capital verdicts are overturned is not news. At issue is whether so many verdicts are reversed because of flaws in the sentencing system or because of improper reversals by an appellate court. The Liebman Report makes no attempt to distinguish valid reversals from erroneous reversals. It inaccurately counts as “serious error” every finding causing reversal of a conviction or sentence. For example, the U.S. Court of Appeals for the Ninth Circuit is notorious for erroneously overturning valid capital sentences. A 1995 study by the Criminal Justice Legal Foundation revealed that the Ninth Circuit is regularly reversed by the U.S. Supreme Court on capital convictions. The Liebman Report never explores the possibility that reversals by the Ninth Circuit are not “serious errors” in state capital trials but rather are errors by the Ninth Circuit.

Another mischaracterization by the Liebman Report is to count as “error” reversals due to changes in U.S. Supreme Court case law. For more than 25 years, the Supreme Court and other courts have continually tinkered with the rules for capital sentencing, and all of the changes apply retroactively to all cases still pending on the first round of appeals. Hence, numerous defendants who were properly convicted and sentenced to death years ago can suddenly have their cases reversed if the Supreme Court changes the rules. Such reversals indicate a change of heart at the high court level – not error at the trial court level – and thus should not be included in the catalogue of erroneous verdicts.

On the question of guilt versus penalty, the Liebman Report indicates very little because it lumps together guilt and sentence reversals. It does, however, reveal that 9 percent of the cases sent back for retrial of the guilt verdict ended in acquittals. Given how heavily the trial process is weighted in favor of the defendant, it is surprising that a small percentage of cases resulted in acquittals – especially when retried a decade or more after the fact, when memories had faded and witnesses were no longer available. The fact that the retrial-acquittal rate is so low significantly serves to reinforce confidence in the system, not undermine it.

Liebman's “error rate” study is further discredited by the fact that he draws statistics selectively from the sample of direct appeals or from the sample of habeas/collateral appeals in order to achieve a desired result. For example, he claims courts are reluctant to overturn convictions on technicalities. As proof, his data shows no exclusionary-rule reversals on appeal – but he looks only at *collateral review* for these data. *Direct appeal* is the stage at which exclusionary-rule

claims are generally made, and thus the stage at which a researcher would expect to find a reversal for such. That he found none on collateral attack is meaningless.

Liebman plays the same nonrepresentative-sample game to reach his conclusion that incompetent lawyers for capital defendants and suppression of exculpatory evidence are the main problems. By looking only at collateral review, the stage geared to hearing claims of ineffective assistance and nondisclosure of evidence, he predictably finds a high percentage of reversals for these two very reasons. Cases on direct appeal are excluded from the analysis of the reasons for reversal, even though that is where 79 percent of the reversals occur.

From the standpoint of making public policy, this study relays very little of value. It is based on assumptions that are either false or assume one alternative without considering others with different policy implications.

### **Deterrence: Risk the Lives of the Innocent to Save the Guilty?**

Death-penalty opponents often make the claim that capital punishment does not and cannot deter murders. However, as a general principle of human behavior, incentives matter. If the cost of engaging in an activity increases, fewer people will engage in that activity. Similarly, the probable “costs” or consequences of engaging in criminal activity apply to the potential criminal contemplating whether to commit or not commit a particular crime. Those who deny deterrence are claiming, in effect, that murder is exempt from this general principle and that a credible, enforced death penalty for murder would have no effect on the number of murders committed.

Death-penalty opponents regularly compare homicide rates in the 12 non-death-penalty states to those in the 38 states utilizing the death penalty. This sort of analysis inevitably is overly simplistic because it fails to control for confounding variables, such as that the 12 non-death-penalty states tend to have lower crime rates generally. A more relevant comparison is to examine how the states’ homicide rates have changed relative to the national average in recent years when there have been a significant number of executions, compared to the “moratorium” period of no executions. States actively using capital punishment have shown the greatest reduction.

A sophisticated econometric analysis by Emory University recently estimated that each execution saves 18 innocent lives.<sup>6</sup> Another recent analysis at the University of Colorado estimated a lower, but still very substantial, five to six fewer homicides for each execution.<sup>7</sup> Even using the lowest of these figures, a national moratorium would kill hundreds of innocent people each year.

Those who argue that most homicides are impulsive and therefore unlikely to be deterred by the death penalty fail to distinguish capital and noncapital homicides. First-degree murder in California, as in most states, requires either premeditation or murder in commission of another

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6 Dezhbakhsh, Rubin, and Shepherd, “Does Capital Punishment Have a Deterrent Effect? New Evidence from Post-moratorium Panel Data,” Emory University Dept. of Economics Working Paper No. 01-01 (Feb. 2001), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=259538](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=259538); see also Rubin, “Study: Death Penalty Deters Scores of Killings,” *Atlanta Journal-Constitution* (Mar. 13, 2002).

7 Mocan and Gittings, “Pardons, Executions, and Homicide,” NBER Working Paper 8639 (December 2001), <http://econ.cudenver.edu/mocan/papers/deathpenalty1007.pdf>.

felony. The isolated, impulsive killing is not capital murder under current law.

### **The Death Penalty Is Not Racially Biased**

Of all the fallacies concerning the death penalty, the one argument about which there has been more misinformation is that there is a racial bias in its application. The U.S. District Court in Georgia examined racial bias extensively in *McCleskey v. Zant* and found that “the best models which Professor Baldus [defense expert] was able to devise ... produce no statistically significant evidence that the race of the victim or Defendant plays a part in either the prosecution's or the jury's capital decision.”<sup>8</sup> The Eleventh Circuit Court of Appeals and the U.S. Supreme Court both echoed this sentiment in the *McCleskey* appeals.

The rationale for the erroneous racial claim is based primarily on population statistics, which is a faulty method of analysis. The argument is that since Black Americans comprise 14 percent of California's population but constitute about 34.5 percent of Death Row, there must be bias in the system. But women comprise about 55 percent of the population and only 1.9 percent of the Death Row population – yet no one has voiced the conclusion that men are the victims of discrimination by the California criminal-justice system?

A correct analysis looks at legal variables such as prior criminal history and the aggravated nature of the murder to determine the propriety of the death penalty. The death penalty is imposed based upon conduct, not race. It is a well-known social phenomenon that Los Angeles County is home to a large number of Black street gangs, such as Crips, Bloods, and the like. By their very nature, their activities and prior records bring their homicides within the California capital-sentencing scheme and skew the statistics for Black convicts on Death Row. If the murderers from Los Angeles County were eliminated from the equation, the White population on California's Death Row would greatly increase, and the Black population would decrease.

Only 10 executions have occurred in California since the death penalty was reinstated more than 25 years ago. Eight of the 10 men put to death were White.

### **The Death Penalty Is Not Too Expensive**

Critics of the death penalty frequently will cite to the expense of enforcing the law as a reason for its abolition. Indeed, costs often do increase when death is sought, but a fundamental question must be posed: what price justice? The criminal-justice system is not a commercial endeavor, nor does it lend itself to a simplistic “cost/benefit” analysis. No price can be assessed on the value of a victim's life, or on the anguish and loss caused to a victim's friends and loved ones, or on the closure an execution may bring to those persons.

The right to a free attorney for an indigent criminal defendant comes at considerable public expense. So too does the use of juries. That the Legislature deems serious crimes such as kidnapping, rape, and armed robbery worthy of punishment in state prison also leads to far greater expense than if the punishment were akin to a traffic ticket. Nevertheless, no one reasonably would suggest eliminating these fundamental underpinnings of the criminal-justice system due to their attendant costs. The death penalty should be analyzed similarly.

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<sup>8</sup> *McCleskey v. Zant* (1984) 580 Fed. S. 338, 368.

A substantial share of the costs associated with the death penalty come from the protracted appeals and habeas challenges in both state and federal court. Sensibly, in 1996 Congress passed the Antiterrorism and Effective Death Penalty Act, which includes a significant streamlining of the federal appeals process, creating a “one bite at the apple” at mounting federal habeas challenges to a death sentence. It is axiomatic that a reduction in the delay of enforcing the death penalty will result in a reduction in the costs of enforcing the law.

### **Public Support of the Death Penalty Is Not Diminishing**

Recent poll results indicate most people support the death penalty. In fact, the most current Gallup poll, conducted in May 2002, shows the level of support for the death penalty for persons convicted of murder has risen to 72 percent this year. An ABC News.com survey conducted in May 2002 indicated 65 percent of the 1,021 adults polled nationwide were in favor of imposing the death penalty for persons convicted of murder. The new Field Poll taken in April 2002, which measured California public opinion on capital punishment, showed 72 percent of voters surveyed back the death penalty.

### **DELAY – AND WHAT TO DO ABOUT IT**

Our delay problem lies primarily in the review process. Despite legislative requirements that the record on appeal be certified within 90 days of entry of judgment, the deadline is missed about half the time without penalty. Additionally, appointment of counsel is an enormous source of delay. Because capital cases are too large for solo practitioners or small firms, California has expanded the Office of the State Public Defender (OSPD) and created a new Habeas Corpus Resource Center (HCRC) to handle such cases. These offices unfortunately are still inadequate, and the problem remains to eliminate the backlog of capital cases without compromising efficacy.

Federal habeas is the largest single source of delay in the system. As mentioned above, Congress, in an attempt to expedite capital proceedings, passed in 1996 the Antiterrorism and Effective Death Penalty Act (AEDPA). The AEDPA provides a “fast track” system of federal habeas review for states that comply with specific requirements, for example, establishing qualifications for capital-defense counsel. The AEDPA reduces delay, first, because it requires federal habeas cases to proceed only on those federal questions that were properly raised in the state court. This prevents habeas petitioners from attempting to shoehorn in new claims not raised on the direct appeal or first state habeas. Second, and even more importantly, AEDPA cases are given priority in the federal courts over all noncapital matters and they are subject to time limits on disposition.

Many of the elements to reduce delay are already in place. What is necessary now is for responsible actors in government to implement these laws.

### **CONCLUSION**

The simple fact of the matter is that Californians have spoken – and they want to reserve the ultimate punishment of death for those murderers whose actions so truly shock the conscience

that a punishment of life in prison is inadequate.

Death-penalty opponents know what Californians want. This is why they have not endeavored to place an initiative before the electorate proposing a repeal of the death penalty. They instead have devised clever strategies to undermine public support, such as generating sympathy for murderers by arguing that large numbers of them are mentally retarded, or are juveniles, or had incompetent defense counsel – or portraying that innocent people are being executed. While these accusations receive wide media coverage, successfully inundating the public almost daily with onslaughts on capital punishment, jurors continue nevertheless to return death sentences for those who would abduct, molest, and then kill our youth.

The most insidious strategy devised yet by those seeking to end capital punishment is the so-called “moratorium.” Faced with an unwilling electorate and courts not persuaded that execution is unconstitutional, abolitionists now seek to pressure the executive branch, namely governors, to call a purportedly temporary halt to the death penalty. They argue that such action is warranted because the death penalty is a run-away system that must be saved from itself. Whereas the justice system, with its traditional checks and balances of opposing counsel and layers of court review, is sufficient for all civil matters and 99 percent of all criminal-justice matters, somehow it breaks down in this one rarified area of enforcement of the death penalty.

Perhaps the greatest irony of a death-penalty moratorium is that there in fact is no area of the justice system, civil or criminal, that receives greater scrutiny. It is only in death-penalty cases where the jury’s verdict is automatically appealed to the California Supreme Court. It is only in death-penalty cases that typically two attorneys are appointed at trial and a special homicide-defense fund underwrites virtually all costs of a vigorous defense. Additionally, in California there are 15 to 20 years of state and federal appellate court review, often including the United States Supreme Court, between the jury’s imposition of death and an actual execution being carried out.

Reasonable minds can and do and will differ over whether in fact there should be a death penalty. The purpose of this paper is not to change the minds of those philosophically or theologically opposed to capital punishment. It instead is to provide an overview of California’s death penalty and address the major issues raised by death-penalty critics as well as those who seek to objectively and fairly examine this most important law. We believe the overriding prosecutorial obligation to ethically seek truth is reflected within the pages of this paper.



# I

## *Death Penalty in Practice*

### **WHO GETS THE DEATH PENALTY IN CALIFORNIA** *(listed alphabetically by last name)*

The following individuals are representative – though certainly not all inclusive – of murderers who have been sentenced to death in California.

#### **Clarence Ray Allen**

During the 1970s, Clarence Allen led a gang of robbers in California's San Joaquin Valley. In 1974, he orchestrated the burglary of Fran's Market in Fresno. Shortly thereafter, he ordered the murder of a teenage girl who "snitched" him off to Brian Schletewitz, the young son of the market's owner. Three years later, Allen was convicted of the young girl's murder based on the testimony of Brian Schletewitz and Allen's accomplices.

While serving his life sentence in Folsom Prison, Allen befriended fellow inmate Billy Ray Hamilton. When Hamilton was paroled in 1980, he went to Fran's Market in Fresno and murdered three young store employees, including Brian Schletewitz. Hamilton carried a "hit list" with the names and addresses of each witness who testified against Allen in 1977, including Brian Schletewitz.

In addition to overwhelming evidence, the prosecution presented Allen's 10 prior violent-felony convictions and his own poetry glorifying his murderous lifestyle.

Clarence Ray Allen was sentenced to death in 1982 following his conviction for triple murder, conspiracy to murder seven people, and three special circumstances, including witness-killing, prior murder, and multiple murder. The California Supreme Court's Chief Justice at the time, Rose Bird, stated that Allen had no credible argument that the death penalty was disproportionate in his case.<sup>1</sup> The United States District Court denied in 2001 Allen's petition for writ of habeas corpus. The case currently is pending on appeal to the Ninth Circuit Court of Appeals.

*Local Prosecuting Agency: California Department of Justice, Office of the Attorney General*

#### **William George Bonin**

Between 1968 and 1969, William Bonin kidnapped and forcibly sodomized more than 20 young boys between the age of 12 and 18 years old throughout Southern California.

On November 17, 1968, Bonin confronted 14-year-old William and handcuffed, stripped, and beat him into semiconsciousness, while threatening to sodomize and kill him. One week later, Bonin kidnapped and handcuffed 17-year-old John; he traumatized the victim's testicles and then forcibly sodomized him. On January 1, 1969, Bonin kidnapped and sodomized 12-year-old Larry, and threatened to kill him if he reported the assault. Eleven days later, Bonin kidnapped, handcuffed, beat, and brutally sodomized 18-year-old Jesus.

Bonin was arrested in January 1969 and subsequently sent to Atascadero State Hospital and California State Prison at Vacaville. He was discharged from custody on June 11, 1974. Just three months after his release, Bonin kidnapped at gunpoint, orally copulated, and sodomized 14-year-old David. Two days later, he confronted 15-year-old Gary. Bonin asked the boy if he wanted to sell his body for \$35 dollars. The victim told Bonin to "Get out of here." Bonin then drove his van onto the sidewalk attempting to hit the victim.

While being arrested on October 11, 1975, Bonin told law enforcement, "Next time there won't be any more witnesses." He was thereafter committed to prison on December 31, 1975 and subsequently paroled on October 11, 1978.

Ten months after this [second] release, Bonin embarked on a series of 18 murders, involving kidnapping, sodomy, and torture:

August 4, 1979, Bonin drove a stick into the body of 17-year-old Mark Shelton, killing him.

August 5, 1979, Bonin sodomized then strangled to death 17-year-old Markus Grabbs.

August 20, 1979, Bonin left the corpse of John Doe to be found in Los Angeles.

August 27, 1979, Bonin bound, sodomized, and strangled to death 15-year-old Donald Hyden, and then threw his body in a Dumpster.

September 9, 1979, Bonin bound, strangled, and dumped over a freeway embankment 17-year-old David Murillo.

September 17, 1979, Bonin murdered Robert Wirosteck in Los Angeles.

November 30, 1979, Bonin bound and kidnapped 17-year-old Frank Fox. Frank Fox died during a ligature-strangulation process designed by Bonin to occur during forcible sodomy of the victim.

February 3, 1980, Bonin kidnapped, stripped, bound, strangled, and sodomized 12-year-old James McCabe before dumping his body at a construction site. He then kidnapped, bound, strangled, and sodomized 14-year-old Charles Miranda.

March 15, 1980, Bonin kidnapped, stripped, bound, strangled, and sodomized 18-year-old Ronald Gatlin, leaving his corpse behind an industrial building.

March 22, 1980, Bonin kidnapped, stripped, and hog-tied 14-year-old Glen Barker and 15-year-old Russell Rugh. Bonin raped and strangled both boys. Glen was raped with a foreign object that enlarged his rectum four to five times the normal size.

March 25, 1980, Bonin kidnapped, stripped, bound, and sodomized 14-year-old Harry Todd Turner, before beating him with a blunt instrument and slowly strangling him to death.

April 11, 1980, Bonin kidnapped, stripped, and bound 15-year-old Steven Wood, then slowly strangled him to death.

April 29, 1980, Bonin kidnapped, stripped, bound, and slowly strangled 19-year-old Darin Kendrick. Prior to Darin dying, Bonin drove a metal spike into his brain – through his ear.

May 18, 1980, Bonin kidnapped, stripped, bound, sodomized, and slowly strangled to death 17-year-old Lawrence Sharp.

May 20, 1980, Bonin murdered 14-year-old Sean King.

June 6, 1980, Bonin kidnapped, stripped, bound, and sodomized 18-year-old Steven Wells, before killing him slowly during a savage sodomy.

Bonin was arrested for the above murders by the Los Angeles Police Department on June 11, 1980. He was sentenced to death in both Orange and Los Angeles counties following his multiple convictions for molestation, sodomy, and murder. William George Bonin was executed in February 1996.

*Local Prosecuting Agency: Los Angeles County District Attorney's Office/Orange County District Attorney's Office*

### **Richard Allen Davis**

Around 10:00 p.m. on October 1, 1993, Richard Allen Davis quietly entered a Petaluma, California home through an unlocked door; he went to the bedroom of 12-year-old Polly Klaas and, while she and her two young friends were playing, he bound and gagged them at knifepoint. Polly's mother and younger sister were asleep in another bedroom in the house. Davis then took Polly out of the house and drove her away in his car.

Davis, a parolee who had been released from prison just three months earlier (after serving eight years for the kidnap-robbery of a woman in San Mateo, California), had prior convictions as well, and he had served several other prison terms for assaults on women.

Within an hour of leaving Polly's house, Davis got his car stuck on the side of private, country lane about 20 miles from Petaluma. He was confronted by several people, including two deputy sheriffs; but because law enforcement had not yet been notified of the kidnapping, the sheriffs thought Davis was only a trespasser and allowed him to go on his way.

Two months later, evidence linking Davis to Polly's disappearance, including restraints and an unrolled condom, was found near the location of his trespass. When the evidence was found, the sheriff's department checked their records, which disclosed that Davis had been stopped on the night of October 1. Records further revealed that Davis had a history of crimes against women.

Davis was arrested denied any involvement in Polly's case. Several days later, when law enforcement positively identified Davis's fingerprints on Polly's bunk bed in her bedroom, he

admitted kidnapping and strangling Polly to death because “she would be a witness against him.” When confronted during his interview, Davis did not deny the possibility of sexual contact with Polly. Davis ultimately took law-enforcement authorities to Polly’s strangled and badly decomposed body, which months earlier he had dumped in brambles along a road outside of Cloverdale, California. Due to the condition of Polly’s body, it was not possible for authorities to determine if Davis sexually assaulted her.

A jury sentenced Richard Allen Davis to death in August 1996 following his conviction for first-degree murder and four special circumstances of robbery, kidnapping, burglary, and lewd act on a child. He also was convicted of assaults on Polly’s girlfriends.

*Local Prosecuting Agency: Sonoma County District Attorney’s Office*

### **Robert Alton Harris**

On July 5, 1978, after attempting unsuccessfully to steal two cars, Robert Harris and his brother spotted teenagers John Mayeski and Michael Baker parked at a fast-food restaurant in San Diego, California. Harris walked up to the boys, pulled out a 9-millimeter Luger pistol, got into the backseat of their car, and forced them to drive to a remote area. Harris’s brother followed in a 1963 Ford.

Once there, Harris shot John Mayeski in the back and shot Michael Baker four times. Harris then ran to the boys’ fallen bodies – and fired one more shot into each of them. Following the killings, the Harris brothers drove both cars back to the home at which they were staying – and Robert Alton Harris ate the remainder of the murdered boys’ lunches.

That afternoon, Harris and his brother drove the stolen vehicle to the local bank they planned to rob. Donning ski masks, Harris held the bank customers and employees at gunpoint while his brother collected approximately \$2,000 in cash.

The two were arrested later that same day by San Diego police officers. Robert Alton Harris was sentenced to death following his conviction for two counts of first-degree murder with special circumstances and kidnapping. He was executed in April 1992.

*Local Prosecuting Agency: San Diego County District Attorney’s Office*

### **Robert Lee Massie**

In 1965, Robert Massie was convicted and sentenced to death for four counts of robbery, one count of attempted murder, and one count of capital murder. His sentence was commuted in 1972 when the death penalty was overturned. As a result, Massie was paroled in 1978 – and would again commit a capital murder.

Just eight months after his release from prison, on the morning of January 3, 1979, Massie entered the Twin Peaks Grocery in San Francisco, California, looked around, and left without buying anything. A short time later, he returned to the store and again departed without making a purchase. When he did this a third time, the store proprietor followed Massie out of the store.

Massie walked one block to an automobile that was parked with the engine running, got in, and drove away.

Around 1:45 that afternoon, Kenneth Ross was at the Miraloma Liquor Store, not far from the Twin Peaks Grocery, when Massie entered. Boris “Bob” Naumoff, who had owned the store for about 30 years, asked Massie, “Can I help you?” Massie replied, “I’m just looking. He left five minutes later. Ross left the store 10 minutes later. He saw Massie standing outside, making nervous, jerky movements and looking up and down the street.

At 3:45 p.m., Sandy Bateman-Collins walked into the Miraloma Liquor Store. Store owner Naumoff was standing behind the counter. He was handing money to a man but was dropping some of the money on the floor. As the man began to leave, Naumoff followed after him, mumbling, “A guy can’t make a living any more.” Bateman-Collins then heard three quick shots, followed a few seconds later by a fourth shot. She ducked behind a counter.

Just before the shooting, Charles Harris, who was scheduled to work at the Miraloma Liquor Store that evening, had entered the store and saw store owner Naumoff talking to a man who Harris assumed was a customer. Sensing nothing amiss, Harris walked toward the back room. Hearing a scuffle, he turned and saw Naumoff and the man face-to-face, with Naumoff holding the man in a bear hug. As Harris started to walk towards them, he heard three quick shots, followed by a fourth. He felt a pain in his leg, saw that the man was holding a gun, and ran to the back room.

Outside the Miraloma Liquor Store, 13-year-old Duffy Aceret saw a man run from the liquor store with a gun in his hand. At a lineup several days later, Aceret identified Massie as the man he had seen. San Francisco police officers, called to the scene, found Naumoff’s body on the floor of the Miraloma Liquor Store. He had been shot once in the right chest and twice in the heart. Dr. Boyd Stephens, chief medical examiner for the City and County of San Francisco, described the two shots to the heart as “near contact wounds.”

Upon his arrest, Massie waived *Miranda* and told police that he went to the liquor store, pulled a gun, and told the man behind the counter, Mr. Naumoff, “It’s a holdup.” Mr. Naumoff gave him \$20 or \$30 but attacked him as he tried to leave, so Massie shot him. Massie claimed that he had been drunk and under the influence of cocaine at the time.

Massie pled guilty originally and was convicted and sentenced to death in 1979. Upon automatic appeal to the supreme court, however, his case in 1985 was reversed due to procedural complications. In 1989, following a retrial, another jury found Massie guilty.

Robert Lee Massie was sentenced to death following his conviction for murder and robbery. He was executed in March 2001.

*Local Prosecuting Agency: San Francisco City & County District Attorney’s Office*

**Giles Albert Nadey**

A felony probationer who had four prior felony convictions and had previously served several prison terms, Albert Nadey savagely sodomized and murdered a 24-year-old woman in Alameda.

Terena Fermenick, wife of Don Fermenick and new mother of five-month-old Regan, began relocating with her family in late 1995 from Pleasanton to Alameda, California. Don had just been appointed Pastor of the Church of Christ in Alameda, and they were in the process of moving into the designated church residence.

On the afternoon of January 18, 1996, Terena and the baby went to the new residence to meet with an employee of Chem-Dry, a company she chose out of the yellow pages a few days earlier to clean the rugs prior to their move-in. The carpet cleaner was Giles Albert Nadey.

Terena met with Nadey, discussed the areas to be cleaned, and then left for about two hours so she did not have to be alone with Nadey as he worked. When she returned about 4:00 p.m., she left the baby in her car, wrote and gave a check to Nadey at the door, and was about to depart — when Nadey apparently tricked her to return by claiming he needed to see her driver's license in order to accept her check.

Once inside, Nadey produced a knife, forced her into the master bedroom, made her strip, stabbed her twice in the right flank to show he was serious, then forced her onto the bed where he viciously sodomized her. Thereafter, he pulled her head back and cut her throat, severing the jugular vein.

Though fatally maimed, Terena staggered through the hallway and into the family room where she ultimately collapsed near a telephone. According to the pathologist, she lived for 60-90 seconds before bleeding out and dying.

When Terena and baby Regan failed to return home, the fearful Pastor drove to Alameda and retraced his wife's last-known whereabouts. At the church residence, he found the baby in Terena's car, and his dead and obviously abused wife some six hours after the carnage.

Alameda police executed a search warrant on Nadey and his residence. Recovered from the search was a notepad containing writings made by Nadey boasting, "sodomy is my specialty." Among other evidence, blood drawn from Nadey was compared to anal swabs from Terena's body and semen stains on her jeans; a DNA expert from California's Department of Justice found a match, with the frequency being one in 32 billion.

Giles Albert Nadey was sentenced to death in April 2000 following his conviction for murder with special circumstances and sodomy.

*Local Prosecuting Agency: Alameda County District Attorney's Office*

## **Darrell Keith Rich**

In the summer of 1978, Darrell Rich, a sexual predator and a serial killer, hunted and preyed upon young women in and around Redding, California.

In June of that year, Rich relentlessly beat 25-year-old Donna W. after she refused to orally copulate him. He struck her on the head repeatedly with a hard object and then left her for dead at the bottom of a steep hill. Donna W. was not found until 12 hours later. She suffered severe head injuries, including damage to her brain and a serious skull fracture. Six days later, Rich abducted, raped, and orally copulated 21-year-old Robin H. and grinned when telling his friends that "it was pretty easy to do." And just six days after his attack on Robin H., Rich raped and sodomized 14-year-old Lisa S.

In July, Rich, while acting "very professional," raped 19-year-old Marla Y. On or near that same day, he raped and bludgeoned to death 19-year-old Annette Edwards. Fifteen days later, he abducted, raped, and sodomized 15-year-old Kelly M. and had the presence of mind to search for a secluded area in which to do so and to bring a lubricant.

In August, Rich abducted, raped, and killed 17-year-old Patricia "Pam" Moore. Pam Moore's head was badly crushed by a heavy object, and injuries to her neck indicated manual strangulation. Days later, Rich kidnapped, raped, and killed 27-year-old Linda Slavik. Linda Slavik suffered gunshot wounds to the neck and spinal column, which a pathologist described at trial as resulting from an "open-mouth shot." The bodies of both women were left, naked, at a local dump. Also in August, Rich kidnapped, bit, raped, and sodomized 11-year-old Annette Selix; he then threw her off a bridge, leaving her to die 105-feet below. The lifeless body of Annette Selix was found in the fetal position. Bite marks found on her buttocks matched Rich's teeth impressions "to a medical certainty."

Rich made numerous admissions and confessions to his friends. Moreover, he instructed at least two of his friends on how to "rape girls." He told his girlfriend that he killed Annette Edwards. He "acted out" to a couple of other friends how he killed Linda Slavik, imitating the voice she used when pleading for her life. Rich said "it just doesn't bother [him]" because "once you've killed, you can always kill again." Rich also admitted killing Pam Moore because "she was in the wrong place at the wrong time." He told another friend that "[he] raped two girls" and had to kill them "so [he] wouldn't get caught." He provided police with a written list of all the rapes and murders he committed. In a tape-recorded confession, he admitted abducting Annette Selix and throwing her off a bridge.

Identification was never an issue at trial. Rich and his car were both positively identified by several of his victims. Rich claimed diminished capacity as his defense, and he presented an extensive and complete account of his family, psychological history, and social history through 44 lay and expert witnesses. Rich had the benefit of 11 retained medical experts and nearly \$90,000 in investigative funds (under Penal Code section 987.9) to prepare his defense. Nevertheless, evidence of his guilt, cognitive mental state, and severe aggravation was overwhelming. Rich was proven to be a sexual sadist, suffering no organic brain dysfunction or memory impairment.

Darrell Keith Rich was sentenced to death following his conviction for three counts of first-degree murder and numerous counts of related sexual offenses and other forcible crimes. He was executed in March 2000.

*Local Prosecuting Agency: Shasta County District Attorney's Office*

**Arturo Juarez Suarez**

Mexican national Arturo Juarez Suarez worked seasonally on a ranch outside of Auburn, California. His wife and two children lived in Mexico. His wife's two brothers, Jose Luis and Juan Manual, lived in Galt, California. Jose Luis and his wife, Yolanda, had two children: Jack, age five and Arele, age three.

On July 12, 1998, Jose Luis, Yolanda, their children, and Juan Manual traveled to Auburn in the late afternoon to pick up Suarez and take him back to Galt for an appointment the next day with the Mexican Consulate in Sacramento.

Suarez lured Jose Luis and Juan Manual separately to a blackberry thicket on adjacent property where one week earlier he had dug a deep, nearly perfect, rectangular-chiseled grave. He shot both men in the head with a .22-caliber rifle and then returned to his small trailer on the ranch and assaulted Yolanda.

He choked, kicked, and hit Yolanda before dragging her into his trailer while her children looked on. Once inside the trailer, he bound her hands behind her back, tied her ankles together, and covered her mouth by wrapping a handkerchief and duct tape around her face. He cut off her shorts and raped her as she lapsed in and out of consciousness, her children screaming in the background.

After he chained Yolanda by her neck to the bedpost, defendant left the trailer and took the children to the gravesite. Using a shovel handle, he struck the boys unconscious and threw them into the grave with their father and uncle. Suarez then covered them with dirt. The coroner determined the men died of multiple gunshot wounds to the head, and the children were bludgeoned and buried alive.

While Suarez was burying the four victims, Yolanda managed to escape. When Suarez returned to the trailer and realized she was gone, he fled the area. He was taken into custody two days later.

Arturo Juarez Suarez was sentenced to death in April 2001 following his conviction for four counts of first-degree murder, one count of penetration with a foreign object, one count of rape, and multiple-murder and lying-in-wait special circumstances.

*Local Prosecuting Agency: Placer County District Attorney's Office*

## **David Allen Westerfield**

On February 2, 2002, Damon and Brenda van Dam discovered that their seven-year-old daughter, Danielle, was missing from their home in San Diego, California. Police and citizen volunteers searched the neighborhood. Their expanding efforts continued until February 27, when citizen volunteers found Danielle's nude body under a tree on Dehesa Road.

Fifty-year-old David Westerfield lived two doors from the van Dam house. On February 3, officers went door-to-door in the neighborhood looking for Danielle. When detectives went to Westerfield's house, no one was home. On February 4, the police added tracking dogs to their search and repeated the house-to-house canvass.

The detectives were able to locate Westerfield at his home February 4 around 9:15 a.m. Westerfield told the detectives he had been gone all weekend, alone in his motor home. He described a 48-hour, 550-mile circuitous journey that went from the beach at Coronado to the sand dunes in Imperial County and back again. Ultimately, Westerfield volunteered to go to the police station where he was interviewed on tape for about nine hours. Westerfield repeated the same story he had earlier told the detectives while at his residence, this time in more detail.

While being interviewed, the San Diego Police Department was simultaneously preparing a telephonic search warrant for Westerfield's home, motor home, and SUV. Items seized pursuant to those search warrants linked Westerfield to Danielle van Dam. Danielle's hair was found on the pillow and top and bottom sheets of Westerfield's bed. Orange and blue fibers found in his bed and laundry room were consistent with fibers later found on Danielle's nude body. More of the orange fibers were found in his SUV.

The following items were found within Westerfield's motor home: Danielle's blood on the hallway carpet; her hair was found in the bathroom and hallway carpet; van Dam dog hair was in the hallway and on the bathroom rug; a van Dam carpet fiber was on the bedroom carpet; blue fibers from Danielle's body were located throughout the motor home including the headboard to his bed; and her fingerprints were on a cabinet next to his bed. Finally, Danielle's blood was found on Westerfield's jacket.

The police discovered a mountain of pornography, some of it depicting children, which had been downloaded from the Internet and saved onto CDs and zip-disks. The disks were found hidden behind books in Westerfield's home office.

At trial, the defense suggested the van Dam's "swinging" lifestyle proved an unknown third party could be responsible for the crime. And they blamed Westerfield's 19-year-old son for the pornography. They introduced "bug evidence" to show that Danielle was killed and dumped after Westerfield was placed under 24-hour police surveillance. The jury deliberated approximately 10 days before returning guilty verdicts on all counts.

Prosecution penalty-phase evidence consisted of victim-impact testimony and an incident about 10 years ago where Westerfield's seven-year-old niece complained about "Uncle Dave" inserting his fingers into her mouth while she was sleeping.

Defense penalty-phase evidence consisted of no prior felony convictions, a good work history including patents for medical devices, and sympathetic testimony from family and friends.

David Allen Westerfield was sentenced to death in January 2003 following his conviction for murder, kidnapping, and possession of child pornography.

*Local Prosecuting Agency: San Diego County District Attorney's Office*

**Brandon Wilson**

On November 14, 1998, Brandon Wilson brutally murdered nine-year-old Matthew Cecci.

Wilson, high on LSD, stalked the beach area of Oceanside, California looking for someone to murder. Wilson saw little Matthew running from a beach play area towards a restroom. Wilson followed Matthew into the men's room. Matthew heard Wilson enter the men's room and turned to look at him. Wilson smiled at Matthew; Matthew turned back towards the urinal at which he was standing. Wilson then immediately leaped upon Matthew, slamming a four-inch, double-edged hunting knife into Matthew's throat. With one left-to-right slice, Wilson cut Matthew's neck open from ear to ear. The cut was deep enough to tear open Matthew's voice box and expose a neck vertebra. Wilson held Matthew's head back as blood pumped out, spraying the walls of the bathroom. Matthew collapsed to the floor where Wilson stabbed him five to six times in the back before fleeing past Matthew's aunt who was waiting for her nephew outside the bathroom.

Wilson was caught in Los Angeles two days later as he fled after attempting to murder a woman walking to work. Wilson was transported back to San Diego after he disclosed to detectives of the Los Angeles Police Department that he murdered a young boy in Oceanside several days earlier.

On November 18, 1998, Wilson was arraigned and pled not guilty to murder and denied the special circumstance of killing while lying-in-wait. He thereafter added a plea of not guilty by reason of insanity and then pled guilty to first-degree murder and admitted as true the special circumstance of lying-in-wait.

Brandon Wilson was sentenced to death in October 1999 following his conviction for first-degree murder and the special circumstance of lying-in-wait.

*Local Prosecuting Agency: San Diego County District Attorney's Office*

## II *Background*

### **A BRIEF HISTORY OF THE DEATH PENALTY IN CALIFORNIA**

Since it achieved statehood in 1850, California has consistently authorized the death penalty as punishment for some offenses. “An Act Concerning Crimes and Punishments,” the state’s first criminal code, defined any killing with malice as murder.<sup>2</sup> And it provided that the punishment for murder “shall be death.”<sup>3</sup> The Legislature subsequently amended § 21 of the Crimes Act by dividing murder into first and second degree, with death the sole punishment for a first-degree murder.<sup>4</sup>

The Crimes Act was later replaced by the California Penal Code of 1872. Section 190 of the Code provided that a defendant convicted of murder in the first degree shall suffer death. The section was amended soon thereafter to provide that a conviction for first-degree murder shall result in “death or confinement in the State prison for life, at the discretion of the jury” trying the case.<sup>5</sup> In 1921, the Legislature precluded the death penalty for a defendant who committed the crime before reaching the age of 18.<sup>6</sup> And in 1957, enacted Penal Code § 190.1, which created a bifurcated trial requiring the jury to first determine guilt without any finding as to penalty and to then fix the penalty following a hearing at which evidence of the “circumstances surrounding the crime,” the “defendant’s background and history,” and “any facts in aggravation or mitigation of the penalty” could be presented.<sup>7</sup> Aside from minor changes, the alternative punishments for first-degree murder and the procedure for imposing death remained unchanged until 1973.<sup>8</sup>

Under the scheme created by the 1873-1874 amendments, determination of the penalty for a first-degree murder was “under the absolute discretion of the jury.”<sup>9</sup> No restraints were placed on the jury’s exercise of its discretion.<sup>10</sup> The jury was not required to “find ameliorating circumstances to impose life imprisonment, nor need they find aggravating circumstances to impose death.”<sup>11</sup> The California Supreme Court consistently rejected challenges to the statutory scheme based on its failure to provide standards for guiding the jury’s exercise of discretion.<sup>12</sup> The United States Supreme Court reached the same conclusion, finding it “quite impossible to say that committing to the untrammelled discretion of the jury the power to pronounce life or death in capital cases is offensive to anything in the Constitution.”<sup>13</sup> But in 1972, both courts struck down the death penalty, albeit for different reasons. On February 18, 1972, the California Supreme Court issued a 6-1 opinion in *People v. Anderson*.<sup>14</sup> The court held that the death penalty was unconstitutional under former article I, section 6, now article I, section 17, of the California Constitution. Unlike the Eighth Amendment to the United States Constitution, which prohibits “cruel *and* unusual punishments” (emphasis added), the state constitution prescribes “cruel *or* unusual punishments” (emphasis added). Relying on this difference, the state court found that capital punishment was cruel in part due to the “dehumanizing effects of the lengthy imprisonment prior to execution” resulting from delays in reviewing death judgments.<sup>15</sup> The decrease in the number of executions demonstrated to the court “that capital punishment is unacceptable to society today.”<sup>16</sup> Because the court perceived no rehabilitative effect, it was “incompatible with the dignity of an enlightened society” to justify the death penalty solely for

the purpose of vengeance or retribution.<sup>17</sup> In addition, the court determined that rejection of the death penalty in many other countries as well as some portions of the United States made it “literally, an unusual punishment among civilized nations.”<sup>18</sup> The court thus held that the death penalty violated California’s constitutional prohibition against cruel or unusual punishment. In light of its holding, the court found it unnecessary to decide whether capital punishment also violated the Eighth Amendment.<sup>19</sup>

The effect of *Anderson* was to overturn every death sentence then pending before the state court and to require modification of every affirmed death judgment.<sup>20</sup> The electorate immediately responded by adding article I, section 27 to the state constitution. That provision, effective November 7, 1972, reinstated all death-penalty statutes in effect on February 17, 1972, the day before *Anderson* was decided, and proclaimed that the death penalty was not prohibited by the cruel or unusual punishment section of the California Constitution. Prior to the amendment, however, the United States Supreme Court had effectively struck down all death-penalty statutes throughout the country.

The Supreme Court had granted certiorari in three cases specifically to consider whether the death penalty constituted cruel and unusual punishment prohibited by the Eighth Amendment.<sup>21</sup> The death judgments in the cases were reversed in *Furman v. Georgia* in a 5-4 decision that produced a separate opinion from each of the justices – and no agreement among the majority as to why the judgments were unconstitutional.<sup>22</sup> Justice Douglas was concerned that unrestricted discretion to impose death resulted in discriminatory application of the death penalty but did not suggest capital punishment was unconstitutional per se.<sup>23</sup> Relying in part on the reasoning of the California Supreme Court in *Anderson*, Justice Brennan concluded that the death penalty is unconstitutional per se because it was inflicted arbitrarily, was rejected by contemporary society, and served no penal purpose.<sup>24</sup> Justice Marshall agreed that capital punishment was unconstitutional under all circumstances, finding it morally unacceptable because it was imposed discriminatorily and had no deterrent effect.<sup>25</sup>

Two other justices took a different approach. Justice Stewart asserted that the constitutionality of capital punishment in the abstract was not before the Court. He concluded, however, that the death sentences at issue were “cruel and unusual in the same way that being struck by lightning is cruel and unusual.” The Constitution could not tolerate the imposition of death “so wantonly and so freakishly.”<sup>26</sup> Justice White agreed that the death penalty was not unconstitutional per se but found there was “no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not.”<sup>27</sup>

Extracting a rule from the divergent opinions of the majority justices was a daunting task. In his dissenting opinion Chief Justice Burger emphasized that the Court had not found the death penalty to be unconstitutional per se.<sup>28</sup> Rather, the scope of the Court’s holding could be extracted from the concurring opinions of Justices Stewart and White, which focused on the perceived arbitrary imposition of the death penalty. Accordingly, states were required to provide standards for determining the sentence in capital cases or more narrowly define the crimes for which it could be imposed.<sup>29</sup> In subsequent opinions, in particular *Gregg v. Georgia*, the Court endorsed the Chief Justice’s description of *Furman*’s holding.<sup>30</sup> Thus the discretion to impose a

death sentence “must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.”<sup>31</sup>

“Predictably, the variety of opinions supporting the judgment in *Furman* engendered confusion as to what was required in order to impose the death penalty in accord with the Eighth Amendment.”<sup>32</sup> The states responded in one of two ways. Some required individual assessment of whether death was appropriate in a particular case and provided standards to guide the sentencing discretion. Others adopted mandatory death penalties for a limited category of specific crimes.<sup>33</sup> California took the latter path and in 1973 enacted a statute that provided that the sole punishment for first-degree murder with a special-circumstance finding was death.<sup>34</sup>

In 1976, the United States Supreme Court granted certiorari in capital cases from five states. The statutory schemes under consideration were all different and reflected a cross-section of the various approaches taken by the states in response to *Furman*. The Court upheld statutes from Georgia, Florida, and Texas.<sup>35</sup> In each case, the jury was obligated to find some aggravating factor or answer specific questions before it could return a death sentence. But the Court reversed death sentences from North Carolina and Louisiana because those states made the death penalty mandatory upon conviction of first-degree murder.<sup>36</sup> As a result of these two decisions, the California Supreme Court in *Rockwell v. Superior Court* found the state’s mandatory death-penalty scheme to be unconstitutional.<sup>37</sup>

Following *Rockwell* and the *Gregg* line of cases, the California Legislature enacted, over the Governor’s veto, new death-penalty statutes in 1977.<sup>38</sup> That scheme was replaced soon thereafter by the so-called Briggs Initiative, which took effect on November 7, 1978.<sup>39</sup> With some minor modifications and additions, the statutory scheme endorsed by the electorate establishes the procedure by which death judgments are now imposed in California.<sup>40</sup> Both the 1977 and 1978 statutes have consistently been upheld as constitutional.<sup>41</sup>

## **SAFEGUARDS IN DEATH PENALTY TRIALS PROTECT DEFENDANTS**

California leads the nation in protecting defendants against errors and preventing prosecutions of innocent persons by providing numerous safeguards in death-penalty trials. Not one of the more than 600 inmates currently on Death Row has demonstrated innocence. California’s procedural safeguards are exceedingly effective.

### **ELIGIBILITY**

#### **The Majority of Murders Do Not Qualify for the Death Penalty**

What may surprise many people is that the majority of murder cases are not eligible to be prosecuted as death-penalty cases. No matter how horrible or heinous the murders may have been, the death penalty may be sought in only a small percentage of narrowly defined homicide cases.

First, juveniles under the age of 18 are not eligible. Second, the prosecution must prove beyond reasonable doubt murder in the first degree. Lesser killings, like second-degree murder and

voluntary or involuntary manslaughter, do not qualify. Third, only 21 types of murder involving so-called “special circumstances” can qualify for the death penalty.<sup>42</sup> Many of these allow the death penalty based on the type of victims murdered (e.g., peace officers, firefighters, judges, prosecutors, jurors, elected officials, witnesses to crimes, and victims who are murdered only because of their race, color, religion, etc.). Other “special circumstances” involve the type of crimes (e.g., multiple or serial murder, or murder by a defendant who has murdered before, murders by torture, poison, or bombing, murders for financial gain, some street gang and “drive-by” murders, and murders committed during the course of certain specific other felonies such as robbery, kidnapping, rape, sodomy, lewd acts against children, burglary, arson, train wrecking, car-jacking, etc.).

Unless the murder fits into one of these narrowly limited “special circumstance” categories, the death penalty cannot be sought. Most murders do not qualify, no matter how premeditated or monstrous.

## INITIAL SCREENING PROCESS

### **Prosecutorial Discretion**

Even if the murder technically fits into one of these “special circumstances,” prosecutors often do not seek the death penalty. Instead, a life-without-the-possibility-of-parole prison term is frequently sought. Prosecutors have an ethical duty not merely to convict but, more importantly, to seek justice. Each murder case is carefully screened to determine whether death is an appropriate sentence; many times the result is that prosecutors do not seek death, even though they could.<sup>43</sup> A sentence of death is reserved for only the worst crimes and criminals – and prosecutors take the grave responsibility of deciding when to seek it very seriously. Many factors are thoroughly examined and evaluated before this decision is made.

### **Determining Factors**

The Penal Code sets forth 11 categories to be evaluated, called “aggravating” or “mitigating” factors.<sup>44</sup> Only the first three categories are considered “aggravating.” The nature of and circumstances surrounding the murder case are critically important, along with whether or not the defendant has previous felony convictions and/or a history of violence.<sup>45</sup>

The remaining eight categories are considered “mitigating.” These include the age of the defendant, whether the defendant committed the murder while he or she was under the influence of extreme mental or emotional disturbance, or under the influence of drugs or alcohol. Other factors are whether the defendant was under extreme duress or domination of another person, or whether the defendant was merely an accomplice whose participation was relatively minor to the crimes.

Prosecutors must consider *any* other circumstance that extenuates the gravity of the crime, even if it is not a legal excuse for the crime. Prosecutors try to take into account anything at all that may provide sympathetic aspects to the defendant’s character, such as whether he or she suffered child abuse, brain damage, or mental retardation, or whether he or she was normally a decent

person who acted out of character. Defense attorneys are welcome to provide input at this stage but for tactical reasons often do not.

Prosecutors must try to balance the known aggravating factors with the mitigating ones and reach a just decision as to whether death should be the appropriate sentence.

### **Review by Supervisors**

This balancing process by the trial prosecutor then goes through a series of reviews, first by his or her immediate supervisor(s) and usually later by a special committee of senior prosecutors with exceptional homicide-prosecution experience, all of whom evaluate the above factors ethically, carefully, and thoroughly. Following the extensive reviews, the case is presented to the County District Attorney, or the District Attorney's designate, who ultimately makes the final decision. If he or she decides to seek death, the defense attorney and courts are notified, and still more procedural safeguards are engaged.

## DEFENSE ATTORNEYS

### **Highly Qualified Representation**

Only the most experienced criminal-defense attorneys are assigned to death-penalty cases. This alone is an extraordinary reflection of the seriousness placed upon protecting defendants faced with capital punishment. In January 2003, the Judicial Council of California promulgated standards for the appointment of trial counsel in capital cases, with particular emphasis on tenure and related experience.<sup>46</sup> These standards mirror California's long-standing practice of appointing only the very best to handle these most important cases.

### **Two Attorneys for Each Defendant<sup>47</sup>**

California law also authorizes the judge to appoint an *extra* defense attorney for the defendant, at taxpayers' expense. In fact, it is commonplace for a court to exercise its discretion by appointing a second trial attorney.

### **Training and Ongoing Assistance**

California is recognized nationwide for its outstanding training of counsel in death-penalty cases. Each year, the California Public Defenders Association (CPDA) and California Attorneys for Criminal Justice (CACJ) hold death-penalty seminars attended by about 1,000 defense attorneys from all over the nation. They provide extensive manuals, sample legal pleadings, demonstrations, and excellent instruction on how best to defend capital prosecutions. These organizations also provide assistance to any attorney who seeks it, including Internet-networking services that allow defense attorneys to communicate with each other and seek guidance on a regular basis.

Capital-case attorneys are paid much higher fees than attorneys appointed in noncapital cases. Significantly more funding also is available for defense investigators and other experts.<sup>48</sup> Often, thousands of dollars are spent hiring multiple defense experts, including psychiatrists, forensic scientists, criminalists, jury-selection experts, and penalty-phase coordinators, to ensure no stone is left unturned.

### **Skilled Trial Tactics**

Defense attorneys have an ethical duty to do whatever they can within the parameters of the law to protect their clients from conviction and from receiving the death penalty – and they take this duty very seriously. They routinely file all sorts of motions to keep evidence away from the jury, such as motions to suppress physical evidence seized, motions to suppress confessions, motions to attack all types of scientific evidence, and motions to suppress eyewitness identification. Likewise, all manner of objections are routinely made at trial.

### JURY PROTECTIONS

Some might argue that the very best safeguard of all is the bedrock principle of trial by jury, where guilt must be proven beyond reasonable doubt. Understandably, juries take death-penalty cases extremely seriously.

### **Jury Selection Procedures Are Different**

In a death-penalty case, jury selection itself is different from other criminal prosecutions. Jurors are ordinarily given very lengthy and detailed questionnaires that ask all manner of personal questions, which jurors in noncapital cases rarely have to answer. Among these are questions about the jurors' attitudes about the death penalty itself, in which prospective jurors must not only identify personal opinions, but also personal reasons for holding whatever opinion they have. Defense attorneys often hire jury-selection experts to assist them in analyzing the questionnaires, as well as the jurors themselves when they later are asked questions in the courtroom.

### **Jurors With Very Strong Opinions Excluded**

By law, if a prospective juror expresses extremely strong views about the death penalty, he or she may be excluded from service. That is, if a juror is philosophically opposed to the death penalty, or feels so strongly in favor of it that in virtually every murder case he or she would impose death as the sentence, the juror is excluded. Only jurors who demonstrate that they can remain objective and evaluate fairly the various "aggravating" and "mitigating" factors discussed above before deciding the penalty are qualified to serve. The defendant in a capital case is entitled to 20 peremptory challenges, as is the prosecution.<sup>49</sup>

### JUDICIAL SAFEGUARDS

In addition to the protections provided by California's ethical prosecutors, zealous defense attorneys, and qualified juries, a final protection at the trial level is provided by the judge.

Judges are not advocates. They are sworn to apply the rules of law objectively and ethically, irrespective of the consequences. Judges rule on all objections and motions presented by the trial attorneys. It is a judge's duty to fairly and impartially apply the law; all trial judges know their rulings will be carefully scrutinized by appellate judges – and no judge wants a case to be reversed due to errors in the trial. Judges also are responsible for properly instructing the jury on the law and preventing the jury from hearing anything improper throughout the trial.

### **The Judge May Reduce the Jury’s Death Verdict to Life in Prison**

Even if the jury, after hearing all the evidence and instructions of law, votes for a death verdict, the trial judge is authorized by state law to modify that verdict under certain circumstances.<sup>50</sup> That is, even if the jury votes unanimously for death, the trial judge can reduce the sentence to life in prison without the possibility of parole. A judge cannot, however, change a sentence of life in prison without the possibility of parole to death.

Only in death-penalty cases does this special “modification” hearing exist. It is worth noting that if a judge denies a defendant’s modification application, i.e., affirms the jury’s death verdict, he or she must in so doing make an independent determination whether imposition of the death penalty upon the defendant is proper in light of the relevant evidence and the applicable law. The judge must also determine whether the weight of the evidence supported the verdict, assess the credibility of the witnesses, determine the probative force of the testimony, weigh the evidence, and state on the record the reasons for his or her findings. Failure by a judge to do this can result in the case being reversed.

### **CALIFORNIA’S PROCEDURE FOR CAPITAL CASE REVIEW IS FAIR AND THOROUGH**

Death-penalty judgments are reviewed by both state and federal appellate courts. It is a dual system of review unique to the United States.<sup>51</sup> The judgments are also subject to independent clemency review by the Governor. The numerous layers of reviewing courts and procedures lend themselves to the main strategy for those who represent capital prisoners – delay in the final execution of judgment.<sup>52</sup> The average amount of time in California between commission of the crime and execution for the 10 executions that have occurred since 1992 is 16 to 17 years. Although the last three executions in California took place more than two decades after the prisoner committed the murder that led to his death sentence.<sup>53</sup> The rules, practices, and procedures detailed below are calibrated to balance the inmate’s entitlement to a complete review of the case with the public interest in the timely resolution of these cases. Whether or not this process has achieved an acceptable balance remains in doubt.

Capital cases are litigated and reviewed in different forums having different functions. The actual capital trial decides the basic factual issue: is the defendant guilty or innocent? Once that question is decided at trial by a jury or judge, a defendant’s guilt or innocence is rarely if ever second-guessed on appeal or in other postconviction proceedings. After the trial and assuming the evidence presented was legally sufficient to support the verdict, attention is turned to deciding whether or not there were legal or procedural errors that denied a defendant a fair trial.

### **STATE APPELLATE/HABEAS CORPUS PROCESS**

A convicted defendant has no constitutional right to an appeal or any other postconviction review, including habeas corpus.<sup>54</sup> However, California law requires an automatic appeal, which cannot be waived by the condemned prisoner.<sup>55</sup> An appeal is limited to issues that can be decided based on the record of the trial. A prisoner cannot present new evidence or testimony on appeal.<sup>56</sup>

But a prisoner does have the opportunity to present new evidence by way of habeas corpus. A postconviction proceeding by petition for writ of habeas corpus is also an institutionalized part of the state review process.

The California Supreme Court appoints separate counsel to represent the prisoner on appeal and state habeas corpus. The People are represented by the Attorney General. The central issue in developing appellate/habeas corpus procedures has been an ongoing effort to reduce delay without curtailing the prisoner's right to a fair and adequate review.

### **The Record on Appeal**

The first stage of the state appellate process is the preparation of the record on appeal. This initial stage of the appeal has attained a procedural significance unique to California death penalty practice. It is rarely utilized in noncapital cases and is not a major component of other states that have the death penalty. Current state law requires the trial counsel, both defense and prosecution, to ensure the preparation of a complete and accurate record including all documents filed in the trial courts and transcripts of all oral proceedings.

The second phase begins after appointment of appellate counsel for the inmate. The appeals counsel and state ensure the accuracy of the completed record through corrections, augmentation with any omitted material, and settled statements of any unreported oral proceedings.<sup>57</sup> Currently, cases may lie dormant for several years in the record correction process since there is a multi-year delay in appointment of appellate counsel.

### **Appointment of Appellate and Habeas Corpus Counsel**

As noted, the condemned murderer is represented by an appellate counsel and habeas counsel.<sup>58</sup> Despite the California Supreme Court's considerable outreach to the defense bar, there still exists a five- to six-year delay in appointment of counsel, which precludes any progress on the appeal.<sup>59</sup>

Recent legislation has now established specific and extensive qualifications for appellate and habeas counsel. Rule 76.6 of the California Rules of Court sets forth a framework of multiple counsel for both the appeal and habeas. Thus, as many as four lawyers may be appointed to represent a prisoner at this stage of the proceedings. The qualifications for appellate and habeas counsel include four years practicing law in California, prior experience in multiple felony appeals or felony trials, familiarity with supreme court death-penalty practices, training in approved courses, and proven proficiency in researching and writing briefs. The court examines writing samples and peer evaluations. The rule also provides for exceptions when the attorney has substantially equivalent experience in complex cases in other jurisdictions or other types of legal practice. The rule also endeavors to ensure that at least one habeas attorney has had trial experience. These qualifications actually exceed the requirements for appointment of counsel in federal death-penalty cases.<sup>60</sup>

Various institutional authorities or "designated entities" are available for appointment on appeal or habeas. These entities are the State Public Defender, the California Habeas Resource Center (HCRC), and the California Appellate Project (CAP). All three of these agencies accept

appointments and assign the cases to staff members who meet the qualifications in Rule 76.6. The Public Defender handles appeals. In 1997, the California Legislature authorized the Public Defender to hire 15 additional staff members for capital appeals.<sup>61</sup> The HCRC is a newly created agency authorized to employ up to 30 lawyers for habeas representation. It is administered by an executive director who is subject to Senate confirmation and governed by a Board of Directors representing the defense bar.<sup>62</sup> Since they are employees of the judicial branch, the HCRC attorneys are actually paid more than the deputy attorneys general representing the State in these cases. CAP is affiliated with the State Bar. It accepts appointments for both appeals and habeas corpus cases. CAP frequently provides legal and investigative assistance to other attorneys in capital cases.<sup>63</sup>

The Legislature now authorizes the California Supreme Court to compensate private counsel at a rate of at least \$125 per hour. The court has announced two alternative payment guidelines for capital cases based on either the hourly rate or a fixed fee. Privately appointed habeas counsel may receive up to \$25,000 to investigate the habeas corpus petition.<sup>64</sup>

It remains to be seen whether these recent measures will significantly decrease the current delay in appointment of qualified counsel.

### **Briefing on Appeal**

When the record has been certified by the trial court as complete and accurate, the California Supreme Court advises the appointed appellate counsel of the time for filing an appellant's opening brief on appeal. Court rules limit these briefs to 280 pages except for good cause.<sup>65</sup> The court frequently grants permission to file oversized briefs. New court policies also require counsel to set forth good faith time estimates as to when the brief will be completed and filed.<sup>66</sup> On occasion, the court has disciplined attorneys for undue delay in filing the briefs.<sup>67</sup>

The Attorney General's Office is responsible for the respondent's brief. The same rules apply as to page length and submitting a good faith time estimate as to completing and filing the brief. Once the respondent's brief is filed, the prisoner's appellate counsel may file a reply brief. This brief is subject to a 140-page limit.<sup>68</sup>

Pursuant to Penal Code section 190.6, new deadlines take effect for sentences imposed on or after January 1, 1997. Under the new rule, the prisoner's brief should be filed no later than seven months after certification of the appellate record.

### **Habeas Corpus Petition**

While appellant's appointed appellate counsel is briefing the appeal, separately appointed habeas counsel are preparing a habeas corpus petition to file in the California Supreme Court on the inmate's behalf. Although an inmate may waive a habeas petition, it is ordinarily the case that such a petition is filed in every case. Pursuant to California Supreme Court policies, the petition should be filed no later than a specific number of days after the filing of the reply brief on appeal. If the brief is not filed during that time span, the habeas counsel must justify the delay in filing the petition.<sup>69</sup>

For the purpose of preparing and filing the habeas corpus petition, California law provides \$25,000 of investigative monies. Since there is no habeas corpus action pending, there is no right to discovery.<sup>70</sup> But in cases in which the trial counsel is unable to provide a defendant's case files to the habeas attorney, the court may order the prosecution to provide copies of all discovery that should have occurred at trial.<sup>71</sup>

The petition should be supported by declarations and reasonably available documentary evidence.<sup>72</sup> The prisoner may raise claims that are not ordinarily part of the trial record. These claims usually relate to allegations of ineffective assistance of counsel, jury misconduct, or that the prosecution failed to disclose evidence favorable to the prisoner at time of trial. However, California law also permits the prisoner to raise claims that false evidence was presented at trial or that newly discovered evidence establishes the prisoner's innocence.<sup>73</sup>

When a petition is filed, the court frequently asks the Attorney General's Office for an "informal response." The "informal response" gives the Attorney General the opportunity to point out facial defects in the petition that will enable the court to summarily deny the petition without further proceedings. The prisoner is allowed to file a reply.

If the court believes that the petition states facts that would entitle the prisoner to relief, it will issue an order to show cause. This will frequently lead to an evidentiary hearing in state court on the petitioner's claims, oral argument before the California Supreme Court, and a written opinion.<sup>74</sup>

It should be noted that the prisoner's appeal and habeas corpus petition run on separate tracks and are not necessarily considered and disposed of at the same time. A habeas corpus petition may be denied before the California Supreme Court decides the appeal, or the habeas corpus petition may remain pending long after the appeal is over.

### **Oral Argument and Opinion**

The California Supreme Court sets aside 45 minutes for each side for oral argument in a capital appeal. Two counsel may argue for each side.<sup>75</sup> The opinion is issued within 90 days after the argument. Ordinarily, a petition for rehearing is filed. The court has up to 90 days to act on the rehearing petition. If rehearing is denied, the decision is final.<sup>76</sup> Once again, for cases in which the death sentence was imposed on or after January 1, 1997, Penal Code section 190.6 requires that the opinion be reached seven months after completion of the briefing.<sup>77</sup>

### **Petition for Writ of Certiorari to the United States Supreme Court**

Within 90 days after the California Supreme Court denies rehearing, a defendant may file a petition for writ of certiorari in the United States Supreme Court. Under that Court's rules, the People must file an opposition within 30 days.<sup>78</sup> These petitions are rarely granted.

## FEDERAL HABEAS CORPUS REVIEW

### **United States District Court**

When the United States Supreme Court denies the petition for writ of certiorari, the prisoner has one year to file a petition for writ of habeas corpus in United States District Court.<sup>79</sup> The only exception to this one-year deadline is if a state habeas corpus petition is still pending in the California Supreme Court.<sup>80</sup> At this point, the prisoner files a request for appointment of new counsel and a motion to stay execution.<sup>81</sup> These requests are routinely granted. Each district court has adopted specific rules for death-penalty cases.<sup>82</sup>

There is no constitutional right to representation by counsel on federal habeas corpus.<sup>83</sup> But the district court will appoint either private counsel or the Federal Defender. The procedures for appointment and compensation of counsel are established by federal statute, 18 U.S.C. 3600A and 21 U.S.C. 848(q). Ordinarily two counsel are appointed, at least one of the counsel must have tried cases in the court of appeals for five years including not less than three years handling appeals in felony cases.

During 1996-1999, counsel were paid \$125 an hour. Since that time, the federal courts have been authorized to raise the hourly payments on an annual basis.<sup>84</sup>

Counsel is also entitled to reasonably necessary investigative expenses to aid in the preparation of the petition. If counsel show a need for confidentiality, they can have hearings with the district court outside the presence of the Attorney General to apply for the investigative expenses. Investigative expenses should not exceed \$7,500 unless excess payments are certified by the court “for services of an unusual character or duration.” The amounts disbursed shall be disclosed after disposition of the petition.<sup>85</sup>

Ordinarily, the new lawyers will file a petition for writ of habeas corpus claiming that the prisoner’s conviction and sentence violate the Constitution of the United States. These petitions repeat virtually all of the claims rejected by the California Supreme Court on appeal and habeas corpus. The Attorney General’s Office represents the State of California by filing an answer to the petition.<sup>86</sup> The parties then engage in discovery about the claims, and frequently the district court conducts an evidentiary hearing.<sup>87</sup> The district court then issues an opinion granting or denying the petition.<sup>88</sup>

A recurring issue in federal habeas corpus cases is the tension between the presumption that the state court decision is “final” and the prisoner’s desire to reopen and relitigate his or her entire case over again. The United States Supreme Court has repeatedly proclaimed that the state trial is the “main event” and not just a “tryout on the road” for subsequent federal habeas corpus proceedings.<sup>89</sup> Accordingly, a prisoner is not entitled to raise claims in federal court that were not properly raised in state court. Substantial litigation is devoted to whether a prisoner did raise claims and whether the prisoner should be excused from this requirement to follow state procedures.<sup>90</sup>

Currently, there is no particular time limit in effect for completion of federal habeas proceedings.

In 1996, Congress enacted an alternate system that did set strict deadlines for proceedings in states that had established a comprehensive rule for the appointment and compensation of counsel on state habeas.<sup>91</sup> No state, including California, has yet qualified for this so-called “fast track” system.<sup>92</sup>

Congress has also adopted rules that require the federal courts to give more deference to the state court’s adjudication of the prisoner’s federal constitutional claims. These rules also limit the discretion of the federal district courts to conduct evidentiary hearings if the state court has already conducted hearings or the prisoner failed to present all available facts to the state court.<sup>93</sup> The actual significance of these recent reforms remains to be seen.

### **Ninth Circuit Court of Appeals**

Either the prisoner or the Attorney General may appeal the district court’s disposition of the habeas corpus petition to the Ninth Circuit Court of Appeals.

The Ninth Circuit Court of Appeals is allotted 28 active judges and is the largest federal appeals court circuit in the United States, covering all appeals from the district courts in the Western United States, including states of California, Oregon, Washington, Idaho, Montana, Nevada, Arizona, Alaska, and Hawaii. It also hears appeals from various Pacific Island territories. The Ninth Circuit currently has 24 active judges, including three judges appointed by President Carter, three judges appointed by President Reagan, three judges appointed by President George H.W. Bush, 14 judges appointed by President Clinton, and one judge appointed by President George W. Bush. In addition, there are 21 senior judges who can also be available to judge cases, including one judge appointed by President Kennedy, five judges appointed by President Nixon, nine judges appointed by President Carter, six judges appointed by President Reagan, and one judge appointed by President George H.W. Bush. The Senate only recently acted on one of President Bush’s three pending nominations to the court.<sup>94</sup>

The Ninth Circuit has acquired a reputation for being one of the most frequently reversed circuits in the country.<sup>95</sup> On October 4, 2002, the Ninth Circuit achieved what is believed to be the unprecedented and dubious distinction of being reversed **three** times in one day by the United States Supreme Court. All three reversals were unanimous and were done summarily – without oral argument or additional briefing – a very unique rebuke. One of these reversals was a capital case.<sup>96</sup>

The Ninth Circuit has also been criticized about the expense and slowness of its handling of capital cases. The Ninth’s judges have engaged in public controversies about the handling of death-penalty litigation.<sup>97</sup> The United States Supreme Court has twice rebuked the Ninth Circuit for its handling of California’s capital cases. In the Robert Alton Harris case, the Court actually took jurisdiction away from the Ninth Circuit because of its handling of the last-minute litigation in that case.<sup>98</sup>

Due to the problems encountered with the Harris execution in 1992, the Ninth Circuit refined its specific rules for handling death-penalty appeals. Unlike ordinary appeals, once briefing has been completed, a particular panel of three judges is chosen to handle all matters pertaining to

the case. The rules also allow for more extensive briefing. Uniquely, the Ninth Circuit rules still give any single judge on the court the power to stay imminent executions.<sup>99</sup>

Oral arguments occur on a special calendar. After the panel has issued its opinion, the losing party may petition for rehearing. This is often accompanied by a petition for rehearing *en banc*, a request that a larger panel of the court consisting of 11 judges rehear the case.<sup>100</sup> There is no time limit as to how long the court will consider an appeal or a petition for rehearing.

The Ninth Circuit's death-penalty rules also choose an en banc panel for each case that will hear all en banc matters. The en banc procedures are also unique to the Ninth Circuit. In all of the other circuits, all the judges sit on an en banc court. Thus, a decision by an en banc in those circuits truly reflects a decision of a majority of the judges of that circuit. Due to its size, Congress has authorized the Ninth Circuit to conduct en banc hearings with less than all of the judges. In fact, an en banc court in the Ninth Circuit consists of only 11 judges. A majority of six of those 11 judges may decide an issue that binds all 28 judges of the Ninth Circuit.<sup>101</sup> While the court could sit as a full en banc with all the judges, this has never occurred.

### **Petition for Writ of Certiorari to the United States Supreme Court**

After completion of the appeal in the Ninth Circuit, either party may again petition for writ of certiorari to the United States Supreme Court. A response is required. Once again, these petitions are rarely granted. When the inmate's petition is denied, he or she has completed an entire round of state and federal review.

## LAST-MINUTE PROCEEDINGS AND LITIGATION LEADING TO EXECUTION

An ongoing issue in capital-case procedure has been repetitious litigation. How much latitude should a prisoner have in starting an entire new cycle of postconviction litigation once he or she has had her "one bite of the apple"?

### **Scheduling Execution Date**

When the United States Supreme Court denies certiorari after a federal court has denied habeas, the district attorney will ordinarily request the original sentencing court to schedule a public session to set an execution date. The court must give 10 days' notice of the public session. The court must set an execution date for 30-60 days after the session.<sup>102</sup> As the scheduled date approaches, prison psychologists periodically examine the inmate's mental state.<sup>103</sup> If a court stays the execution and the scheduled date expires, then the entire process of scheduling an execution date must begin again. Thus, if a defendant successfully procures a stay, he or she may be able to delay the execution for at least an additional 40 days. The only way to avoid this delay is for the Governor to issue a reprieve or postponement of the execution. As a matter of state law, the execution may occur the day after the Governor lifts the reprieve.

### **Application for Executive Clemency**

Once the execution date is set by the sentencing court, the Governor customarily asks the prisoner if he or she intends to apply for commutation of the death sentence. If the prisoner indicates an intention to seek clemency, the Governor will set a schedule for the prisoner and the

district attorney to make submissions. If requested by the Governor, the Board of Prison Terms will conduct its own investigation and hold a public proceeding on the clemency request before submitting a confidential recommendation to the Governor. Ordinarily, the Governor issues a written explanation for the ultimate clemency decision. California law uniquely requires four members of the California Supreme Court to concur if the Governor commutes the sentence of a prisoner who has been previously convicted of another felony.<sup>104</sup> Although the prisoner has no right to counsel in these proceedings, California does provide representation to capital prisoners seeking clemency from the Governor.<sup>105</sup>

The clemency process is very different from the judicial process. The Governor may consider any evidence and may base the clemency decision on any constitutionally permissible criteria. However, even though the clemency process is non-judicial, it has frequently been the focus of litigation in California. The United States Supreme Court has held that applicants for clemency are entitled to minimal due-process protections.<sup>106</sup> Four of the 10 executions that have occurred in California since 1992 have included litigation concerning the executive clemency process. On one occasion, the prisoner temporarily delayed the execution due to questions about the clemency process and was able to reapply for clemency from Governor Davis.<sup>107</sup>

### **Successive Habeas Corpus Petitions**

While the clemency process is occurring during the 30- to 60-day period preceding the execution, the prisoner will ordinarily start a second series of habeas corpus petitions. Litigation often continues until hours before the scheduled execution. All of the courts are aware of the situation and are frequently working on the case simultaneously and in advance of the actual application for relief.

#### *California Supreme Court*

The successive petition litigation usually begins in the California Supreme Court. But that court has now established strict limitations on successive petitions. A prisoner will need to justify the delay in presenting new claims or show that a fundamental miscarriage of justice will occur. A “fundamental” miscarriage of justice includes: (1) a fundamental error such that absent the error no reasonable jury would have convicted the prisoner; (2) the prisoner is “actually innocent;” (3) the death sentence was imposed due to such a grossly misleading profile of the prisoner that absent the error or omission that no reasonable jury would have sentenced the prisoner to death; or (4) the prisoner was convicted or sentence under an invalid statute.<sup>108</sup> Copies of the pleadings filed in the California Supreme Court are also sent to the federal courts.

#### *Ninth Circuit Court of Appeals*

If the California Supreme Court denies the successive petition, a prisoner cannot file a new petition in the federal district court. Rather, he or she must file a request to file that successive petition with the Ninth Circuit Court of Appeals.<sup>109</sup> In order to file a second petition, the prisoner must be raising a new claim not previously raised in federal court. In addition, the prisoner must show that he or she is relying on a new rule of constitutional law that has been made retroactive to the case by the United States Supreme Court or a newly discovered claim that could not have been presented before with due diligence and that is sufficient to establish that no reasonable juror would have found the prisoner guilty. The three-judge panel has only 30

days to make this decision, and it is not appealable unless the en banc court chooses to review the decision on its own motion. If the court finds that the prisoner has made the required showing, it will grant the prisoner permission to file the petition in district court and a new habeas corpus process will begin. Of all the most recent reforms, this has been the most successful change in shortening the process of repetitious litigation in capital cases.

#### *United States Supreme Court*

Once the Ninth Circuit has denied the request, the prisoner may still file an original petition for writ of habeas corpus in the United States Supreme Court. The prisoner will also ask for a stay of execution.<sup>110</sup> Frequently, this litigation is occurring just hours or even minutes before the scheduled execution. These last-minute pleadings are ordinarily denied.

#### **Civil Rights Suits**

On two occasions, California prisoners have filed last-minute civil rights lawsuits to stop their executions. These lawsuits are not aimed at proving that the prisoner was unjustly convicted, but attack the execution procedure itself as “cruel and unusual punishment” under the Eighth Amendment of the United States Constitution. These lawsuits are ordinarily initiated in federal district court and include review proceedings in the Ninth Circuit Court of Appeals and the United States Supreme Court.

#### **Competence to be Executed**

The United States Supreme Court has held that it is cruel and unusual punishment to execute a prisoner who is mentally unable to understand that he or she is being executed and the reason for the execution. California law has established an elaborate procedure, which exceeds constitutional requirements, to determine a prisoner’s competency to be executed when the warden has a doubt about the prisoner’s sanity.<sup>111</sup> Under this procedure, the prisoner is entitled to a jury trial. If the prisoner is found insane, he or she is confined until his or her reason is restored and the prisoner is certified sane by a judge sitting without a jury.

Similarly, the United States Supreme Court has now held that it is unconstitutional to execute the mentally retarded. The Court left the states considerable latitude to develop procedures for determining if a murderer is mentally retarded. That decision may be made by a jury, a judge, or an appellate court.<sup>112</sup> Bills have been introduced in the California Legislature to establish a state procedure.

#### **Pregnancy**

California law prohibits the execution of pregnant prisoners. If there is good cause to believe that a female prisoner is pregnant, California statute provides for a closed-door examination in court by three physicians. The execution is suspended until the defendant is no longer pregnant.<sup>113</sup>

#### **Volunteers**

On two occasions, condemned inmates in California have waived further legal review of their cases and been executed. They are referred to as “volunteers.” However, it is not enough to simply express the desire to end further proceedings. As already noted, a prisoner cannot waive automatic appeal in California as a matter of state law. Once the state appeal is completed,

however, an inmate will be permitted to waive further proceedings in a state or federal court. The court must find that the prisoner has the mental capacity to appreciate his or her position and to rationally choose whether to continue or abandon further litigation. If a court finds that the prisoner has the required mental capacity, that finding will frequently be challenged by either the prisoner's own attorney or a third party. This usually results in litigation through the state and federal courts. On the other hand, if the court finds that the prisoner does not have the required mental capacity, then litigation will continue at the behest of a close friend or relative of the prisoner.<sup>114</sup>

### III

#### *Debunking Common Fallacies and Misinformation*

#### **INNOCENT PRISONERS ARE NOT BEING EXECUTED, AND THE CLAIMS OF WRONGFUL CONVICTIONS ARE BASED ON MISLEADING, EXAGGERATED DATA**

##### **Critique of DPIC List (“Innocence: Freed From Death Row”)<sup>115</sup>**

The Death Penalty Information Center (DPIC)’s innocence list (“*Innocence: Freed from Death Row*”) [hereinafter “DPIC List” or “List”] is frequently cited as support for the claim that 102 innocent prisoners have been released from Death Rows across the nation.<sup>116</sup> The List is uncritically accepted as definitive. But an examination of the premises and sources of the List raises serious questions about whether many of the allegedly innocent prisoners named on the List are actually innocent at all.

Analysis of the cases listed suggests an exaggerated number of inaccurate convictions. For many of its cases, the DPIC List jumps to conclusions and misstates the implications of what has happened in the various cases that it cites as involving “actually innocent” defendants. The DPIC “falsely exonerates” many of the former Death Row members on its List and misleads the public about the frequency of wrongful convictions in terms of appraising the current capital-punishment system in this country.

In fact, it is arguable that at least 68 of the 102 defendants on the List should not be on the List at all – leaving 34 released defendants with claims of actual innocence – less than one-half of one percent of the 7,096 defendants sentenced to death between 1973 and 2001.<sup>117</sup>

##### **Background of DPIC List**

The year 1972 marks the beginning of modern death-penalty jurisprudence in this country. That year, the United States Supreme Court in *Furman v. Georgia* declared all death-penalty statutes unconstitutional.<sup>118</sup> The states immediately responded by enacting various statutes tailored to meet the concerns expressed in *Furman*. In 1976, the United States Supreme Court approved new death-penalty laws that narrowed the class of murderers eligible for the death penalty and permitted the presentation of any mitigating evidence to justify a sentence less than death. The Court also abrogated so-called “mandatory statutes” that did not permit presentation of mitigating evidence. There is no proof that since the reinstatement of the death penalty in 1976 an innocent person, convicted and sentenced under these statutes, has been executed. Not even the DPIC makes this claim.

Nonetheless, death-penalty opponents claim that numerous innocent persons have been sentenced to death, only to escape that ultimate punishment by subsequent exoneration. The current source of this claim is the DPIC List. The DPIC describes itself as “a non-profit organization serving the media and the public with analysis and information on issues

concerning capital punishment.” In actuality, the DPIC is an anti-death-penalty organization that was established “to shape press coverage of the death penalty.”<sup>119</sup> Its Board of Directors is comprised of prominent anti-death-penalty advocates and defense lawyers.

The DPIC now claims that its standard for including “innocent” capital defendants on its List “is to count those whose convictions are reversed and who are then either acquitted at retrial or have charges formally dismissed.” The List also includes any cases in which a governor grants an absolute pardon. Under its current standards, the DPIC no longer lists defendants who plead guilty to lesser charges.<sup>120</sup> As will be shown, however, the DPIC’s standards as a whole are inadequate and misleading.

The DPIC List was first assembled in 1993 at the request of the House Subcommittee on Civil and Constitutional Rights. The List has its roots in a series of studies beginning with Bedau & Radelet, *Miscarriages of Justice in Potentially Capital Cases* [hereinafter *Stanford*].<sup>121</sup> This article was followed by the 1992 publication of the book, *In Spite of Innocence*, by Bedau, Radelet, and Putnam. The most recent article is Radelet, Lofquist, & Bedau, *Prisoners Released from Death Rows Since 1970 Because of Doubts About Their Guilt* [hereinafter *Cooley*].<sup>122</sup>

### **The *Stanford* Study**

The *Stanford* article presented 350 cases “in which defendants convicted of capital or potentially capital crimes in this century, and in many cases sentenced to death, have later been found to be innocent.” Thus, the article included cases during the twentieth century in which the defendants were not actually sentenced to death. The *Stanford* authors acknowledged that their study was not definitive, but only based on their untested belief that a majority of neutral observers examining these cases would conclude the defendants were actually innocent.<sup>123</sup>

The article limited the cases it discussed to defendants in cases in which it was later determined no crime actually occurred or the defendants were both legally and physically uninvolved in the crimes. The focus was primarily on “wrong-person mistakes.” The article did not include defendants acquitted on grounds of self-defense.<sup>124</sup> The article relied on a variety of sources, including the “unshaken conviction by the defense attorney” that his or her client was innocent.<sup>125, 126</sup>

The *Stanford* study was criticized in Markman & Cassell, *Protecting the Innocent: A Response to the Bedau-Radelet Study*.<sup>127</sup> In a reply, Bedau and Radelet acknowledged that their analyses were not definitive, *The Myth of Infallibility: A Reply to Markman and Cassell*<sup>128</sup> [hereinafter *Stanford Reply*].

### ***In Spite of Innocence***

The book that followed the *Stanford* study, *In Spite of Innocence* (1992), was a “less-academic” popularization of the cases presented in the *Stanford* article. The book purportedly corrected some unidentified errors from the *Stanford* article.

Significantly, *In Spite of Innocence* referred to the new post-*Furman* death-penalty statutes and conceded that “[c]urrent capital punishment law already embodies several features that

**probably reduce the likelihood of executing the innocent. These include abolition of mandatory death penalties, bifurcation of the capital trial into two distinct phases (the first concerned solely with the guilt of the offender, and the second devoted to the issue of sentence), and the requirement of automatic appellate review of a capital conviction and sentence.**<sup>129</sup>

### *The Cooley Article*

The recent *Cooley* article is the principal source for the DPIC List.<sup>130</sup> Two of its authors, Bedau & Radelet, also wrote the original *Stanford* study and *In Spite of Innocence*. The *Cooley* article ostensibly continued the *Stanford* focus of identifying “factually innocent” defendants – wrongly convicted persons who were not actually involved in the crime.<sup>131</sup>

*Cooley*, however, had a narrower time focus than the *Stanford* article or *In Spite of Innocence*. The *Cooley* list of 68 condemned, but allegedly innocent, prisoners is supposedly limited “to cases since 1970 in which serious doubts about the guilt of a Death Row inmate have been acknowledged.”<sup>132</sup> The “admittedly somewhat arbitrary” cutoff date of 1970 appears to be directed at eliminating cases that were disposed of no earlier than 1973, after *Furman*. As the authors had indicated in their earlier book, *In Spite of Innocence*, current death-penalty law included features that probably reduced the likelihood that an innocent person would be sentenced to death. Accordingly, earlier cases under old statutes would not add much to analyzing the contemporary problem of “wrongful convictions.” Nevertheless, the *Cooley* cutoff date of 1970 was still flawed for purposes of assessing our current capital-punishment system since it still included prisoners convicted under the pre-1972, pre-*Furman* statutes.

The *Cooley* article purported not to include inmates released because of “due process errors” unrelated to allegations of innocence.<sup>133</sup> Finally, *Cooley* excluded inmates who were found to be guilty of lesser-included homicides or not guilty by reason of mental defenses.<sup>134</sup>

*Cooley* expanded the original *Stanford* study, however, to include allegedly “innocent” defendants who actually committed the crime or were involved in the murder. Unlike *Stanford*, *Cooley* included cases in which the defendant was ultimately acquitted on grounds of self-defense.<sup>135</sup> The *Cooley* article also included cases in which defendants *pled* to lesser charges and were released “because of strong evidence of innocence.”<sup>136</sup> The DPIC has since disavowed inclusion of cases in which prisoners pled to lesser charges, although it has not removed such prisoners from its List.

The *Cooley* article failed to mention at least one significant change from the previous studies – the inclusion of accomplices mistakenly convicted as actual perpetrators. The *Stanford* study excluded such defendants. “We also do not consider a defendant innocent simply because he can demonstrate, in a case of homicide, it was not he but a co-defendant who fired the fatal shot ... because the law does not nullify the [accomplice's] culpability merely because he was not the triggerman, we do not treat him as innocent.”<sup>137</sup> *Cooley* and the DPIC List abandoned that limitation and included supposedly innocent defendants who were still culpable as accomplices to the actual triggerman. Thus, unlike its predecessor studies, *Cooley* cited cases in which there were no actual “wrong-person” mistakes – a practice the DPIC has continued.

Finally, and most importantly, *Cooley* “includ[ed] cases where juries have acquitted, or state appellate courts have vacated, the convictions of defendants because of doubts about their guilt **(even if we personally believe the evidence of innocence is relatively weak).**”<sup>138</sup> However, except for defendant Samuel Poole, *Cooley* does not otherwise identify the defendants that the authors themselves believe have relatively weak evidence of innocence. Nevertheless, a comparison of the *Cooley* list with the names omitted from the *Stanford* study and *In Spite of Innocence* suggests which cases even the authors of the *Cooley* article believe only have “weak” evidence of innocence.

Thus, the *Cooley* article and the DPIC List differ from the original *Stanford* article and *In Spite of Innocence* because they both expand the categories of allegedly innocent defendants. The *Stanford* article was “primarily concerned with wrong-person mistakes” and only included defendants whom the authors believed were legally and physically uninvolved in the crimes.<sup>139</sup> As will be shown, neither *Cooley* nor the DPIC List conforms to these original limitations. The result is a padded list of allegedly innocent Death Row defendants that overstates the frequency of wrongful convictions in capital cases.<sup>140</sup>

### **The DPIC List: Miscarriages of Justice or Miscarriages of Analyses?**

Using the *Cooley* article as a starting point, this portion of the paper explains that as many as 68 of the 102 names on the DPIC List (two-thirds of the List as of September 17, 2002) should be eliminated. In several respects, the methodology of the DPIC List as explained in the *Cooley* article is deficient. The premises used in selecting and pronouncing particular defendants as “actually innocent” do not in fact support that conclusion or do not assist in determining the actual number of allegedly mistaken convictions under current capital-punishment jurisprudence.

### ***Time Frame: Relevance of DPIC List to Current Death Penalty Procedures***

In terms of the risk of condemning the innocent to death, the “admittedly somewhat arbitrary” time frame used by the DPIC List of 1970 is overly inclusive. Although the United States Supreme Court’s *Furman* decision did abrogate all of the completely discretionary, standardless death-penalty statutes in 1972, it was not until 1976 that the Court upheld new death-penalty statutes. As noted in the book *In Spite of Innocence*, numerous features of these new laws “probably reduce the likelihood of executing the innocent.”

Among the features that decreased the likelihood an innocent person would be sentenced to death, these statutes (1) narrowed the range of death-penalty-eligible defendants and (2) permitted convicted murderers to produce any relevant mitigating evidence supporting a penalty less than death. Mitigating evidence may frequently include evidence that will raise so-called “residual doubt” or “lingering doubt” about the defendant's guilt or otherwise raise doubts about a defendant's level of culpability due to mental impairment or some other factor.

In 1976, the Court abrogated statutes with so-called “mandatory” death penalties that did not permit consideration of mitigating evidence. As the *Stanford* study acknowledged, it has only been since those decisions that “juries have been permitted to hear any evidence concerning the nature of the crime or defendant that would mitigate the offense and warrant a sentence of life imprisonment.” These mitigating factors include lingering doubt about guilt, mental

impairments, and limited culpability.<sup>141</sup>

To the extent that the DPIC List includes defendants convicted and condemned under old statutes that did not meet the Court's 1976 standards, those defendants are irrelevant in terms of assessing contemporary capital-punishment statutes and should be excluded from the List. Since those defendants were not tried under today's "guided discretion" laws, they were sentenced to death without the appropriate finding of eligibility or the opportunity to present mitigation. They were not provided the modern protections that "probably reduce the likelihood of executing the innocent." Their sentences are not reliable or pertinent indicators for evaluating the effect of *today's* statutes on the conviction and sentencing of the "actually innocent." There is no assurance they would have been sentenced to death under today's statutes.

Implicitly, the *Cooley* article accepted this premise by limiting its time frame to cases that were actually disposed of after the 1972 *Furman* decision. The mistake in *Cooley*, however, was in not further limiting the time frame to defendants sentenced to death after their state enacted the appropriate post-1972, post-*Furman* "guided discretion" statutes.<sup>142</sup>

In addition, the United States Supreme Court has from time to time invalidated other state death-penalty statutes or issued rulings that would have affected the penalty procedures in various states. To the extent that those changes affected the eligibility for or selection of the penalty, it is inappropriate to include inmates who may not have had the benefit of those procedures.<sup>143</sup>

### ***The Concept of "Actual Innocence"***

To analyze the DPIC List, it is necessary to distinguish between the concepts of "actual innocence" and "legal innocence." The former is when the defendant is simply the "wrong person," not the actual perpetrator of the crime or otherwise culpable for the crime. The latter form of innocence means that the defendant cannot be legally be convicted of the crime, even if that person was the actual perpetrator or somehow culpable for the offense.

The United States Supreme Court and appellate courts have discussed the concept of "actual innocence." "Actual innocence means factual innocence, not mere legal insufficiency."<sup>144</sup> "Actual innocence" does not include claims based on intoxication or self-defense.<sup>145</sup> Proof of "actual innocence" also involves considering relevant evidence of guilt that was either excluded or unavailable at trial.<sup>146</sup> At a minimum, any showing of actual innocence would have to be "extraordinarily high" or "truly persuasive."<sup>147</sup>

Although the DPIC and the *Cooley* article purported to limit their lists of the "innocent" to defendants who were "actually innocent," not just "legally innocent," the available information from the case material and media accounts they rely upon indicate that many defendants on the List were not "actually innocent." These are not cases in which it can be concluded that the prosecution charged the "wrong person."

As noted, the DPIC currently limits the cases on the List to those in which a prisoner has been acquitted on retrial or charges have been formally dismissed. However, the DPIC List also includes other cases in which the conviction was reversed because of legally insufficient

evidence or because the prisoner ultimately pled to a lesser charge. As will be shown, inserting these cases on the List is misleading in terms of assessing whether truly innocent defendants have been convicted and sentenced to death. In actuality, the DPIC List includes a number of “false exonerations.”

To begin with, defendants are only convicted if a jury or court finds them guilty of murder “beyond a reasonable doubt.” Implicit in the “reasonable doubt” standard, of course, is that a conviction does not require “absolute certainty” as to guilt. Equally implicit, however, is that many guilty defendants will be acquitted, rather than convicted, because the proof does not eliminate all “reasonable doubt.”<sup>148</sup>

An acquittal because the prosecution has not proven guilt beyond a reasonable doubt does not mean that the defendant did not actually commit the crime.<sup>149</sup> Even an acquittal based on self-defense does no more than demonstrate the jury's determination that there was a reasonable doubt about guilt, not that the defendant was actually innocent.<sup>150</sup> A jury must acquit “someone who is probably guilty but whose guilt is not established beyond a reasonable doubt.”<sup>151</sup> An acquittal means that the defendant is “legally innocent” but not necessarily “actually innocent.” “Defendants are acquitted for many reasons, the least likely being innocence. A defendant may be acquitted even though almost every member of the jury is satisfied of his or her guilt if even one juror harbors a lingering doubt. A defendant may be acquitted if critical evidence of his or her guilt is inadmissible because the police violated the Constitution in obtaining the evidence by unlawful search or coercive interrogation ... More remarkable is the spectacle of jury acquittal because the jury sympathizes with the defendant even though guilt clearly has been proven by the evidence according to the law set forth in the judge's instructions.” Schwartz, “*Innocence*” – *A Dialogue with Professor Sundby*.<sup>152</sup> As the authors of *Stanford, In Spite of Innocence*, and *Cooley* agree, reversals, acquittals on retrial, and prosecutorial decisions not to retry cases are not conclusive evidence of innocence.<sup>153</sup>

Modern examples of this distinction between acquittal and innocence (or between “actual” and “legal” innocence) include O.J. Simpson who was acquitted of criminal charges, but was later found responsible for his wife's and Ron Goldman's deaths in a civil proceeding in which it was only necessary to prove his responsibility by a preponderance of the evidence. Or, to cite another recent example, the acquittal of the police officers in the Rodney King beating case obviously did not establish their “actual innocence” given their subsequent conviction in federal court for violating King's constitutional rights. Or, as an Ohio jury just demonstrated in a civil case, Dr. Sam Sheppard's acquittal in the 1960s for murdering his wife did not mean he was actually innocent.<sup>154</sup> The DPIC itself removed one case from its List when that supposedly innocent defendant, Clarence Smith, was convicted in federal court of charges that included the murder for which he had been acquitted in the Louisiana state court.

No matter how overwhelming the evidence of a defendant's guilt, the prosecution cannot appeal if a jury finds the defendant “not guilty.” Nor may the prosecution retry an acquitted defendant.<sup>155</sup> Due to the Double Jeopardy Clause, the prosecutor does not get a “second chance” to improve his or her evidence or present newly discovered evidence of guilt. The defendant, no matter how guilty, goes free. The defendant is “legally innocent” but not “actually innocent.”

Similarly, if an appeals court reverses a conviction because the evidence of guilt was legally insufficient to prove guilt beyond a reasonable doubt, then the state cannot retry the defendant under the Double Jeopardy Clause.<sup>156</sup> However, the judges cannot reverse or uphold convictions because they personally believe the convicted defendant is guilty or innocent. Ordinarily, the judges cannot substitute their opinion for the jury's guilty verdict. They cannot second-guess how the jury resolved conflicts in the evidence or the inferences the jury drew from the evidence.<sup>157, 158</sup>

Rather, when an appellate court finds that the evidence was legally insufficient, it is only finding as a matter of law, not fact, that the prosecution did not present enough evidence to prove guilt beyond a reasonable doubt, i.e., the evidence of guilt was not sufficient as a matter of law for a reasonable juror to find the defendant guilty beyond a reasonable doubt.<sup>159</sup> Courts will frequently be compelled legally to reverse these cases, even if the evidence signals strongly that the defendant is guilty. The defendant is “legally innocent” but not “actually innocent.”

As will be noted in the discussions of some of the various cases on the DPIC List, some individual states themselves have their own unique and more demanding standards for sufficiency of evidence or double jeopardy. Accordingly, a reversal in one state is not representative of the potential disposition of the case under the United States Constitution or other states' laws. In other words, a prisoner may have had his or her case reversed for insufficient evidence in one state when that conviction might have been upheld in federal court or another state.<sup>160</sup>

Thus, the “reasonable doubt” standard represents the determination that the prosecution will pay the price if the evidence is insufficient and that any errors in fact-finding in criminal cases will be in favor of the defendant, i.e., that the guilty will be acquitted because of insufficient proof.<sup>161</sup> Indeed, evidence of guilt is frequently excluded and never presented to the jury if the prosecution or police have violated the defendant's constitutional rights in obtaining that evidence – even if the evidence proves the defendant's guilt.<sup>162</sup>

For instance, a technical violation of the rights under *Miranda v. Arizona* may lead to the exclusion of powerful evidence of guilt such as a defendant's confession or other damaging statements.<sup>163</sup> If evidence is seized from the defendant in violation of the Fourth Amendment's rule against unreasonable searches and seizures, the evidence that was taken will not be presented to the jury even if that evidence demonstrates the defendant's guilt. As a result, the jury may be deprived of sufficient convincing evidence of guilt even though the defendant is undoubtedly guilty, or the prosecution may no longer have sufficient evidence to try the defendant.<sup>164</sup>

Finally, a prosecutor's decision whether to retry a case that has resulted in a “hung jury” or has been reversed on appeal (for reasons other than lack of sufficient evidence) is not necessarily motivated by a prosecutor's personal belief that a defendant is guilty or innocent. Prosecutorial discretion is an integral part of the criminal-justice system. The decision not to retry is not ipso facto a concession that the defendant is actually innocent. Rather, it frequently represents the prosecutor's professional judgment that there is simply not enough evidence to persuade an

entire jury that the defendant is guilty beyond a reasonable doubt, or that for some other reason, such as the defendant is now serving time for other convictions, further prosecution is not appropriate. If an earlier trial has ended in a mistrial because the jury could not unanimously agree on guilt or innocence, the prosecutor may simply conclude as a practical matter that the evidence is insufficient to persuade a jury of guilt beyond a reasonable doubt.

Local prosecutors have discretion to decide whether to seek the death penalty. That discretion is motivated by such factors as the strength of the case, the likelihood of conviction, witness and evidence problems, potential legal issues, the character of the defendant, the case's value as a deterrent to future crime, and the government's overall law-enforcement priorities.<sup>165</sup> Prosecutors have the discretion to decline to charge the defendant, to offer a plea bargain, or to decline to seek the death penalty in any particular case.<sup>166</sup>

As stated in *McCleskey*, “Numerous legitimate factors may influence the outcome of a trial and a defendant’s ultimate sentence, even though they may be irrelevant to his actual guilt. If sufficient evidence to link a suspect to a crime cannot be found, he will not be charged. The capability of the responsible law enforcement agency can vary widely. Also, the strength of the available evidence remains a variable throughout the criminal justice process and may influence a prosecutor’s decision to offer a plea bargain or go to trial. Witness availability, credibility, and memory also influence the results of prosecutions.”<sup>167</sup> And as even the authors of the *Stanford* study concede, “[p]rosecutors sometimes fail to retry the defendant after a reversal not because of doubt about the accused’s guilt, much less because of belief that the defendant is innocent or that the defendant is not guilty ‘beyond a reasonable doubt,’ but for reasons wholly unrelated to guilt or innocence.”<sup>168</sup> When a conviction is reversed, this discretion will also be affected by the toll that the passage of time has taken on the witnesses and the evidence.<sup>169</sup>

### **Cases on DPIC List: Actually Innocent or Falsely Exonerated?**

After examination of the DPIC List and available supporting materials including appellate opinions, newspaper reports, and academic articles, it is submitted that the following 68 defendants should be stricken from the current DPIC List of 102 allegedly innocent defendants “freed from Death Row.”<sup>170</sup> The DPIC List fails to take into account many of the factors mentioned above that may lead to an acquittal or a prosecutorial decision not to retry a case even though a defendant is not actually innocent. As a result, it includes defendants whose guilt is debatable to say the least and whom it is hard to believe that a majority of neutral observers would conclude were innocent. The List also includes cases that should not be considered in terms of assessing the overall effectiveness of today’s post-1972 death-penalty procedures in reliably and accurately imposing the ultimate punishment on defendants who legitimately deserve that sanction, procedures that “probably reduce the likelihood of executing the innocent.”

The DPIC List identifies three allegedly innocent Death Row inmates released in California. But an examination of the record and information about those three cases demonstrates that none of them are examples of cases in which the wrong person was prosecuted for the crime. Indeed, the record of two of the cases (Croy and Bigelow) establishes indisputably that the two defendants were either actual perpetrators or accomplices. In the case of the third defendant (Jones), the

available evidence still points to his guilt, but the prosecution concluded that it was unable to marshal enough evidence at retrial to prove guilt beyond a reasonable doubt. A closer examination of these cases follows.

For ease of cross-referencing, the cases that should be omitted from the DPIC List are discussed below in the same numerical order as they currently appear on the DPIC's website. Only California cases are discussed here; for analysis of the non-California cases, see *Appendix B*.<sup>171</sup>

- 34. **Jerry Bigelow** – *Bigelow v. Superior Court (People)*, 204 Cal.App.3d 1127 (1988). Bigelow’s conviction and death sentence were reversed for reasons unrelated to his guilt. On retrial, the jury convicted Bigelow of robbery and kidnapping. The jury also found true that the murder occurred while Bigelow was committing or was an accomplice in the robbery and kidnapping of the victim. In short, the jury found true beyond a reasonable doubt all the facts necessary to convict Bigelow of first-degree felony murder under California law. Nonetheless, the jury did not actually convict Bigelow of the separate charge of first-degree murder. The trial judge made the mistake of excusing the jury without clarifying its inconsistent verdict. Therefore, under California law, the verdicts had to be entered, and Bigelow was not eligible for the death penalty. But rather than establishing that Bigelow was innocent, the jury’s verdicts still indicated that the jury totally rejected Bigelow’s defense and found that he was at least an accomplice to the murder. An inconsistent verdict, such as Bigelow’s, is not an exoneration. “Inconsistent verdicts” are often a product of jury leniency rather than a belief in innocence. Even so, the prosecution cannot appeal an inconsistent verdict.<sup>172</sup> As noted, the jury's verdict also indicates that, at a minimum, it believed that Bigelow was an accomplice to the murder. Originally, this factual distinction between actual perpetrator and accomplice was not considered proof of “actual innocence.”<sup>173</sup>
- 45. **Patrick Croy** – *People v. Croy*, 41 Cal.3d 1 (Cal. 1986). Croy was convicted of murdering a police officer in Yreka, California. The California Supreme Court reversed Croy’s murder conviction for instructional error, but it affirmed his conviction for conspiracy to commit murder. His defense was intoxication. Yet, on retrial, Croy claimed self-defense and was acquitted of murder. Thus, Croy was not “actually innocent” in the sense of being the wrong person.

There was no dispute Croy killed the police officer. But he was acquitted on the basis of a controversial and legally questionable cultural defense based on his Native American heritage, i.e., that his background as a Native American led him to *reasonably fear that the police officer intended to kill him*.<sup>174</sup>

By contrast (and inconsistently), at his first trial, Croy did not claim self-defense. Instead, he relied on an extensive intoxication defense and testified that he initially “became concerned when he saw the police because he was on probation and was afraid that he would be arrested for being drunk.” He also claimed “he was startled when [the police officer/victim] appeared as he was trying to find safety in his grandmother’s cabin, and that if he shot [the victim] he did not intend to.”<sup>175</sup> The defenses Croy used at his

first and second trials were inconsistent with each other.

Croy's testimony at his second trial was not all that impressive either. While he testified emotionally that he believed the police "were going to kill us all," other parts of his testimony sounded like a "prepared statement," and he was forced to admit that he had consumed an "impressive amount of liquor and marijuana" during the fateful weekend he confronted the police. Croy admitted lying at his first trial but explained that he lied because he did not believe he could win and he wanted to protect his friends. "All in all, Croy's performance was neither as commanding as [his attorney] hoped it would be, nor as damaging as the prosecution tried to make it. As the long trial drew to a close ... it seemed that victory ... would depend less on [Croy's] courtroom 'vibrations' than on the [defense] attorney to indict Yreka as a racist community."

Croy's second trial was depicted as a political trial, not a trial about guilt or innocence. "What made ... Croy worthy in his attorney's mind was not so much his innocence as his symbolic value as an aggrieved Indian [sic] ...."<sup>176</sup> More significantly, neither defense at Croy's two trials established that Croy was "actually innocent" or the "wrong person."

- 70. **Troy Lee Jones** – *In re Jones*, 13 Cal.4th 552 (1996); *People v. Jones*, 13 Cal.4th 535 (1996). The conviction was vacated because of ineffective assistance of counsel. The California Supreme Court held that while the evidence of Jones's guilt was not overwhelming, it still suggested Jones's guilt. Jones was convicted of murdering Carolyn Grayson in order to prevent Grayson from implicating him in the murder of an elderly woman, Janet Benner.

Grayson had told Jones's brother Marlow that she had seen Jones strangle the old lady. Grayson had told her daughter Sauda that Jones killed Ms. Benner. Jones's sister overheard a conversation between Jones and his mother in which Jones arguably regretted not killing Grayson when he killed Benner. The same sister also testified to Jones's involvement in a family plot to murder Grayson. Although there was also evidence that Jones was ambivalent about killing Grayson, there was more testimony that Grayson's neighbor witnessed a violent altercation between Grayson and Jones in which she assured him that she would not say anything and he continued to threaten to kill her. Grayson's body was later found in a field the day after she had reportedly left with Jones for Oakland. At best, Jones only had evidence to contradict the inferences suggesting his guilt.

To sum up: "[T]he prosecution introduced ... evidence that [Jones] was observed attacking Carolyn Grayson with a tire iron a few weeks before she was fatally shot, [Jones] and his family engaged in a plot to fatally poison Grayson, [Jones] confided to his brother that he had to kill Grayson or she would send him to the gas chamber, [Jones] informed his brother of the need to establish an alibi for the evening Grayson was murdered, and Grayson's daughter, Sauda, testified that, on the night of Grayson's death, Grayson told her daughter that she was going out with [Jones]."<sup>177</sup> While it was also true that this evidence had been subject to some varying accounts and biases, the evidence

came from several different sources and it can hardly be said that Jones has been shown to be “actually innocent.”

The prosecution did not choose to drop charges because Jones was innocent. Rather, due to the passage of time, it no longer had the evidence and witnesses available to retry the case.<sup>178</sup>

### ***United States v. Quinones***

On July 1, 2002, in the case of *United States v. Quinones* [hereinafter *Quinones*], the United States District Court for the Southern District of New York declared that the Federal Death Penalty Act unconstitutional.<sup>179</sup> The federal court based its decision in part on the DPIC List. The federal court itself analyzed the List and applied undefined “conservative criteria” to conclude that 40 defendants on the List were released on grounds indicating “factual innocence.” But 23 of the names on the *Quinones* list are names that this study submits should be eliminated from the DPIC List. If the *Quinones* court’s analysis of the DPIC List is combined with this critique’s analysis, only 17 defendants should be on the List, not the 102 defendants currently listed.

### **DPIC Implications and Result**

The DPIC engaged in a “rush to judgment” to compile a list of allegedly innocent defendants released from Death Row. It is tragic whenever an innocent person is convicted and sentenced to death. Obviously, it is a very serious charge to claim that 102 innocent defendants have suffered such an unjust fate. While recent developments such as DNA have revealed “wrongful convictions,” the evidence does not support other claims of such miscarriages under our current capital-punishment system.

In compiling its List, the DPIC has too often relied on inexact standards such as acquittals on retrial, dismissals by the prosecution, and reversals for legal insufficiency of evidence to exonerate released Death Row inmates. However, there is a big difference between “reasonable doubt” and the kind of “wrong-person” mistake that was the genesis of the original *Stanford* study. Moreover, the DPIC has used old cases in which the defendants did not receive the modern protections that “probably reduce the likelihood of executing the innocent.”

No reasonable person would be so dishonest as to say that no actually innocent person has ever been convicted and sentenced to death. Recently, the Second Circuit Court of Appeals in *United States v. Quinones* [hereinafter *Quinones II*], reversing *Quinones*, reiterated what should be a truism: “But the argument that innocent people may be executed – in small or large numbers – is not new; it has been central to the centuries-old debate over both the wisdom and constitutionality of capital punishment ....”<sup>180</sup>

The system has always anticipated potential factual error and has provided remedies for wrongly convicted defendants – which is why there is a more elaborate post-*Furman* trial process, an appellate process, state and federal habeas corpus processes, and clemency. The development in DNA technology is now giving birth to new postconviction procedures in many of the states designed to give inmates the opportunity to have DNA testing that was not available at the time of their trials. Moreover, our open society promotes ongoing inquiry and investigation into

legitimate claims of injustice.

However, it is irresponsible to misrepresent the extent and dimensions of this phenomenon. “It is important to preserve the distinction between acquittal and innocence, which is regularly obfuscated in news media headlines. When acquittal is interpreted as a finding of innocence, the public is led to believe that a guiltless person has been prosecuted for political or corrupt reasons.”<sup>181</sup> The DPIC’s gimmicky and superficial List falsely inflates the problem of wrongful convictions in order to skew the public’s opinion about capital punishment.

The *Cooley* article includes the dramatic, but meaningless, statistical conclusion that “one Death Row inmate is released because of innocence for every five inmates executed.”<sup>182</sup> Of course, comparing an execution rate with a “sentenced to death” rate is mixing apples and oranges because there is no claim that any innocent defendants have actually been executed – being sentenced to death is not the same as then being executed. Yet, the recent book by Barry Scheck and Peter Neufeld, *Actual Innocence* (2000), updated this hysterical ratio to assert that one innocent inmate is being released for every seven inmates executed. This contrived “statistic” has even made its way to the Senate floor.<sup>183</sup> The “wide use” of this dubious “new measure for evaluating the accuracy of the death penalty” is cited as one of the events most responsible for “igniting the current capital punishment debate.”<sup>184</sup>

Of course, the valid comparison is between the total number of death sentences and the number of innocent Death Row inmates actually released from Death Row. The most recent available statistics reveal that 7,096 death sentences were imposed between 1973 and 2001.<sup>185</sup> Thus, even under the DPIC’s own questionable estimate that 102 innocent defendants have been sentenced to death – only 1.4 percent of the inmates sentenced to death were released because of innocence. Needless to say, given the analysis in this paper, the DPIC’s estimate of 102 innocent inmates is artificially inflated. If the 68 cases analyzed in this paper are removed from the DPIC List, then the most that can be said is that between 1973 and 2001, there were 34 wrongly convicted defendants, i.e., less than one-half of one percent or 0.4 percent of the inmates sentenced to death were actually innocent.

The analysis of the federal court opinion in *Quinones* yields similar results. As noted, that decision held that 40 names on the DPIC List were released for reasons indicating “actual innocence.” This would mean that approximately one-half of one percent of the 7,096 inmates sentenced to death between 1973 and 2001 were “actually innocent.” When the *Quinones* analysis and this critique are combined to remove all but 17 names from the List, the result is that 0.2 percent of the 7,096 prisoners were released on actual-innocence grounds.

The significance of these figures may be appreciated when contrasted with the aforementioned hyperbolic ratio used by the authors of the *Cooley* study and echoed in *Actual Innocence* and in the halls of Congress that fallaciously compare executions and exonerations. That 7:1 ratio is a nonsensical public-relations statistic that creates the misimpression of an epidemic of wrongful convictions. The facts actually show that for every 7,096 death sentences imposed, 102 innocent defendants were sentenced to death, or more likely it is that for every 7,096 death sentences imposed, only 40 or 34 or 17 innocent defendants have been sentenced to death. In other words,

the relative number of innocent defendants sentenced to death appears to be infinitesimal.

The public may or may not take comfort from these estimates. The microscopic percentage of defendants who may have been wrongly convicted and sentenced to death can be considered a testament to the accuracy and reliability of our modern capital-punishment system in filtering out and punishing the actual perpetrators of our most heinous crimes. The United States Supreme Court continues to monitor and modify this system.

But if a person believes that the death penalty should be abolished if any risk at all exists that an innocent person could be sentenced to death, then that person is justified in advocating the abolition of capital punishment. No criminal-justice system can promise that kind of foolproof perfection – although the minute number of cases in which an innocent person may have been sentenced to death in this country approaches that absolute standard.

The inherent risk, however, of sentencing an innocent person to death and the still unrealized possibility that an innocent person may actually be executed cannot be considered in isolation. Counterbalancing the concern that even one innocent person may be executed is the question of whether the death penalty saves innocent lives by deterring potential murderers.<sup>186</sup> As explained in a separate section of this paper, various academic and statistical reports have been published that examine the effect of capital punishment during this modern, post-*Furman* period of death-penalty jurisprudence. Anecdotal evidence and recidivist conduct also support the commonsense intuitive belief that capital punishment does deter the murder of innocents.<sup>187</sup> Inevitably (and properly), the debate over deterrence and the validity of these new studies will continue.<sup>188</sup>

Under any analysis, innocent lives are at stake. On the one hand, there is the remote prospect that an innocent person may be executed despite the most elaborate, protracted, and sympathetic legal-review procedures in the world. On the other, there is the possibility of innocent people horribly and brutally murdered in the streets and in their homes with no legal-review process at all. When weighing these choices, the public deserves information that places the innocence question in proper perspective. The DPIC List of allegedly innocent defendants released from Death Row fails to provide that legitimate perspective.

### **Postscript: Actually Guilty**

Recent international interest has focused on the case of James Hanratty, one of the last murderers to be executed in England. Hanratty was hanged in 1962 for the notorious “A6 Murder.” He was convicted of murdering Michael Gregsten and also raping and shooting Gregsten’s girlfriend, Valerie Storie. Despite some alleged confusion about Storie’s identification of him as the perpetrator, Hanratty was convicted after the longest murder trial in English history. After Hanratty was hanged, another man confessed to the murder but then recanted the confession. Hanratty’s case became a *cause celebre* and was part of the final impetus leading to the abolition of the death penalty in England in 1969.<sup>189</sup> The late Beatle John Lennon mourned Hanratty as a victim of “class war.” But the continuing efforts of Hanratty’s supporters to “clear” his name have now come to naught. DNA evidence from Ms. Storie’s underpants established Hanratty’s guilt and eliminated the other alleged perpetrator who had “confessed” after Hanratty’s execution. In dismissing the Hanratty family’s case, the English court graciously “commend[ed]

the Hanratty family for the manner in which they have logically but mistakenly pursued their long campaign to establish James Hanratty's innocence."<sup>190</sup> Since the abolition of the death penalty, the rate of unlawful killings in Britain has soared.<sup>191</sup> "All of us who regret the transformation of our country from a 'relative oasis in violent world' to a society where crimes like the A6 murder are almost daily occurrences, are surely entitled to an apology."<sup>192</sup>

## **"ERROR RATE" STUDY IS RIDDLED WITH ERRORS OF ITS OWN**

Much attention has been given to a pair of reports by opponents of capital punishment claiming to show that the system of capital trials is "broken" because of the large number of verdicts reversed on appeal. The first study was released June 12, 2000, and received widespread criticism as not supporting its conclusions, stating its data in misleading ways, and, in some respects, simply dishonest.<sup>193</sup> That report is often called the "Liebman Report" after its lead author, Columbia Law School Professor James Liebman, a long-time opponent of capital punishment.

The fact that a large percentage of capital verdicts are overturned is not news. The controversy is, and has been for many years, whether that number reflects problems in the system for trying capital cases, as the anti-death-penalty group contends, or whether it constitutes obstruction of valid, deserved sentences, as death-penalty supporters have long contended.

The second study, released February 11, 2002<sup>194</sup>, builds an elaborate structure of statistical analyses atop the same foundation of false assumptions and misleading characterizations. Below is a guide to the flaws apparent on the face of the report. A distinct issue is whether the data on which the report is based are valid. Because of the very large volume of data, a substantial effort will be needed to determine that.

### **Ignoring Erroneous Reversals**

One of the largest, ongoing problems in capital litigation is the erroneous overturning of valid sentences. The U.S. Court of Appeals for the Ninth Circuit, with jurisdiction over nine western states, has been particularly notorious in this regard.<sup>195</sup> A 1995 study by the Criminal Justice Legal Foundation looked at cases where that court overturned sentences based on disagreement with state courts on an issue of capital-sentencing law and where the U.S. Supreme Court subsequently resolved the disagreement. Only on one issue out of a dozen did the Supreme Court find the Ninth Circuit's decision to be correct under the law as it existed at the time.<sup>196</sup> On one other issue, the Supreme Court itself has been inconsistent.<sup>197</sup> On *all* of the other issues, the state court was right, and the Ninth Circuit wrongly overturned a correct judgment.

The problem continues in more recent cases. For example, in 1982, Charles McDowell broke into a home, attempted to rape Paula Rodriguez, the housecleaner, and then stabbed her to death. He then slashed the throat of a neighbor, Theodore Sum, who had come to help. Mr. Sum survived and identified McDowell, whom he previously knew. There is no doubt of guilt. When the jury asked a question about how to proceed, the trial judge answered by directing them to the instruction that correctly answered their question. The California Supreme Court held that this response was appropriate.<sup>198</sup> So did the federal district judge and a majority of the original Ninth

Circuit panel.<sup>199</sup> But a majority of an 11-judge panel of the Ninth Circuit simply disagreed with all three of the courts to consider the case before it and overturned the sentence, and the U.S. Supreme Court denied review.<sup>200</sup> In a later case from Virginia, presenting the same situation, the high court confirmed that this manner of response to a jury question is correct.<sup>201</sup> The California state court had been right in *McDowell*, and the federal court of appeals was wrong. But it was too late. McDowell's case had been sent back for resentencing. He has been resentenced to death, and the cycle begins again, even though his original sentence was entirely proper.

The report simply ignores this problem. It counts as “serious error” every finding causing reversal of a conviction or sentence.<sup>202</sup> There is no indication that any attempt has been made to distinguish valid from erroneous reversals. On the contrary, the report looks at the low rate of reversals in California state courts and the large number of these cases subsequently overturned by the Ninth Circuit and concludes the federal court is making up for “lax” review by the state court.<sup>203</sup>

The Ninth Circuit is the one court in the nation most often reversed by the Supreme Court, and the obvious alternative explanation is that the Ninth is wrongly overturning correct judgments. The report fails to even consider this highly plausible alternative hypothesis.

### **Constantly Changing Rules**

In legal jargon, a judgment may be deemed in “error” or even “plain error” if it is contrary to the rules as they exist at the time of the appeal, even if it was perfectly valid under the rules in effect at the time it was rendered.<sup>204</sup> For more than 25 years, the Supreme Court and other courts have continually tinkered with the rules for capital sentencing, and all of the changes apply retroactively to all cases still pending on the first round of appeals. Justice Scalia aptly called this the high court's “annually improvised” jurisprudence.<sup>205</sup> Here are a couple of examples. In a trial conducted in 1976, a court instructs a jury in accordance with a statute the Supreme Court has just upheld as valid,<sup>206</sup> but 11 years later that instruction is declared constitutional “error.”<sup>207</sup> Another court uses a standard instruction and verdict form telling jurors they must deliberate and agree on the circumstances to be weighed in reaching their verdict, in complete accord with the long-standing American tradition of jury decision-making. Years later, out of the blue sky, that instruction and form are declared invalid, and all of the cases that used it are suddenly in “error” and must be retried.<sup>208</sup> If the instruction was used in most or all of the capital cases in a state, wholesale reversals will follow.

These “errors” do not indicate anything at all wrong in the trial court, and their existence should not undermine public confidence in capital trials in the slightest. Yet the vast majority of them are included in the study's definition of “serious error.” The new study indicates that it excludes the cases where the Supreme Court has declared a state's entire system unconstitutional,<sup>209</sup> but there were no such decisions throughout most of the study period. Far more common is a decision throwing out a standard instruction, form, or practice that had previously been considered valid.

The report decries the waste and delay that are caused when so many judgments are reversed<sup>210</sup> – and supporters of capital punishment wholeheartedly agree. But nothing we can do at the trial

level will prevent reversals of this type. The only answer is for the reviewing courts, and especially the Supreme Court, to stop inventing new restrictions. Whatever the intrinsic merit of these rules may be, the turmoil of the change exacts an enormous cost.

### **Blurring Guilt and Punishment**

Several commentators criticized the first report for glossing over the distinction between the determination of guilt of murder and the determination that the particular murderer ought to be sentenced to death.<sup>211</sup> Most people would agree that the execution, or for that matter the imprisonment, of an innocent person is of far greater concern than the execution of any person who is actually guilty of murder. The question of greatest concern is the degree to which the system risks executing a person who neither killed the victim nor was a party to the killing. The “abuse excuse,” rules excluding valid evidence because of how it was obtained, and compliance with the Supreme Court’s Byzantine code of sentencing procedure are all matters of much lesser moment.

On the question of guilt versus penalty, the report does not tell us much. For the most part, it lumps guilt and sentence reversals together. In the statistical analyses, reversals are not broken out by guilt and sentence. For “actual innocence” cases, the report simply relies on the discredited DPIC List, which is addressed in another section of this paper. The report does indicate that nine percent of the cases sent back for retrial of the guilt verdict ended in acquittals.<sup>212</sup> That is, these cases are retried, typically a decade or more after the fact, when memories have faded and witnesses may no longer be available. In some cases evidence used the first time is suppressed for reasons unrelated to its reliability, such as the *Miranda* rule. In a small percentage of these cases, the jury decides that guilt has not been proven to the exacting standard of “beyond a reasonable doubt.” Our trial system is intentionally stacked in the defendant’s favor in many ways, including the burden of proof and the fact that the prosecution cannot appeal trial errors. Many guilty people are acquitted as a result, and a handful of acquittals among the retrials would be expected even if 100 percent were actually guilty. The fact that the acquittal rate on retrial is so low serves to reinforce confidence in the system, not undermine it.

### **Reliability Versus Technicalities**

In an effort to convince its audience that all reversals go to reliability of the verdict, rather than “technicalities,” the report employs a misleading half-truth. It states, “As far as our data show, however, courts *never* reverse capital verdicts based on technical error freeing demonstrated perpetrators of serious crimes....”<sup>213</sup> The support for this striking statement is an absence of reversals based on the rule excluding evidence on search and seizure grounds.<sup>214</sup> However, the data showing no such reversals are limited to collateral review, not direct appeal,<sup>215</sup> and direct appeals are four-fifths of the total reversals.<sup>216</sup> Readers of the report who do not work in this field would not know that direct appeal is the stage of the review process where such claims are considered, to the nearly complete exclusion of the other stages. The Supreme Court virtually banned such claims from federal habeas just four days after it approved the reinstatement of capital punishment.<sup>217</sup> These claims are also not usually considered in state collateral review, either because of similarly categorical rules<sup>218</sup> or on the general principle that claims that can be made on the appellate record must be raised on appeal or else are defaulted. The absence of

exclusionary-rule reversals on collateral review thus reflects primarily the structure of the review system and says little or nothing about the proposition it is offered to support: a supposed general reluctance of courts to overturn convictions on “technical error.”

### **Skewed Sampling**

A major theme of the first report was to convince the public that incompetent lawyers for capital defendants and suppression of exculpatory evidence were the main problems. To this end, Columbia Law School put out a press release announcing the study with this statement:

The study found that the errors that lead courts to overturn capital sentences are not mere technicalities. The three most common errors are: (1) egregiously incompetent defense lawyers (37%); (2) prosecutorial misconduct, often the suppression of evidence of innocence (19%); and (3) faulty instructions to the jurors (20%). Combined these three constitute 76% of all error in capital punishment proceedings.<sup>219</sup>

This statement is false. Those percentages are not percentages of the total, but only of a narrow segment of cases – those overturned in “state post-conviction” review<sup>220</sup> – which is the particular stage of the review process particularly geared to claims of ineffective assistance and nondisclosure of evidence. Analogously, if a researcher stations an observer in the tire shop of an auto center, he or she will observe that most of the cars repaired there have tire problems. That observation, while true, means nothing.

The new study continues the effort to exaggerate the number of cases of defense lawyers deemed ineffective by the Monday-morning quarterbacks and of prosecutors who failed, often inadvertently, to turn over a piece of evidence that in hindsight might have made a difference. The mechanism, again, is the skewed sample. This time the sample is extended to include federal as well as state habeas corpus review,<sup>221</sup> but the result is largely the same. Cases on direct appeal are still excluded from the analysis of the reasons for reversal, even though that is where 79 percent of the reversals occur.<sup>222</sup> Direct appeal is, not coincidentally, also the stage of the review process where reversals for “mere technicalities” most often occur. It is not hard to get the results one wants if one can exclude the four-fifths of the cases where the contrary data points are most likely to be found.

The explanation offered by the study for this nonrepresentative sample is that state and federal habeas corpus cases were selected because that is where data were “available.”<sup>223</sup> That assertion is not credible. Direct appeal is far and away the easiest segment of the process to track. Capital cases in most states are appealed directly to the state’s highest court, which typically publishes a relatively high proportion of its opinions.<sup>224</sup> Cases on state or federal habeas corpus, by contrast, tend to be dispersed among multiple courts, and the petitions are far more likely to be disposed of without published opinions, or even without any opinions at all. If limited resources and the large number of direct appeal cases are the problem,<sup>225</sup> the proper solution is a carefully controlled representative sample drawn from the larger population. The selection of a skewed sample has no apparent legitimate justification.

From the standpoint of making public policy, this study tells us very little of value. It is based on

assumptions that are either false or that assume one alternative without considering others with different policy implications.

## **DETERRENCE: RISK THE LIVES OF THE INNOCENT TO SAVE THE GUILTY?**

*I remember well in the 1960s when I was sentencing a woman convicted of robbery in the first degree and I remember looking at her commitment sheet and I saw that she carried a weapon that was unloaded into a grocery store robbery. I asked her the question: “Why was your gun unloaded?” She said to me: “So I would not panic, kill somebody, and get the death penalty.” That was firsthand testimony directly to me that the death penalty in place in California in the sixties was in fact a deterrent. — Senator Dianne Feinstein<sup>226</sup>*

Despite experience and common sense, it is an article of faith among opponents of capital punishment that the death penalty does not and cannot deter murders. “Scientific studies have consistently failed to demonstrate that executions deter people from committing crime,” says the Death Penalty Focus website,<sup>227</sup> in a typically sweeping statement. There are, to be sure, studies claiming to find no deterrent effect, but Death Penalty Focus’s assertion that the studies are consistent in that direction is simply false.

A recent study found evidence of a deterrent effect and noted that by itself this did not prove deterrence. “However, this study is but another on a growing list of empirical work that finds evidence consistent with the deterrence hypothesis. These studies as a whole provide robust evidence – evidence obtained from a variety of different models, data sets and methodologies that yield the same conclusion. It is the cumulative effect of these studies that causes any neutral observer pause.”<sup>228</sup>

As a general principle of human behavior, incentives matter. If the cost of engaging in an activity is increased, fewer people will engage in that activity. This principle is the basis of economics, and it applies to a wide variety of noneconomic behavior as well. In particular, it applies to the potential criminal’s decision to commit or not commit a contemplated crime, with many studies finding data consistent with an important deterrent effect of punishment.<sup>229</sup>

In the deterrence debate, however, capital-punishment opponents claim that murder is exempt from this general principle, and that a credible, enforced death penalty for murder would have no effect on the number of murders committed. Yet a former veteran County Public Defender recently said in part: “We’ve heard the death penalty is not a deterrent. Nonsense. Whole categories of criminals *are* deterred. Criminals often think of the consequences. It’s really that simple. Granted, many murders aren’t ‘death eligible.’ But witness killings, murder while ‘lying in wait,’ and killings in the course of listed felonies are. Let’s add a new one: *any first-degree murder by someone who has spent time in state prison* ... declare zero tolerance for killings; and ask the prosecutor to seek death in every legally appropriate case.”<sup>230</sup>

A few other opposition arguments are also easily diffused.

Opponents of capital punishment are fond of pointing out that the 12 states within the United States that do not have capital punishment tend to have lower homicide rates, as a group, than the 38 that do. This argument suffers from a failure to control for confounding variables. These states are different in ways other than capital punishment and homicide. They tend to have lower crimes rates generally. The argument quite probably gets the cause and effect backwards. The states in question already had lower homicide rates, for other reasons, when they decided that they could afford to do without capital punishment.<sup>231</sup> Those states with the greater crime problem have a greater need for strong remedial measures and therefore are more likely to have capital punishment.

A more relevant comparison is to examine how the states have changed in homicide rate relative to the national average in recent years, when there have been a significant number of executions, compared to the “moratorium” period of no executions.<sup>232</sup> The five states showing the greatest relative improvement for the years 1995-2000 compared to 1968-1976 are, in order, Georgia, South Carolina, Florida, Delaware, and Texas, all states actively using capital punishment. The District of Columbia is dead last, by a wide margin, with no capital punishment and a badly worsening murder rate.

Another argument is that most homicides are impulsive and therefore unlikely to be deterred. That would be an argument against imposing capital punishment for voluntary manslaughter or second-degree murder, but no one is proposing that we should. First-degree murder in California, as in most states, requires either premeditation or murder in commission another felony, typically rape or robbery.<sup>233</sup> The isolated, impulsive act, suddenly committed and immediately regretted, is not capital murder under current law.

A more sophisticated approach is to examine correlations between capital punishment and homicide with techniques that attempt to control for the other variables. This is an inexact science, at best. The other variables are numerous, and their effects are not precisely known. While total homicides are a fairly well-determined number, most homicides are not capital murder, so in a study of total homicide rate the deterrence of capital murders is diluted in a much larger number of noncapital murders that one would not expect to be deterred. Attempts have been made to look only at felony murder, but there are serious reliability problems with the input data.<sup>234</sup>

The difficulty of the task makes the diversity of the results understandable. When Texas effectively halted executions for about a year to resolve a legal issue affecting all its cases, researchers saw an opportunity to test the deterrence hypothesis. Sorensen, et al. found no support for deterrence,<sup>235</sup> while Cloninger and Marchesini found strong evidence of deterrence.<sup>236</sup> The studies used different techniques. The Sorensen study looked at Texas data alone, while the Cloninger study used differences between Texas and the country as a whole, noting that homicide rates were declining nationally throughout the period. The Cloninger study also examined a shorter time frame than the Sorensen study. If Cloninger and Marchesini are right, the one-year moratorium killed over 200 people.<sup>237</sup>

The two most recent studies have both indicated strong support for deterrence. As of this writing, these are both “working papers.” A sophisticated econometric analysis at Emory University estimated that each execution saves 18 innocent lives.<sup>238</sup> Another study at the University of Colorado estimated a lower but still very substantial 5 to 6 fewer homicides for each execution.<sup>239</sup> Even using the lowest of these figures, a national moratorium would kill hundreds of innocent people each year. As Stuart Taylor noted in response to the Emory study, “So those of us who lean against the death penalty must confront the very real possibility that abolishing it could lead to the violent deaths of unknown numbers of innocent men, women, and children.”<sup>240</sup>

Although the studies are mixed, there is a strong scientific foundation to confirm what common sense and general principles tell us: incentives matter. Those who contend that incentives do not matter in this one particular instance, contrary to everything we know about human behavior generally, have a heavy burden of proof, and they have not come close to carrying it. The call to abolish capital punishment is a call to sacrifice the lives of the innocent to save the lives of the guilty.

## **THE DEATH PENALTY IS NOT RACIALLY BIASED**

Of all the fallacies concerning the death penalty, the one argument about which there has been more misinformation is that there is a racial bias in its application.

Death-penalty opponents allege a virtual racial conspiracy in the imposition of the death penalty. Examples include Byron Stevenson, a capital-punishment opponent and an attorney with the Equal Justice Initiative in Alabama. He claims that the death penalty reflects the middle-class’s desire to strike out at the poor and racial minorities.<sup>241</sup> And Sister Helen Prejean (*Dead Man Walking*), a well-known and outspoken opponent of capital punishment in California and nationally, also throws her full support to the abolition of the death penalty, stating, “middle-class White ... are so much for the death penalty [to] ‘keep those dangerous people [the poor and minorities] in their place.’”<sup>242</sup>

The opposition’s primary argument regularly is this: Since Black Americans comprise 14 percent of California’s population and comprise about 34.5 percent of California’s Death Row, the system must be discriminatory. But to cite to a statistical disparity based on an immutable characteristic with nothing else is questionable. For example, women represent roughly 55 percent of California’s population, yet comprise only 1.9 percent of the Death Row population. Would anyone credibly argue, based on this disparity, that *gender* bias exists in the enforcement of the death penalty? Of course not.

A closer look at the real facts and real numbers, in addition to the many subsequent studies by separate authors and court decisions, should diffuse the myth of racial bias in the application of California’s death penalty.

According to the U.S. Department of Justice, of the 63 men and three women executed in 2001,

48 were White, 17 were Black, and one was American Indian. And of the 155 people sentenced to death in 2001, 89 were White, 61 were Black, four were Asian, and one was self-identified Hispanic. The Death Row population as of December 31, 2001 was 55 percent White, 43 percent Black, and 2 percent Indian, Asian, or other.<sup>243</sup> Though the focus of this paper is California, these national numbers are certainly noteworthy – and clearly representative of the fact that those who routinely denounce capital punishment as racially unjust are *misinformed*.

In California as of December 2001, the Death Row population (consisting of 607 people at the time) was 41.4 percent White, 34.6 percent Black, and 18.8 percent Hispanic. The remaining five percent were of unknown ethnicity or “other.”<sup>244</sup>

Not coincidentally, Los Angeles County has the largest population in California, and, as such, has condemned more defendants to death than any other county in the state (182 as of December 1, 2001). Among the 182 condemned inmates, 90 are Black – that is 42.9 percent of the total Death Row population in California comes from Los Angeles County. It is well known that Los Angeles County is “home territory” to a large number of Black street gangs, such as Crips, Bloods, and the like.<sup>245</sup> And, by their very nature, gang-member activities and prior criminal records frequently bring gang-related homicides within California’s capital-sentencing scheme.<sup>246</sup>

Significantly, if one were to remove Los Angeles County from the equation when studying the numbers or people on California’s Death Row, the total number would drop to 425 [using 2001 data of 607 total Death Row inmates]. After subtracting the 90 Black, 41 Hispanic, 40 White, and 11 “other” who comprise the population, the White population increases to 49.6 percent, the Black population drops to 28.8 percent, the Hispanic population drops to 17.1 percent, and the “other” population remains virtually the same, at 4.9 percent.

Throw into this mix the 10 people executed in California since the reinstatement of the death penalty: Eight were White; one was Black.<sup>247</sup> The Death Row population becomes 50.2 percent White; 27.8 percent Black. This example illustrates the extraordinary malleability of these statistics based on just a few isolated variables from one jurisdiction with a unique crime problem.

A thorough evaluation of the racial-bias subject was presented in *McCleskey v. Zant*, wherein the Federal District Court judge found that “the best models which Baldus [defense expert] was able to devise ... produce no statistically significant evidence that race [of the victim or defendant] plays a part in either [the prosecution’s or the jury’s capital] decisions.”<sup>248</sup> In 1985, the Eleventh Circuit Court of Appeals affirmed *McCleskey*, stating “viewed broadly, it would seem that the statistical evidence presented here ... confirms rather than condemns the [death penalty] system.”<sup>249</sup>

Doctors Stephen Klein and John Rolph found that “after accounting for some of the many factors that may influence penalty decisions, neither race of the defendant nor race of the victim appreciably improved prediction of who was sentenced to death.”<sup>250</sup> Smith College Professors Stanley Rothman and Stephen Powers additionally found that legal variables such as prior

criminal history and the aggravated nature of the murder are the proven basis for the imposition of the death penalty.<sup>251</sup>

Studies will always exist. Variables of class, race, and ethnicity will always be examined in connection with our criminal-justice system. And death-penalty supporters and critics will always debate interpretation and applicability of such. But one statistic is irrefutable: Since the reinstatement of the death penalty more than 25 years ago, 80 percent of the people executed in California were White.

## **DEATH PENALTY IS NOT TOO EXPENSIVE**

Critics of the death penalty frequently will cite to the expense of enforcing the law as a reason for its abolition. Indeed, costs often do increase when death is sought and imposed in qualifying cases. Some of these costs result from the extraordinary safeguards California imposes in death-penalty cases, such as appointment of two attorneys at trial and a special homicide defense fund. Other costs are a direct result of the inordinate delay in carrying out executions.

Whatever the cost, or its underlying cause, a fundamental question must be posed: what price justice? The criminal-justice system is not a commercial endeavor. It does not lend itself to a simplistic “cost/benefit” analysis. Nor should it. The right to a free attorney for an indigent criminal defendant comes at considerable public expense. So too does the use of juries. That the Legislature deems serious crimes such as kidnapping, rape, and armed robbery worthy of punishment in state prison also leads to far greater expense than if the punishment were akin to a traffic ticket. Nevertheless, no one would reasonably suggest eliminating these fundamental underpinnings of the criminal-justice system due to their attendant costs. Why then should the death penalty be analyzed any differently? With the passage of the Briggs initiative in 1978 reinstating the death penalty, the voters of California overwhelmingly demonstrated a desire to make certain heinous murders punishable by death. Since then, the Legislature and voters have time and again expressed their support for the death penalty with the creation of new special circumstances triggering the death penalty, such as murders by carjacking, drive-by shooting, or done in furtherance of a gang.

A substantial share of the costs associated with the death penalty are the protracted appeals and habeas challenges in both state and federal court. It is doubly frustrating to prosecutors that opponents of the death penalty succeed in delaying executions with often meritless litigation and then use the resulting costs of their obfuscation as further argument to abolish the law. But there is some reason for cautious optimism that the length of delay may shorten in years to come. Since the late 1980s, the United States Supreme Court has prohibited federal judges from accepting appeals from inmates claiming technical error in the vast majority of cases. Moreover, in 1996, President Clinton signed the Antiterrorism and Effective Death Penalty Act, which includes a significant streamlining of the federal appeals process, creating a “one bite at the apple” at mounting federal habeas challenges to a death sentence.

It is axiomatic that a reduction in the delay of enforcing the death penalty will result in a reduction in the costs of enforcing the law. Take for example a murderer sentenced at age 25 to

life without the possibility of parole. Assuming he lives until age 65, the costs of incarceration, calculated at the current fiscal-year's annual cost of \$26,690,<sup>252</sup> would total just over \$1 million. Now assume that instead the criminal was sentenced to death. Each incarcerated Death Row inmate also costs California this fiscal year \$26,690.<sup>253</sup> If 20 years elapsed until his execution, the cost of incarceration would be \$533,800. But if the time necessary to exhaust his legal appeals were reduced to 10 years – still a very long time to litigate whether the verdict was just – costs would be reduced to \$266,900. Moreover, with a streamlined appellate process, the legal expenses would likewise diminish dramatically.

Having observed the above, it nevertheless must be acknowledged that there is something inherently untoward in analyzing the death penalty in pure monetary terms. This discussion takes place only because opponents of the death penalty inject such considerations into the debate. The fact of the matter is that, more important than the costs of litigating death-penalty cases and housing Death Row inmates, one or more persons died as a result of the wanton callousness of the defendant. What price should be assessed on the value of the victim's life, or on the anguish and loss caused to the victim's friends and loved ones, or on the closure an execution may bring to those persons? Should such factors be calculated and then offset against the costs of the death penalty versus life imprisonment? Herein lies the danger of attempting to utilize a framework that simply does not – nor should not – apply to what society has rightly considered the ultimate punishment for truly horrific crimes.

## **PUBLIC SUPPORT OF THE DEATH PENALTY IS NOT DIMINISHING**

*The question with which we must deal is not whether a substantial proportion of American citizens would today, if polled, opine that capital punishment is barbarously cruel, but whether they would find it to be so in light of all information presently available. — Justice Thurgood Marshall*

Information about the death penalty is prevalent. Statistics are published and opinions expressed in newspapers, on television, and on the Internet. Information about public attitudes toward capital punishment comes from a variety of public-opinion polls.<sup>254</sup> Standard polling questions are used to measure public support for the death penalty. Poll results often depend on the way, the order, and the context in which the questions are asked.<sup>255</sup> For determinations regarding capital punishment, however, those variables do not make much difference. The death penalty is unusual because of the “absence of systematic differences between the results of competing polls that phrase their questions about capital punishment differently.”<sup>256</sup>

Recent poll results indicate most people support the death penalty. In fact, the most current Gallup poll, conducted in May 2002, shows support for the death penalty in general is slightly higher this year than in previous years.<sup>257</sup> Nearly half of Americans say the death penalty is not imposed often enough, increasing from 38 percent last year to 47 percent.<sup>258</sup> The level of support for imposing the death penalty for persons convicted of murder has risen to 72 percent from last year.<sup>259</sup>

More than half of Americans, 53 percent, believe the death penalty is applied fairly.<sup>260</sup> Opinion on this matter has changed very little since it was last asked in June 2000, when 51 percent of the people polled said capital punishment was applied fairly.<sup>261</sup> While stability is less dramatic than change, it may be equally important.<sup>262</sup>

The Gallup poll results were based on telephone interviews conducted May 6-9, 2002 with a randomly selected national sample of 1,012 adults.<sup>263</sup> The maximum error attributable was plus or minus three percentage points.<sup>264</sup>

Other recent opinion polls also demonstrate public support for the death penalty. An ABC News.com survey conducted in May 2002 indicated 65 percent of the 1,021 adults polled nationwide were in favor of imposing the death penalty for persons convicted of murder.<sup>265</sup> Forty-six percent said they preferred a capital sentence for people convicted of murder instead of life in prison with no chance of parole.<sup>266</sup>

The new Field Poll, which measured California public opinion on capital punishment, among other things, showed 72 percent of voters surveyed back the death penalty.<sup>267</sup> A statewide telephone survey of 705 registered voters was taken April 19-25, 2002.<sup>268</sup> Questions about capital punishment were asked to a random sample of 343 respondents, with a margin of error of plus or minus 5.6 percentage points.<sup>269</sup>

Public-opinion polls do suffer from at least one defect: Most respondents never really have to deal with the death penalty.<sup>270</sup> Opposing capital punishment is simple, but supporting it is never easy in practice. Therefore, opinions about the death penalty from jurors who have actually served on capital trials yield better insight.

## *IV*

### *Delay – And What to Do About It*

Earlier sections of this paper describe the processes of trial and review of capital cases in California. While our state's trials are considerably longer than the national norm, the problem of delay lies primarily in the review process. The average person finds it difficult to believe that a trial that takes a year, or even two, to conduct would really need 15 years to review, whatever the "experts" say. The average person is correct.

As described earlier, the review process begins with record certification. In 1996, the Legislature required certification of the record for completeness within 90 days of entry of judgment, with some flexibility for long records and other good cause.<sup>271</sup> Despite the flexibility, the deadline is missed about as often as it is met. In fiscal year 2000-01, there were 31 automatic appeals and 16 cases where certification was not completed by the statutory deadline, only two of which had findings of good cause for the delay.<sup>272</sup> Evidently, the lack of teeth in the statutory deadline results in it being brushed aside.

Financial incentives are probably necessary to obtain actual compliance. Nearly all defense counsel are paid by the government in capital cases, whether through a public defender agency or by appointing private counsel. The government would be entirely justified in taking the position that the job has not been finished, and hence the fee is not due, until certification of the record has been completed. For government agencies, some portion of funding can be withheld when deadlines are missed.

Appointment of counsel on appeal remains the largest source of delay in the state court portion of the review process. Both the California Supreme Court and the Legislature have taken steps designed to address this problem. Separate legal teams are now generally appointed to handle the direct appeal and the state habeas corpus proceeding.<sup>273</sup> This change ameliorates, but does not completely solve, the problem that a capital case is too large a unit for a solo practitioner or small firm to handle. The Legislature also expanded the size of the Office of the State Public Defender and created a new Habeas Corpus Resource Center to handle the collateral reviews.

To date, these changes have borne only a little fruit. The backlog of counsel appointments has stopped growing, but it has not shrunk significantly.

The difficult question is what can be done to shrink and eventually eliminate the backlog without compromising the efficacy of the review process. Certainly recruiting and appointing unqualified attorneys is not an answer. Devoting more resources to the problem, such as a further expansion of the Office of the State Public Defender, could also be a solution, but California's present budget crisis makes this solution politically difficult. Opponents of capital punishment cite the backlog as a reason to use the death penalty less often.<sup>274</sup> But for the reasons discussed in the deterrence chapter of this paper, this "solution" has an even greater cost – it would be "paid" in the preventable deaths of innocent people. There are no easy answers.

A first step would be an analysis of why the 1996 changes have produced so little benefit. A careful look at the State Public Defender Office and the Habeas Corpus Resource Center is in order to determine if the people of California are getting the benefit they should have gotten from the expansion of the former and creation of the latter.

A second step would be to reconsider whether direct appeal of all capital cases to the California Supreme Court, bypassing the court of appeal, is still appropriate at this point in history. Most of the issues are routine. The court of appeal is the bread-and-butter of attorneys who specialize in indigent criminal appeals and may be better able to recruit them for capital cases.

A third step is to make changes elsewhere in the review process, thereby freeing up resources for what should be the “main event.” For example, as of this writing the United States Supreme Court is considering, on federal habeas corpus, the case of Robert Garceau, a case in which the habeas petitioner is represented by the State Public Defender. The direct appeal and state habeas were finished nine years ago.<sup>275</sup> If the federal habeas process had been wrapped up in about a year, as Congress has determined it should,<sup>276</sup> the Public Defender would not be representing Garceau and could devote those resources to a direct appeal case. Similarly, the pool of qualified appointed counsel available for state proceedings would be greater if federal habeas proceedings did not drag on for a decade or more.

Federal habeas not only impacts the pool of counsel available for state proceedings. More importantly, it is the largest single source of delay in the system. In 1995, during the debate on the bill that became the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Senator Feinstein denounced the delay in the case of Clarence Ray Allen, which at that point had been mired in the federal district court for six years after completion of state proceedings.<sup>277</sup> Incredibly, the district court took *another* six years to actually decide that Allen’s claims were without merit. As of this writing, the case is still pending in the Ninth Circuit. By no conceivable stretch of the imagination did the district court need 12 years for what the Supreme Court has called a “secondary and limited” review.<sup>278</sup>

In AEDPA, Congress struck a bargain with the states. If they would provide counsel on collateral review, pay reasonable litigation expenses, and establish standards of qualification, which they have no constitutional obligation to do, they would qualify for the benefits of a “fast track” system of habeas review.<sup>279</sup> Because Congress understood that many states, including California, already had established qualifying systems, it provided that the new act would apply retroactively in those states.<sup>280</sup>

Two benefits of the statute are particularly important. First, the case proceeds in federal habeas on those federal questions properly raised in the state courts, with limited exceptions.<sup>281</sup> This will greatly reduce, if not eliminate, much procedural maneuvering and litigation by which habeas petitioners now attempt to shoehorn in new claims not raised on the direct appeal or first state habeas. Second, and even more importantly, the cases are given priority in the federal courts over all noncapital matters and subject to time limits on disposition.<sup>282</sup>

Faced with a termination of its ability to delay the execution of capital cases, the Ninth Circuit

has evaded this Act of Congress by a cramped reading of the statute, and the Supreme Court has not to date accepted the matter for review.<sup>283</sup> Regrettably, it seems that Congress may have to act again, not to enact a reform, but to force the implementation of the reform it has already enacted. The Ninth Circuit Court of Appeals is not a neutral forum to decide whether a state qualifies for the fast track procedure, because the court itself has an interest against such qualification. Congress may need to remove this matter from that court's determination, either by giving the Supreme Court mandatory appellate jurisdiction or by making application of the chapter depend on a certification of compliance by the U. S. Attorney General, rather than the court's own determination.

The elements to greatly reduce the delay in capital cases are largely in place. What is needed is for the responsible actors in all branches of government to give the expeditious resolution of these cases their proper priority and to implement the laws already enacted. The system should also be studied to determine if further changes are needed.

## *Conclusion*

The death penalty is the will of the people of California. It was restored by voter initiative in 1977, and every subsequent measure to expand its provisions, most recently with the addition of a gang-murder special circumstance in March 2000, has been overwhelmingly approved. The simple fact of the matter is that Californians want to reserve the ultimate punishment of death for those murderers whose actions so truly shock the conscience that life in prison is not adequate. In recent months, San Diego killer David Westerfield serves as a graphic example.

Death-penalty opponents understand this fact. And for this reason, they simply have not endeavored to place an initiative before the electorate proposing a repeal of the death penalty. Instead, they have devised clever strategies to undermine support. They have attempted to generate sympathy for murderers by arguing that large numbers of them are mentally retarded or that they are juveniles. They have painted a picture of incompetent defense lawyers, sleeping throughout the trial, or innocent men being executed. Their accusations receive wide media coverage, resulting in a near-daily onslaught on the death penalty. Yet, through all the hysteria, jurors continue to perform their responsibilities and return death sentences for those who would abduct, molest, and then kill our youth.

The most insidious strategy devised yet by those seeking to end capital punishment is the so-called "moratorium." Faced with an unwilling electorate and courts not persuaded that execution is unconstitutional, abolitionists now seek to pressure the executive branch, namely governors, to call a purportedly temporary halt to the death penalty. They argue that such action is warranted because the death penalty is a run-away system that must be saved from itself. Whereas the justice system, with its traditional checks and balances of opposing counsel and layers of court review, is sufficient for all civil matters and 99 percent of all criminal-justice matters, somehow it breaks down in this one rarified area of enforcement of the death penalty.

Perhaps the greatest irony of a death-penalty moratorium is that there is in fact no area of the justice system, civil or criminal, that receives greater scrutiny. It is only in death-penalty cases where the jury's verdict is automatically appealed to the California Supreme Court. It is only in death-penalty cases that typically two attorneys are appointed at trial and a special homicide-defense fund underwrites virtually all costs of a vigorous defense. In California, there is 15 to 20 years of state and federal appellate court review, often including the United States Supreme Court, between the jury's imposition of death and an actual execution being carried out.

Yet, for all the extraordinary precautions, governors should call a halt to this particular law? Is there really not adequate opportunity to examine Death Row cases one by one? Yes, California has more than 600 inmates currently on Death Row. But in the past 25 years, a grand total of 10 executions have occurred in our state. With 15 to 20 years of appellate scrutiny, is there not more than ample time to review the jury's determination that this particular defendant is the murderer and that his or her trial was conducted properly?

The fact that a life is at stake when a murderer is sentenced to death cannot be, and is not, taken lightly by prosecutors or the California justice system. It is for this reason there are such extraordinary additional precautions imposed for capital offenses. As importantly, however, is that another life, or in many cases, other *lives*, also are at issue – those of innocent victims. Twelve-year-old Polly Klaas abducted from a slumber party at her home in Petaluma, California, sexually assaulted, and then murdered. Seven-year-old Danielle van Dam, whose life was snuffed out in much the same manner. And the countless others. The stories of the 600-plus inmates on California's Death Row should be about the victims and the victims' loved ones – not about the callous murderers who savagely ended and ruined their lives.

Reasonable minds can and do and will differ over whether in fact there should be a death penalty. The purpose of this paper is not to change the minds of those philosophically or theologically opposed to the death penalty. It instead is to provide an overview of California's death penalty and address the major issues raised by death-penalty critics, as well as those who seek to objectively and fairly examine this most important law. In the end, it is a prosecutor's overriding ethical obligation to seek the truth in the work he or she does. And we believe this adherence to truth is reflected within the pages of this paper.

So let the debate over the death penalty continue. In service to the public, who one day may be requested to reexamine the law, let us wage the debate based on facts – not distortions.

## Endnotes

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<sup>1</sup> *People v. Allen* (1986) 42 Cal.3d 1222.

<sup>2</sup> Stats. 1850, ch. 99, § 19.

<sup>3</sup> Stats. 1850, ch. 99, § 21.

<sup>4</sup> Stats. 1856, ch. 139, § 2.

<sup>5</sup> Amendments to Stats. 1873-1874, ch. 508.

<sup>6</sup> Stats. 1921, ch. 105, § 1.

<sup>7</sup> Stats. 1957, ch. 1968, § 1.

<sup>8</sup> In addition to first-degree murder, California at one time authorized death as a potential penalty for kidnapping when the victim suffered bodily injury (*see* former Cal. Pen. Code § 209, amended Stats. 1933, ch. 1025, § 1) and for an assault with a deadly weapon or by means of force likely to result in great bodily injury by an inmate serving a life sentence (*see* former Cal. Pen. Code § 246, Stats. 1901, ch. 12, § 3, repealed and replaced by § 4500, Stats. 1941, ch. 106, § 15). The death-penalty provision of § 209 was repealed in 1977 (Stats. 1977, ch. 316, § 15), while application of the death penalty in § 4500 was later limited to cases in which the assault victim died within a year and a day (Stats. 1959, ch. 529, § 1).

<sup>9</sup> *People v. Mason* (1960) 54 Cal.2d 164, 169.

<sup>10</sup> *People v. Green* (1956) 47 Cal.2d 209, 218.

<sup>11</sup> *In re Anderson* (1968) 69 Cal.2d 613, 622.

<sup>12</sup> *Id.* at 623.

<sup>13</sup> *McGautha v. California* (1971) 402 U.S. 183, 207.

<sup>14</sup> *People v. Anderson* (1972) 6 Cal.3d 628.

<sup>15</sup> *Anderson, supra*, 6 Cal.3d at 649.

<sup>16</sup> *Ibid.*

<sup>17</sup> *Id.* at 651.

<sup>18</sup> *Id.* at 656.

<sup>19</sup> *Id.* at 633-634.

<sup>20</sup> Among the condemned inmates whose death sentences were converted to life terms were Charles Manson, Sirhan Sirhan, and Gregory Powell, all of whom remain imprisoned although eligible for parole. Another inmate, Robert Massie, was paroled, again committed a murder for which he was sentenced to death, and was eventually executed in 2001. (*See People v. Massie* (1998) 19 Cal.4th 550; *Massie v. Woodford* (9<sup>th</sup> Cir. 2001) 244 F.3d 1192.)

<sup>21</sup> The court had originally granted review in a fourth case from California but dismissed it as moot in light of the state supreme court's decision in *Anderson, supra*. (*People v. Aikens* (1969) 70 Cal.2d 369, cert. granted (1971) 403 U.S. 952, cert. dismissed as moot (1972) 406 U.S. 813.)

<sup>22</sup> *Furman v. Georgia* (1972) 408 U.S. 238.

<sup>23</sup> *Id.* at 240-257.

<sup>24</sup> *Id.* at 257-306.

<sup>25</sup> *Id.* at 314-371.

<sup>26</sup> *Id.* at 308-310.

<sup>27</sup> *Id.* at 310-313.

<sup>28</sup> *Id.* at 375.

<sup>29</sup> *Id.* at 396-400.

<sup>30</sup> *See, e.g., Gregg v. Georgia* (1976) 428 U.S. 153, 169, fn. 15 (opinion of Justices Stewart, Powell, and Stevens) [holding of the court was premised on position of justices who concurred in judgment on the narrowest ground]; *Lockett v. Ohio* (1978) 438 U.S. 586, 601 (plurality opinion.)

<sup>31</sup> *Gregg v. Georgia, supra*, 428 U.S. at 189.

<sup>32</sup> *Lockett v. Ohio, supra*, 438 U.S. at 599.

<sup>33</sup> *Id.* at 599-600.

<sup>34</sup> Stats. 1973, ch. 719.

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<sup>35</sup> *Gregg v. Georgia*, *supra*, 428 U.S. 153; *Proffitt v. Florida* (1976) 428 U.S. 242; *Jurek v. Texas* (1976) 428 U.S. 262.

<sup>36</sup> *Woodson v. North Carolina* (1976) 428 U.S. 280; *Roberts v. Louisiana* (1976) 428 U.S. 325.

<sup>37</sup> *Rockwell v. Superior Court* (1976) 18 Cal.3d 420.

<sup>38</sup> Stats. 1977, ch. 316.

<sup>39</sup> In cases where the crime occurred after enactment of the 1977 statute but before passage of the Briggs Initiative, the 1977 procedures apply.

<sup>40</sup> In order to impose death, a California jury must first convict of first-degree murder and find at least one special circumstance true beyond a reasonable doubt. At the penalty phase, the jury considers aggravating and mitigating evidence and then imposes a sentence of death or life in prison without parole.

<sup>41</sup> *See, e.g., Pulley v. Harris* (1984) 465 U.S. 37 (1977 statute); *Ramos v. California* (1983) 463 U.S. 992 (1978 statute); *Boyde v. California* (1990) 494 U.S. 370 (1978 statute); *People v. Frierson* (1979) 25 Cal.3d 142 (1977 statute); *People v. Jackson* (1980) 28 Cal.3d 264 (1977 statute); *People v. Rodriguez* (1986) 42 Cal.3d 730 (1978 statute); *People v. Ray* (1996) 13 Cal.4th 313 (1978 statute) [In addition to first-degree murder with special circumstances, California law provides five other situations in which the death penalty could be imposed. Penal Code § 219, which authorizes the death penalty for a train wreck resulting in a death, essentially duplicates a special-circumstance provision; Penal Code § 4500, dealing with an assault by a life inmate resulting in death, is discussed in note 8 above. The other three sections appear to have never been invoked. They provide for the death penalty in cases involving a death resulting from interference with a war effort (Mil. & Vet. Code § 1672); treason against the state (Cal. Pen. Code § 37); and perjury resulting in the execution of an innocent person (Cal. Pen. Code § 128).]

<sup>42</sup> Cal. Pen. Code § 190.2.

<sup>43</sup> *See, Professionalism: A Sourcebook of Ethics and Civil Liability Principles for Prosecutors*, California District Attorneys Association (2001).

<sup>44</sup> Cal. Pen. Code § 190.3.

<sup>45</sup> Unique to California, prosecutors are required to prove prior unadjudicated conduct beyond a reasonable doubt, despite there being no burden-of-proof requirement during the penalty phase. Cal. Pen. Code § 190.3(b).

<sup>46</sup> Cal. Rules of Ct., Rule 4.117.

<sup>47</sup> Cal. Pen. Code § 987; *Keenan v. Superior Court* (1982) 31 Cal.3d 424.

<sup>48</sup> Cal. Pen. Code § 987.9.

<sup>49</sup> Cal. Civ. Proc. Code § 231. [For other felony trials, each side is entitled to 10 peremptory challenges.]

<sup>50</sup> Cal. Pen. Code § 190.4(e).

<sup>51</sup> Powell, "Capital Punishment," 102 Harv. L. R. 1035, 1045 (1989).

<sup>52</sup> *Soering v. United Kingdom* (1989) 11 E.H.R.R. 439, 457 ("The delays are primarily due to a strategy by convicted prisoners to prolong the appeal proceedings as much as possible."); Hintze, "Attacking the Death Penalty: Toward a Renewed Strategy Twenty Years After Furman," 24 Colum. Hum. Rts. L. Rev. 395, 411 (Summer 1993) ("The inherent incentive in death penalty cases to employ tactics of delays add to this problem [of delay]....Here every day of delay is another day of life for the client.").

<sup>53</sup> Information concerning the 10 inmates executed by California since 1992 and their cases is located at <http://www.cdc.state.ca.us/issues/capital>.

<sup>54</sup> *Coleman v. Thompson* (1991) 501 U.S. 722, 746.

<sup>55</sup> *People v. Stanworth* (1969) 71 Cal.2d 820, 834.

<sup>56</sup> *People v. Barnett* (1998) 17 Cal.4th 1044, 1182-1183; *People v. Sakarias* (2002) 22 Cal.4th 596, 635.

<sup>57</sup> Cal. Pen. Code §§ 190.7 et seq., Cal. Rules of Ct., Rules 39.51 et seq.

<sup>58</sup> Cal. Rules of Ct., Rule 76.6.

<sup>59</sup> *New York Times* Abstracts, 7/5/01.

<sup>60</sup> Compare Cal. Rules of Ct., Rule 76.6 with 21 U.S.C. § 848(q).

<sup>61</sup> SB 513 (1997).

<sup>62</sup> *Ibid.*

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<sup>63</sup> *In re Michael Hamilton* (1999) 20 Cal.4th 273.

<sup>64</sup> SB 513 (1997).

<sup>65</sup> Cal. Rules of Ct., Rule 37.

<sup>66</sup> California Supreme Court Press Release 54 (8/22/01).

<sup>67</sup> *In re Rubin* (2001) 25 Cal.4th 1176; *In re Garland* (2001) 25 Cal.4th 1172.

<sup>68</sup> Cal. Rules of Ct., Rule 37.

<sup>69</sup> Supreme Court Policies Regarding Cases Arising from Judgments of Death (adopted 6/6/89).

<sup>70</sup> *People v. Gonzales* (1990) 51 Cal.3d 1179.

<sup>71</sup> Cal. Pen. Code § 1054.9.

<sup>72</sup> *In re Harris* (1993) 5 Cal.4th 813, 827, fn. 5.

<sup>73</sup> Cal. Pen. Code § 1473.

<sup>74</sup> Cal. Const. art. VI, § 4; Cal. Pen. Code § 1254; Cal Rules of Ct., Rules 22, 30; *People v. Medina* (1972) 6 Cal.3d 484; *People v. Pacini* (1981) 120 Cal.App.3d 877.

<sup>75</sup> Cal. Pen. Code § 1254; Cal. Rules of Ct., Rule 22.

<sup>76</sup> Cal. Rules of Ct., Rule 24.

<sup>77</sup> The justices of the California Supreme Court are appointed by the Governor subject to approval by the Commission on Judicial Appointments. And the justices are subject to periodic reconfirmation by the voters of the State of California. In 1986, voters chose not to confirm three justices of the California Supreme Court. It should be noted that many of the key capital decisions of the California Supreme Court prior to 1986 that reversed death sentences were themselves subsequently disapproved by the United States Supreme Court. (See, e.g., *California v. Ramos* (1993) 463 U.S. 992 (disapproving *People v. Ramos* (1982) 30 Cal.3d 553); *California v. Brown* (1987) 479 U.S. 538 (disapproving *People v. Brown* (1985) 40 Cal.3d 512); *People v. Easley* (1983) 34 Cal.3d 858; and *People v. Lanphear* (1984) 36 Cal.3d 163; *Boyd v. California* (1990) 494 U.S. 370 (disapproving *People v. Easley* (1983) 34 Cal.3d 858); *People v. Brown* (1985) 40 Cal.3d 512; *Tison v. Arizona* (1987) 481 U.S. 137; and *Cabana v. Bullock* (1986) 474 U.S. 376 (leading to the ultimate disapproval of *Carlos v. Superior Court* (1983) 35 Cal.3d 131 in *People v. Anderson* (1987) 43 Cal.3d 1104); *Neder v. United States* (1999) 527 U.S. 1 (disapproving *People v. Garcia* (1984) 36 Cal.3d 539); but see *Lockhart v. McCree* (1986) 476 U.S. 162 (approving *People v. Fields* (1983) 35 Cal.3d 329).) However, the United States Supreme Court has repeatedly approved decisions of the post-1986 California Supreme Court. (See, e.g., *Weeks v. Angelone* (2000) 528 U.S. 225 (approving *People v. McDowell* (1988) 46 Cal.3d 551 and disapproving *McDowell v. Calderon* (9<sup>th</sup> Cir. en banc 1999) 197 F.3d 1253); *Tuilaepa v. California* (1994) 512 U.S. 967; *Medina v. California* (1992) 505 U.S. 437; *Calderon v. Thompson* (1998) 523 U.S. 538 (agreeing with California Supreme Court that petitioner had failed to show “actual innocence”).)

<sup>78</sup> Sup. Ct. R., Rules 13, 15.

<sup>79</sup> This is one of the reforms Congress enacted as part of the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA).

<sup>80</sup> 28 U.S.C. § 2244(d).

<sup>81</sup> 21 U.S.C. § 848(q); *McFarland v. Scott* (1992) 512 U.S. 849.

<sup>82</sup> The local rules are available on the respective federal district court websites.

<sup>83</sup> *Coleman v. Thompson* (1991) 501 U.S. 722, 746.

<sup>84</sup> 21 U.S.C. § 848(q).

<sup>85</sup> *Ibid.*

<sup>86</sup> Rules Governing Section 2254 Cases, Rule 5.

<sup>87</sup> Rules Governing Section 2254 Cases, Rule 6.

<sup>88</sup> There are four federal court districts in California: Northern (San Francisco), Southern (San Diego), Central (Los Angeles), and Eastern (Sacramento & Fresno). In three out of the four districts, a district court judge directly handles and presides over the capital habeas proceedings. The Eastern District Court judges in Sacramento have delegated the capital habeas cases to Magistrate Judges who conduct the proceedings and then make findings and recommendations to the district court judges. Thus, there is an

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added layer of judicial review in the Eastern District capital cases in Sacramento.

<sup>89</sup> *Coleman v. Thompson* (1991) 501 U.S. 722, 746.

<sup>90</sup> 28 U.S.C. § 2254.

<sup>91</sup> 28 U.S.C. § 2264.

<sup>92</sup> See, e.g., *Ashmus v. Woodford* (2000) 202 F.3d 1160.

<sup>93</sup> 28 U.S.C. § 2254.

<sup>94</sup> <http://www.ce9.uscourts.gov/web/OCELibra.nsf/504ca249c786e20f85256284006da7ab/b15667ee1d1bb2d98825682600823373?OpenDocument>.

<sup>95</sup> “Ninth Circuit: Oops, They’ve Done it Again,” *The Recorder*, 9/7/01; “Ninth Circuit Holds Its Own with Justices,” *The Recorder*, 6/29/01; “Largest Circuit is Still the Maverick,” 23 Nat’l L.J. 27, (2002); Bar Talk, *The American Lawyer*, 8/00 (“The Ninth Circuit really continues to take a beating”).

<sup>96</sup> *Woodford v. Visciotti* (2002) \_\_U.S.\_\_, 123 S.Ct. 357.

<sup>97</sup> “Death Costs Decline, Controls Helping Circuit, District Court Trim Habeas Bills,” *The Recorder*, 7/26/00 (average case cost in California still almost twice the national average); “President-Appointed Federal Judges Shape Appellate Law in the American West,” *Knight-Ridder Tribune Business News*, 7/10/00; “Circuit Slammed Again Over Defense Costs,” *The Recorder*, 3/9/99; Kozinski, “Tinkering with Death,” *The New Yorker*, 2/10/97; “Wrangling over Death Penalty Process Plagues Courts,” *San Francisco Chronicle*, 6/28/93.

<sup>98</sup> *Calderon v. Thompson* (1998) 523 U.S. 538; *Vasquez v. Harris* (1992) 503 U.S. 1000; see also *San Francisco Chronicle*, 7/18/93 (referencing Justice Sandra Day O’Connor’s criticism of Ninth Circuit’s capital procedures in Harris case).

<sup>99</sup> 9<sup>th</sup> Cir. R., Rules 22 et seq.

<sup>100</sup> Fed. R. App. P., Rule 35; 9<sup>th</sup> Cir. R., Rules 35 et seq.

<sup>101</sup> 28 U.S.C. § 46; 92 Stat. 1633.

<sup>102</sup> Cal. Pen. Code § 1227; Cal. Rules of Ct., Rule 4.315; *People v. Superior Court (Gordon)* (1991) 226 Cal.App.3d 901.

<sup>103</sup> Cal. Pen. Code § 3700.5.

<sup>104</sup> Cal. Const. art. V, § 8; Cal. Pen. Code §§ 4800 et. seq.

<sup>105</sup> Supreme Court Policies Regarding Cases Arising from Judgments of Death, Policy 2.

<sup>106</sup> *Ohio Adult Parole Authority v. Woodard* (1998) 523 U.S. 272.

<sup>107</sup> *Wilson v. United States District Court (Siripongs)* (1998) 161 F.3d 1185.

<sup>108</sup> *In re Clark* (1993) 5 Cal.4th 750.

<sup>109</sup> 28 U.S.C. § 2244.

<sup>110</sup> *Felker v. Turpin* (1996) 518 U.S. 651.

<sup>111</sup> Cal. Pen. Code §§ 3700 et seq.; see *Ford v. Wainwright* (1986) 477 U.S. 399.

<sup>112</sup> *Atkins v. Virginia* (2002) 536 U.S. 534; *Cabana v. Bullock* (1986) 474 U.S. 376.

<sup>113</sup> Cal. Pen. Code §§ 3705-3706.

<sup>114</sup> *Massie ex rel. Kroll v. Woodford* (9<sup>th</sup> Cir. 2001) 244 F.3d 1192; *Mason ex rel. Marson v. Vasquez* (9<sup>th</sup> Cir. 1993) 5 F.3d 1226.

<sup>115</sup> This critique, in addition to being presented originally in 2002 at the annual meeting of the Association of Government Attorneys in Capital Litigation and previously published, is included in the appendix of the U.S. Senate Judiciary Committee’s minority report on the Innocence Protection Act.

<sup>116</sup> The DPIC List is located at its website: <http://www.deathpenaltyinfo.org/innoc.html>.

<sup>117</sup> As this paper was finalized on January 10, 2003, outgoing Illinois Governor George Ryan pardoned four Death Row inmates because they had been convicted based on “false confessions.” Needless to say, this action as well as Governor Ryan’s blanket commutation of Illinois’ entire Death Row have generated controversy. But Governor Ryan’s actions came too late for inclusion in this paper’s analysis.

<sup>118</sup> *Furman v. Georgia* (1972) 408 U.S. 238.

<sup>119</sup> *The American Spectator*, April 2000 at 21; *Washington Post* (12/9/98).

<sup>120</sup> *Washington Times* (9/12/99); *The Record*, Bergen County, N.J. (4/14/02).

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- <sup>121</sup> 40 Stan. L. Rev. 21 (1987).
- <sup>122</sup> 13 T.M. Cooley L. Rev. 907 (1996).
- <sup>123</sup> *Stanford* at 23-24, 47-48, 74.
- <sup>124</sup> *Id.* at 45.
- <sup>125</sup> *Id.* at 53.
- <sup>126</sup> The *Stanford* study includes historically controversial defendants such as Bruno Hauptmann, executed for the kidnapping and murder of the Lindbergh baby, and Dr. Sam Sheppard, ultimately acquitted on retrial for the murder of his wife, as examples of wrongfully convicted murderers. The most recent study of Hauptmann's case, however, supports the evidence of his conviction. (Fisher, *The Ghosts of Hopewell* (Southern Ill. Univ. Press 1999).) Similarly, the most recent civil litigation concerning the conviction of the late Dr. Sheppard rejected evidence of his innocence. (*Cleveland Plain Dealer* (4/13/00).)
- <sup>127</sup> 41 Stan. L. Rev. 121 (1988).
- <sup>128</sup> *Id.* at 161, 264.
- <sup>129</sup> *Id.* at 279.
- <sup>130</sup> *Cooley* itself only lists 68 defendants. The DPIC does not explain how it has otherwise learned of the cases or defendants it has since added to its current list of 102 defendants.
- <sup>131</sup> *Cooley* at 911.
- <sup>132</sup> *Id.* 911.
- <sup>133</sup> *Id.* at 911-912.
- <sup>134</sup> *Id.* at 912-913.
- <sup>135</sup> *Id.* at 913.
- <sup>136</sup> *Id.* at 914
- <sup>137</sup> *Stanford* at 43.
- <sup>138</sup> *Cooley* at 914 (emphasis added).
- <sup>139</sup> *Stanford* at 45.
- <sup>140</sup> *Cooley* was published in 1996. It is not clear what system the DPIC has used since 1996 to collect information on cases of alleged innocence on Death Row.
- <sup>141</sup> *Stanford* at 81-83.
- <sup>142</sup> See also Markman & Cassell, "Protecting the Innocent: A Response to the Bedau-Radelet Study," 41 Stan. L. Rev. 121, 147-152 (1988).
- <sup>143</sup> For example, just recently the United States Supreme Court abrogated statutes in at least four states. (*Ring v. Arizona* (2002) \_\_U.S.\_\_, 122 S.Ct. 2428.). The Court also held that mentally retarded defendants could not be sentenced to death. (*Atkins v. Virginia* (2002) \_\_U.S.\_\_, 122 S.Ct. 2242.) For purposes of assessing whether innocent defendants have been sentenced to death, both of these cases may indicate that certain defendants currently on the DPIC List would not have been or should not have been eligible for the death penalty at all.
- <sup>144</sup> *Bousley v. United States* (1998) 523 U.S. 614.
- <sup>145</sup> *Beavers v. Saffle* (10<sup>th</sup> Cir. 2000) 216 F.3d 918.
- <sup>146</sup> *Schlup v. Delo* (1995) 513 U.S. 298.
- <sup>147</sup> *Herrera v. Collins* (1993) 506 U.S. 390.
- <sup>148</sup> *Smith v. Balkcom* (5<sup>th</sup> Cir. 1981) 660 F.2d 573, 580.
- <sup>149</sup> *Dowling v. United States* (1990) 493 U.S. 342, 249.
- <sup>150</sup> *Martin v. Ohio* (1987) 480 U.S. 228, 233-234.
- <sup>151</sup> *Gregg v. Georgia* (1976) 428 U.S. 153, 225 (White, J. conc.).
- <sup>152</sup> 41 Hastings L.J. 153, 154-155 (1989) cited in Bedau & Radelet, *1998 Law & Contemporary Problems*, 105, 106, fn. 9.
- <sup>153</sup> *Stanford* Reply at 162.
- <sup>154</sup> *Cleveland Plain-Dealer* (4/13/00).
- <sup>155</sup> *Jackson v. Virginia* (1979) 443 U.S. 307, 317, fn. 10.
- <sup>156</sup> *Burks v. United States* (1978) 437 U.S. 1, 16-18.

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<sup>157</sup> *Jackson v. Virginia*, *supra*, 443 U.S. at 319.

<sup>158</sup> As will be shown, in some states there are some exceptions to this general rule of appellate review that favor the defendant.

<sup>159</sup> *Burks v. United States*, *supra*, 437 U.S. at 16, fn. 10.

<sup>160</sup> An example of such a difference relates to convictions based on accomplice testimony. A conviction based solely on accomplice testimony is insufficient for a conviction in California unless it is corroborated by some other evidence. But a conviction on accomplice testimony would be sufficient in federal court even without corroboration. (*Laboa v. Calderon* (9<sup>th</sup> Cir. 2000) 224 F.3d 972.)

<sup>161</sup> *Schlup v. Delo* (1995) 513 U.S. 298, 325.

<sup>162</sup> *Id.* at 327-328.

<sup>163</sup> *Miranda v. Arizona* (1996) 384 U.S. 436.

<sup>164</sup> Furthermore, when a defendant secures a new trial on grounds of ineffective assistance of counsel or because the prosecution has improperly withheld material, exculpatory evidence, he or she is not required to prove innocence or even that he or she would have been acquitted. In fact, the defendant does not need to even prove that it is “more likely than not” that he or she would be acquitted – found not guilty under a “reasonable doubt” standard. A defendant need only show a “reasonable probability” that the outcome would have been different – that is, he or she need only undermine confidence in the guilt verdict in the case. (*Strickland v. Washington* (1984) 466 U.S. 668, 693-694; *United States v. Bagley* (1985) 473 U.S. 667, 679-682.) If a prosecutor presents perjured testimony, the conviction is reversed if there is any reasonable likelihood the verdict would be different. (*Bagley*, *supra*, 473 U.S. at 679-680.) Although a defendant may get a new trial because of these claims, none of these standards amount to a finding of the defendant’s “actual innocence.”

<sup>165</sup> *United States v. Armstrong* (1996) 517 U.S. 456, 463-464; *Gregg v. Georgia* (1976) 428 U.S. 153, 225 (White, J. conc.); *People v. Gephart* (1979) 93 Cal.App.3d 989, 999-1000.

<sup>166</sup> *McCleskey v. Kemp* (1987) 481 U.S. 279, 311-312.

<sup>167</sup> *McCleskey*, *supra*, 481 U.S. at 306-307, fn. 28.

<sup>168</sup> *1998 Law & Contemporary Problems* at 106.

<sup>169</sup> *United States v. Mechanik* (1986) 475 U.S. 66, 72.

<sup>170</sup> Information recently compiled by the Florida Commission on Capital Crimes, the Journal of the DuPage County Bar Association, and the Philadelphia District Attorney’s Office was also used.

<sup>171</sup> This study is not exhaustive, but is based on materials available. These materials are cited in the summaries and also include the *Stanford* study, *In Spite of Innocence*, the *Cooley* article, and the summaries available on the DPIC website. It is not conceded that other defendants on the DPIC List who are not mentioned in this study are actually innocent.

<sup>172</sup> *United States v. Powell* (1984) 469 U.S. 57, 65-66.

<sup>173</sup> *Stanford* at 43.

<sup>174</sup> See, e.g., Comment, 99 Dick. L. Rev. 141 (1994); 13 Ariz. J. Int’l & Comp. L. 523 (1996); Note, 62 Ohio St. L.J. 1695 (2001); Note, 2001 Duke L.J. 1809 (2001).

<sup>175</sup> *People v. Croy* (1986) 41 Cal.3d 1, 16, 19, 21.

<sup>176</sup> *Los Angeles Times* (5/11/00); *San Francisco Examiner* (7/8/90); *Santa Rosa Press Democrat* (7/27/97).

<sup>177</sup> *In re Jones* (1996) 13 Cal.4<sup>th</sup> 552 at 584.

<sup>178</sup> *Modesto Bee* (11/16/96); *Washington Times* (9/12/99).

<sup>179</sup> *United States v. Quinones* (S.D.N.Y. 2002) 205 F. Supp.2d 256.

<sup>180</sup> *United States v. Quinones* (2<sup>nd</sup> Dir. 2002) 313 F.3d 49.

<sup>181</sup> 41 Hastings L.J. 153, 154-155 (1989) cited in Bedau & Radelet, *1998 Law & Contemporary Problems*, 105, 106, fn. 9.

<sup>182</sup> *Cooley* at 916.

<sup>183</sup> 148 *Congressional Record* S889-92 (2/15/02).

<sup>184</sup> 33 Colum. Hum. Rts. L. Rev. 527 (2002); 63 Ohio St. L.J. 343 (2002).

<sup>185</sup> The total number of death sentences since 2001 is not yet available.

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<sup>186</sup> By focusing on the deterrence aspects of capital punishment, this paper is not ignoring that for many people there are reasons for supporting and opposing the death penalty that are totally irrelevant to the deterrence issue.

<sup>187</sup> Statement of the Honorable Dianne Feinstein, Senator from California, Hearing Before the Senate Judiciary Committee on S.221 (April 1, 1993). Moreover, case law reveals examples of the ineffectiveness of imprisonment as a deterrent to murder. (*See, e.g., Campbell v. Kincheloe* (9<sup>th</sup> Cir. 1987) 829 F.2d 1453 [prison escapee commits triple murder of witnesses who testified against him]; *Hernandez v. Johnson* (5<sup>th</sup> Cir. 1997) 108 F.3d 554 [twice-convicted murderer murders jail guard during abortive jail escape]; *People v. Allen* (1986) 42 Cal.3d 1222 [murderer serving life sentence convicted of murdering witness on the outside, murder of two bystanders, and conspiracy to murder seven other prior witnesses].)

<sup>188</sup> The studies cited elsewhere in this paper reflect this tension. Indeed, the Emory University study notes potential problems with some of these other studies. But the objectivity of some these studies is underscored by the ambivalence expressed about the death penalty by several of the academicians who compiled the information. For instance, the Emory study warns: “[D]eterrence reflects social benefits associated with the death penalty, but one should also weigh in the corresponding social costs. These include the regret associated with the irreversible decision to execute an innocent person. Moreover, issues such as the possible unfairness of the justice system and discrimination need to be considered when making a social decision regarding capital punishment.” The Colorado working paper concludes with a similar caveat about other “significant issues” including racial discrimination in the imposition of the death penalty and the pardon process. “Given these concerns, a stand for or against capital punishment should be taken with caution.” Thus, the researchers who have prepared these most recent deterrence studies do not appear predisposed to supporting the death penalty.

<sup>189</sup> Bailey, *Hangmen of England: A History of Execution from Jack Ketch to Albert Pierrepoint*, (1992 Barnes & Noble ed.) at 190-191.

<sup>190</sup> *Regina v. James Hanratty Deceased by his Brother Michael Hanratty*, 2002 WL 499035 (May 10, 2002).

<sup>191</sup> McKinstry, “All my Life I have Been Passionately Opposed the Death Penalty ... This is Why I have Changed My Mind,” *Daily Mail*, 3/13/02.

<sup>192</sup> “Hanratty Deserved to Die,” *The Spectator* (May 11, 2002) at 24-25.

<sup>193</sup> *See* Wilson, “What Mistakes in Death Penalty Cases?” *New York Times*, July 10, 2000, Section A, p. 19, col. 1; Hoffman, “Violence and the Truth,” 76 *Ind. L.J.* 939 (2001); Latzer and Cauthen, “Capital Appeals Revisited,” 84 *Judicature* 64 (2000); Latzer and Cauthen, “The Meaning of Capital Appeals: A Rejoinder to Liebman, Fagan, and West,” 84 *Judicature* 142 (2000); Scheidegger, “Death Penalty Study Is Full of Unjustified Assumptions,” *Los Angeles Daily Journal*, June 30, 2000, p. 6, col. 1.

<sup>194</sup> Liebman, et. al., *A Broken System, Part II: Why There Is So Much Error in Capital Cases, And What Can Be Done About It* (2002) (cited below as “Liebman II”).

<sup>195</sup> *See, e.g., Calderon v. Thompson* (1998) 523 U.S. 538 (reversing 9<sup>th</sup> Circuit en banc decision granting relief from California death sentence and noting circuit court’s lack of respect for finality of state criminal judgments); *Woodford v. Visciotti* (2002) \_\_\_ U.S. \_\_\_, 123 S.Ct. 357 (per curiam) (reversing 9<sup>th</sup> Circuit decision granting relief from California death sentence and finding circuit court’s analysis incompatible with deferential standard of review enacted by Congress in 1996).

<sup>196</sup> Scheidegger, “Overdue Process: A Study of Federal Habeas Corpus in Capital Cases and a Proposal for Reform” (1995), <http://www.cjlf.org/publctns/Overdue/ODCover.htm>.

<sup>197</sup> *See* *Walton v. Arizona* (1990) 497 U. S. 639 (affirming state court and finding *Adamson v. Ricketts* (1988) 865 F.2d 1011 to be erroneous); *Ring v. Arizona* (2002) 536 U. S. \_\_\_, 122 S.Ct. 2428 (overruling *Walton*).

<sup>198</sup> *People v. McDowell* (1988) 46 Cal.3d 551, 578.

<sup>199</sup> *McDowell v. Calderon* (9<sup>th</sup> Cir. 1997) 107 F.3d 1351, 1360.

<sup>200</sup> *McDowell v. Calderon* (9<sup>th</sup> Cir. 1997) 130 F.3d 833, cert den. 523 U.S. 1103.

<sup>201</sup> *Weeks v. Angelone* (2000) 528 U.S. 225; *see also* *Morris v. Woodford* (9<sup>th</sup> Cir. 2001) 273 F.3d 826,

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- 839, fn. 4 (acknowledging that *Weeks* overrules *McDowell*).
- <sup>202</sup> Liebman II at 22.
- <sup>203</sup> *Id.* at 65.
- <sup>204</sup> See *Johnson v. United States* (1997) 520 U.S. 461, 468.
- <sup>205</sup> *Morgan v. Illinois* (1992) 504 U.S. 719, 751 (dissenting opinion).
- <sup>206</sup> *Proffitt v. Florida* (1976) 428 U. S. 242.
- <sup>207</sup> *Hitchcock v. Dugger* (1987) 481 U.S. 393.
- <sup>208</sup> *Mills v. Maryland* (1988) 486 U. S. 367.
- <sup>209</sup> Liebman II at 18.
- <sup>210</sup> *Id.* at 22.
- <sup>211</sup> See Wilson, *supra*, note 193 above; Latzer and Cauthen, “Capital Appeals Revisited,” *supra*, note 193 above, at 64-65.
- <sup>212</sup> Liebman II at 43.
- <sup>213</sup> Liebman II at 42 (emphasis in original).
- <sup>214</sup> *Ibid.*
- <sup>215</sup> *Ibid.*
- <sup>216</sup> *Id.* at 54.
- <sup>217</sup> *Stone v. Powell* (1976) 428 U. S. 465; *Gregg v. Georgia* (1976) 428 U. S. 153.
- <sup>218</sup> See, e.g., *In re Sterling* (1965) 63 Cal.2d 486, 487.
- <sup>219</sup> Columbia Law School Press Release, “Landmark Study Finds Capital Punishment System ‘Fraught with Error’” (June 12, 2000).
- <sup>220</sup> Liebman, Fagan, and West, “A Broken System: Error Rates in Capital Cases, 1973-1995,” p. ii (2000) (Liebman I).
- <sup>221</sup> Liebman II at 41.
- <sup>222</sup> *Id.* at 54.
- <sup>223</sup> *Id.* at 84.
- <sup>224</sup> The California Supreme Court publishes all of its opinions. See Cal. Rules of Ct., Rule 976(a).
- <sup>225</sup> *Id.* at fn. 96.
- <sup>226</sup> 141 Cong. Rec. 14,733 (1995).
- <sup>227</sup> <http://www.deathpenalty.org/facts/other/ineffective.shtml> (as of Feb. 11, 2002).
- <sup>228</sup> Cloninger & Marchesini, “Execution and Deterrence: A Quasi-Controlled Group Experiment,” 33 *Applied Economics* 569, 576 (2001).
- <sup>229</sup> See Kessler & Levitt, “Using Sentence Enhancements to Distinguish Between Deterrence and Incapacitation,” 42 *J. Law & Econ.* 343, 344, fn3 (1999) (collecting studies); *Id.* at 359 (concluding that the recidivist sentence enhancement of California’s Proposition 8 had a deterrent effect, independent of its incapacitative effect).
- <sup>230</sup> Gaskill, “Death Penalty Works,” *Oakland Tribune* (Nov. 30, 2002).
- <sup>231</sup> The Supreme Court’s decision in *Furman v. Georgia* (1972) 408 U.S. 238 declared all existing capital-punishment statutes invalid, and various attacks on capital punishment had created a *de facto* moratorium since 1968. Thus, 1972 gives us a basis for comparing states at a time when none had capital punishment. Sixteen jurisdictions did not act to reinstate capital punishment after *Furman*: Alaska, the District of Columbia, Hawaii, Iowa, Kansas, Maine, Massachusetts, Michigan, Minnesota, New Jersey, North Dakota, Oregon, South Dakota, Vermont, West Virginia, and Wisconsin. See *Gregg v. Georgia* (1976) 428 U.S. 153, 179, fn. 23. Thirteen of these, all except Alaska, D.C., and Michigan, had homicide rates 20 percent or more below the national average in 1972. (See Federal Bureau of Investigation, Uniform Crime Reports 1972, Table 3 at 62-66.) Oregon, New Jersey, and Kansas have since reinstated capital punishment.
- <sup>232</sup> Calculated from the FBI’s data for homicides per 100,000 population, published in the annual Uniform Crime Reports.
- <sup>233</sup> Cal. Pen. Code § 189. There are a few other variations, such as murder by poison, which necessarily

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require some degree of forethought.

<sup>234</sup> Maxfield, "Circumstances in Supplemental Homicide Reports: Variety and Validity," 27 *Criminology* 671 (1989).

<sup>235</sup> Sorensen, Wrinkle, Brewer, and Marquart, "Capital Punishment and Deterrence: Examining the Effect of Executions on Murder in Texas," 45 *Crime and Delinquency* 481 (1999).

<sup>236</sup> Cloninger and Marchesini, *supra*, note 228 above.

<sup>237</sup> Cloninger and Marchesini, *supra*, note 228 above, at 575.

<sup>238</sup> Dezhbakhsh, Rubin, and Shepherd, "Does Capital Punishment Have a Deterrent Effect? New Evidence from Post-moratorium Panel Data," Emory University Dept. of Economics Working Paper No. 01-01 (Feb. 2001), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=259538](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=259538); *see also* Rubin, "Study: Death penalty deters scores of killings," *Atlanta Journal-Constitution* (Mar. 13, 2002).

<sup>239</sup> Mocan and Gittings, "Pardons, Executions, and Homicide," NBER Working Paper 8639 (December 2001), <http://econ.cudenver.edu/mocan/papers/deathpenalty1007.pdf>.

<sup>240</sup> Taylor, "Opening Argument: Does the Death Penalty Save Innocent Lives?" 33 *National Journal* 1551, 1552 (May 29, 2001).

<sup>241</sup> "A Matter of Life and Death," *Christianity Today*, 8-14-95.

<sup>242</sup> "Opposing the Death Penalty," *AMERICA*, 11-9-96.

<sup>243</sup> U.S. Department of Justice, "Capital Punishment 2001," <http://www.ojp.gov/bjs/pub/pdf/cp01.pdf>.

<sup>244</sup> California Department of Corrections, "Condemned Inmate List Summary," 12-1-01.

<sup>245</sup> Mr. A. Alonzo, a recognized street-gang expert, Ph.D. candidate at USC, and an instructor at Santa Monica College, has identified 274 Black gangs in Los Angeles County as of 1996. In a phone conversation with him in January 2002, he indicated that the statistics have fallen as to the number of Black street gangs due to the rise of Hispanic street gangs that have displaced the Black gangs in Los Angeles County. Neighboring counties of San Bernardino and Riverside have increased the number of Black street gangs as a result.

<sup>246</sup> California Supreme Court affirmed sentences of death for gang-related murders in *People v. Hawthorne* (1992) 4 Cal.4<sup>th</sup> 43, *People v. Fudge* (1994) 7 Cal.4<sup>th</sup> 1075, *People v. Champion & Ross* (1995) 9 Cal.4<sup>th</sup> 879, and *People v. Williams* (1997) 16 Cal.4<sup>th</sup> 153.

<sup>247</sup> Manuel Babbitt was of mixed Black/other ethnicity; Jaturun Siripongs was Asian.

<sup>248</sup> *McCleskey v. Zant* (1984) 580 Fed. S. 338, 368.

<sup>249</sup> *McCleskey v. Kemp* (1985) 753 F.2<sup>nd</sup> 877, 899.

<sup>250</sup> Klein and Rolph, "Relationship of Offender and Victim Race to Death Penalty Sentences in California," *Jurimetrics Journal*, 32, Fall 1991.

<sup>251</sup> Rothman and Powers, "Execution by Quota?" *The Public Interest*, Summer 1994.

<sup>252</sup> Memorandum of California Department of Corrections, Legislative Liaison Office: Major Assumptions To Be Used In Estimating Legislation During 2002 (April 12, 2002).

<sup>253</sup> *Id.*

<sup>254</sup> Theodore Eisenberg, Stephen P. Garvey, & Martin T. Wells, "The Deadly Paradox of Capital Jurors," 73 S. Cal. L. Rev. 371, 376 (2001).

<sup>255</sup> *Id.* at 372.

<sup>256</sup> *Id.* at 377, quoting Phoebe C. Ellsworth & Samuel R. Gross, "Hardening of the Attitudes: Americans' Views on the Death Penalty," *J. Soc. Issues*, Summer 1994, at 24.

<sup>257</sup> Jeffrey M. Jones, "Slim Majority of Americans Say Death Penalty Applied Fairly," Poll Analyses, Gallup News Service (May 20, 2002), <http://www.gallup.com/poll/releases/pr020520.asp?Version=p>.

<sup>258</sup> *Id.*

<sup>259</sup> *Id.*

<sup>260</sup> *Id.*

<sup>261</sup> *Id.*

<sup>262</sup> Samuel R. Gross, "Update: American Public Opinion on the Death Penalty – It's Getting Personal," 83 *Cornell L. Rev.* 1448 (1998).

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- <sup>263</sup> Jones, *supra*, note 257 above.
- <sup>264</sup> *Id.*
- <sup>265</sup> ABC News.com Poll, (May 1-5, 2002), <http://pollingreport.com/crime.htm>.
- <sup>266</sup> *Id.*
- <sup>267</sup> John Wildermuth, "Poll on Issues Positive for Davis; Support for Abortion and Gun Control," *San Francisco Chronicle* (May 8, 2002).
- <sup>268</sup> *Id.*
- <sup>269</sup> *Id.*
- <sup>270</sup> Eisenberg, Garvey, & Wells, *supra*, note 254 above, at 372.
- <sup>271</sup> Cal. Pen. Code § 190.8(d); Cal. Rules of Ct., Rule 39.54(g).
- <sup>272</sup> California Judicial Council, 2002 Court Statistics Report 4, 11 (2002).
- <sup>273</sup> California Supreme Court Policies Regarding Cases Arising from Judgments of Death, Policy Statement 3, ¶ 1-1 (amended 1998). See the description of the review process in an earlier chapter of this paper for the difference between appeal and habeas.
- <sup>274</sup> See, e.g., Liebman, et al., "A Broken System II: Why There Is So Much Error in Capital Cases, and What Can Be Done About It" (2002).
- <sup>275</sup> *Garceau v. California* (1994) 513 U.S. 848.
- <sup>276</sup> See 28 U.S.C. § 2266(b)(1)(A), (c)(1)(A) (180 days total for district court, 120 from completion of briefing for court of appeals).
- <sup>277</sup> 141 Cong. Rec. 14,734 (1995).
- <sup>278</sup> *Barefoot v. Estelle* (1983) 463 U. S. 880, 887.
- <sup>279</sup> 28 U.S.C. §§ 2261, 2265.
- <sup>280</sup> Antiterrorism and Effective Death Penalty Act of 1996, P.L. 104-132 § 107(c).
- <sup>281</sup> 28 U.S.C. § 2264.
- <sup>282</sup> 28 U.S.C. § 2266.
- <sup>283</sup> *Ashmus v. Calderon* (9<sup>th</sup> Cir. 2000) 202 F.3d 1160, cert. den. 531 U.S. 916 (2000); *Spears v. Stewart* (9<sup>th</sup> Cir. 2002) 283 F.3d 992, cert. den. 154 L.Ed.2d 363 (2002).

*Appendix*  
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## CALIFORNIA CAPITAL CASES REVERSED BY THE CALIFORNIA SUPREME COURT<sup>1</sup>

INMATE/SCOPE OF REVERSAL	APPEAL/HABEAS/ DATE/CITATION	REASONS FOR REVERSAL	SUBSEQUENT HISTORY
Lavell Frierson [Entire Judgment]	Habeas 1979 25 Cal.3d 142	IAC <sup>2</sup>	Retried and sentenced to death; see below
Nick Velasquez [Penalty Only]	Appeal 1979 26 Cal.3d 425	Errors in jury selection <sup>3</sup>	Opinion reinstated following remand from United States Supreme Court; resentenced to life without parole; died in prison
Ronald Lanphear [Penalty Only]	Appeal 1980 26 Cal.3d 814	Same jury selection error found in Velasquez	Opinion reinstated following remand from United States Supreme Court; retried and sentenced to death; see below
Charles Green [Special Circumstances] <sup>4</sup>	Appeal 1980 27 Cal.3d 1	Insufficient evidence on one special circumstance and instructional error on the other <sup>5</sup>	Resentenced to life term for murder conviction

<sup>1</sup> This chart identifies 95 capital judgments reversed in whole or in part by the California Supreme Court since the state reinstated the death penalty in 1977. During that same period, the supreme court affirmed some 255 death judgments. Of the affirmed cases, 10 condemned inmates were executed by California, one was executed by another state, 12 died while on death row, 23 were reversed in whole or in part by the federal courts, and 209 are at various stages of collateral litigation in the state and federal courts. With respect to the reversals, 58 were issued during the tenure of Chief Justice Rose Bird. The Malcom Lucas court reversed 30 capital judgments, while to date the court under Chief Justice Ronald George has reversed 7 cases. This chart further identifies the basis for the reversal, with footnotes identifying those grounds that were later rejected by United States Supreme Court or reassessed by the California Supreme Court, as well as the subsequent history of the case. To date, 41 of the reversed cases have resulted in the death sentence being reimposed.

<sup>2</sup> IAC refers to a claim of ineffective assistance of trial counsel.

<sup>3</sup> Basis for reversal is questionable in light of subsequent Supreme Court decision on jury selection in capital cases. (See *Wainwright v. Witt* (1985) 469 U.S. 412.)

<sup>4</sup> Because a special-circumstance finding is a prerequisite to imposition of death, reversal of the special circumstance necessarily requires reversal of the death sentence.

<sup>5</sup> The rule established in *Green* was abrogated in part by the Legislature in 1998, and that action was approved by the electorate in 2000.

INMATE/SCOPE OF REVERSAL	APPEAL/HABEAS/ DATE/CITATION	REASONS FOR REVERSAL	SUBSEQUENT HISTORY
Maurice Thompson [Special Circumstances]	Appeal 1980 27 Cal.3d 303	Insufficient evidence of special circumstances based on decision in Green	Double jeopardy barred retrial on the specials; judgment converted to straight life
Billy Lee Chadd [Entire Judgment]	Appeal 1981 28 Cal.3d 739	Allowing guilty plea over objection of counsel in violation of state law <sup>6</sup>	No retrial; convicted and sentenced to life without parole pursuant to plea bargain
David Murtishaw [Penalty]	Appeal 1981 29 Cal.3d 733	Admission of evidence on future dangerousness <sup>7</sup>	Retried and sentenced to death; affirmed on appeal; penalty subsequently reversed by 9 <sup>th</sup> Circuit
Marcelino Ramos [Penalty]	Appeal 1982 30 Cal.3d 553	Improper instruction on commutation <sup>8</sup>	Following remand from United States Supreme Court special circumstances were also reversed; see below
Randy Haskett [Penalty]	Appeal 1982 30 Cal.3d 841	Improper instruction on commutation per Ramos	Retried and sentenced to death; affirmed on appeal
Carl Hogan [Entire Judgment]	Appeal 1982 31 Cal.3d 815	Improper admission of statements to police	Retried and sentenced to life without parole; died in prison
Douglas Stankewitz [Entire Judgment]	Appeal 1982 32 Cal.3d 80	Failure to conduct hearing on competence to stand trial	Retried and sentenced to death; affirmed on appeal
Vicente Arcega [Entire Judgment]	Appeal 1982 32 Cal.3d 504	Improper admission of psychiatric testimony	Retried and sentenced to life without parole

<sup>6</sup> See California Penal Code § 1018.

<sup>7</sup> The United States Supreme Court subsequently held there is no federal constitutional prohibition against the admission of expert testimony on future dangerousness. (*Barefoot v. Estelle* (1983) 463 U.S. 880.)

<sup>8</sup> The United States Supreme Court reversed and remanded, finding no federal constitutional error in the commutation instruction. (*California v. Ramos* (1983) 463 U.S. 992.) The California Supreme Court reiterated its decision as a rule of California law. (*People v. Ramos* (1984) 37 Cal.3d 136.) References to “Ramos error” refer to the California state law rule.

INMATE/SCOPE OF REVERSAL	APPEAL/HABEAS/ DATE/CITATION	REASONS FOR REVERSAL	SUBSEQUENT HISTORY
John Gzikowski [Entire Judgment]	Appeal 1982 32 Cal.3d 580	Denial of continuance resulting in denial of counsel of choice	No retrial; convicted of murder and sentenced to life in prison pursuant to guilty plea; paroled in 1982
Andrew Robertson [Penalty]	Appeal 1982 33 Cal.3d 21	Failure to instruct pursuant to state law on burden of proving other crimes offered in aggravation	Retried and sentenced to death; affirmed on appeal; died of natural causes on death row
Elbert Easley [Penalty]	Appeal 1983 34 Cal.3d 858	Jury was instructed pursuant to wrong death penalty statutes and improperly instructed not to consider sympathy <sup>9</sup>	Retried and sentenced to death; see below
Ronny Mozingo [Entire Judgment]	Habeas 1983 34 Cal.3d 926	IAC	Pleaded guilty to second degree murder
Mariney Joseph [Entire Judgment]	Appeal 1983 34 Cal.3d 936	Denial of motion to represent himself at trial	Died at San Quentin in 1986
Richard Mroczko [Entire Judgment]	Appeal 1983 35 Cal.3d 86	Joint representation resulted in conflict of interest by defense counsel	No retrial; convicted of murder and sentenced to life in prison pursuant to plea bargain; paroled in 1984
Lee Harris [Entire Judgment]	Appeal 1984 36 Cal.3d 36	Denial of impartial jury drawn from fair cross-section of community	Retried and sentenced to life in prison; reversed on appeal; retried and sentenced to life in prison; affirmed on appeal
Ronald Lanphear [Penalty]	Appeal 1984 36 Cal.3d 163	Improper instruction not to consider sympathy per Easley	No retrial; sentenced to life without parole
Rodney Alcalá [Entire Judgment]	Appeal 1984 36 Cal.3d 604	Improper admission of other crimes evidence in guilt phase	Retried and sentenced to death; affirmed on appeal

<sup>9</sup> The United States Supreme Court subsequently held that the anti-sympathy instruction given in this case was constitutionally permissible. (*California v. Brown* (1987) 479 U.S. 538.)

INMATE/SCOPE OF REVERSAL	APPEAL/HABEAS/ DATE/CITATION	REASONS FOR REVERSAL	SUBSEQUENT HISTORY
Charles Whitt [Special Circumstances]	Appeal 1984 36 Cal.3d 724	Carlos/Garcia error <sup>10</sup>	Retried and sentenced to death; affirmed on appeal
Michael Mattson [Entire Judgment]	Appeal 1984 37 Cal.3d 136	Improper admission of confession held to be reversible per se	Retried and sentenced to death; affirmed on appeal
Marcelino Ramos [Special Circumstances]	Appeal 1984 37 Cal.3d 136	Carlos/Garcia error; also held that commutation instruction was state law error in penalty phase (see note 8)	Retried and sentenced to death; affirmed on appeal
Richard Turner [Special Circumstances]	Appeal 1984 37 Cal.3d 302	Failure to instruct on intent to kill <sup>11</sup>	Retried and sentenced to death
Eddie McDonald [Entire Judgment]	Appeal 1984 37 Cal.3d 351	Guilt reversed for failure to admit expert testimony on eyewitness evidence; felony murder special circumstance reversed and retrial barred because jury acquitted on underlying felony; conviction reduced to second degree because verdict did not specify degree <sup>12</sup>	Retried and convicted of second degree murder; affirmed on appeal

<sup>10</sup> In *Carlos v. Superior Court* (1983) 35 Cal.3d 131, the state supreme court held that an intent to kill was a constitutionally required element of the felony-murder special circumstance in the 1978 death-penalty statutes. The court subsequently applied *Carlos* to all cases still on appeal and held that, absent exceptional circumstances, failure to instruct on the intent-to-kill requirement was necessarily prejudicial and required reversal of the felony-murder special-circumstance finding. (*People v. Garcia* (1984) 36 Cal.3d 539.) The supreme court subsequently reversed *Carlos* in *People v. Anderson* (1987) 43 Cal.3d 1104, finding that an intent to kill was not constitutionally mandated for an actual killer. However, the *Carlos/Garcia* requirement remains applicable to all cases tried between the finality of *Carlos* (January 19, 1984) and the finality of *Anderson* (November 12, 1987).

<sup>11</sup> The supreme court extended the intent-to-kill requirement of *Carlos/Garcia* to a multiple-murder special circumstance when all of the killings were based on felony murder. The *Turner* rule was also reversed in *Anderson, supra*, note 10, but remains to cases tried between the finality of *Turner* (January 17, 1985) and the finality of *Anderson* (November 12, 1987).

<sup>12</sup> The portion of the opinion reducing the conviction to second degree was later overruled by the state court. (*People v. Mendoza* (2000) 23 Cal.4th 896.)

INMATE/SCOPE OF REVERSAL	APPEAL/HABEAS/ DATE/CITATION	REASONS FOR REVERSAL	SUBSEQUENT HISTORY
Steven Holt [Entire Judgment]	Appeal 1984 37 Cal.3d 436	Erroneous admission of evidence; improper impeachment of defense witnesses; improper argument by prosecutor	Retried and sentenced to 33 years to life for murder without special circumstances
Joseph Armendariz [Entire Judgment]	Appeal 1984 37 Cal.3d 573	Improper restriction on use of peremptory challenges; special circumstances also reversed for Carlos/Garcia error	Retried and sentenced to life without parole; affirmed on appeal
Jerry Bigelow [Entire Judgment]	Appeal 1984 37 Cal.3d 731	Failure to appoint standby counsel to assist defendant who was representing himself	On retrial jury acquitted of murder but found special circumstances allegations true; appellate court deemed the inconsistent verdicts an acquittal
Stephen Anderson [Special Circumstances]	Appeal 1985 38 Cal.3d 58	Carlos/Garcia error	Retried and sentenced to death; affirmed on appeal; executed
Harold Memro [Entire Judgment]	Appeal 1985 38 Cal.3d 658	Improper restriction on discovery of complaints about police officers for use in challenging confession	Retried and sentenced to death; affirmed on appeal
Theodore Frank [Penalty]	Appeal 1985 38 Cal.3d 711	Error in admission of evidence obtained pursuant to invalid search warrant found harmless as to guilt was prejudicial at penalty phase	Retried and sentenced to death; affirmed on appeal; died of natural causes on death row
Juan Boyd [Special Circumstances]	Appeal 1985 38 Cal.3d 762	Carlos/Garcia error	Retried and sentenced to life without parole
John Hayes [Special Circumstances]	Appeal 1985 38 Cal.3d 780	Carlos/Garcia error	Resentenced to life without parole
Lavell Frierson [Special Circumstances]	Appeal 1985 39 Cal.3d 803	IAC for refusal to introduce evidence in guilt phase as requested by defendant	Retried and sentenced to death; affirmed on appeal

INMATE/SCOPE OF REVERSAL	APPEAL/HABEAS/ DATE/CITATION	REASONS FOR REVERSAL	SUBSEQUENT HISTORY
Raymond Chavez [Special Circumstances]	Appeal 1985 39 Cal.3d 823	Carlos/Garcia error	Retried and sentenced to life in prison
Richard Monteil [Penalty]	Appeal 1985 39 Cal.3d 910	Ramos error; improper instruction not to consider sympathy per Easley	Retried and sentenced to death; affirmed on appeal
Danny Guerra [Special Circumstances]	Appeal 1985 40 Cal.3d 377	Carlos/Garcia error	Retried and sentenced to life without parole
Laird Stankewitz [Entire Judgment]	Habeas 1985 40 Cal.3d 391	Juror misconduct	Pleaded guilty and sentenced to life without parole
Albert Brown [Penalty]	Appeal 1985 40 Cal.3d 512	Improper instruction not to consider sympathy per Easley <sup>13</sup>	Following remand from United States Supreme Court the death sentence was again reversed on other grounds; see below
Robert Massie [Entire Judgment]	Appeal 1985 40 Cal.3d 620	Allowing guilty plea over objection of defense counsel in violation of state law	Retried and sentenced to death; affirmed on appeal; executed after waiving federal habeas corpus review
Jose Fuentes [Special Circumstances]	Appeal 1985 40 Cal.3d 629	Carlos/Garcia error	Retried and sentenced to death; reversed on appeal; see below
Patrick Croy [Entire Judgment]	Appeal 1985 41 Cal.3d 1	Erroneous aiding and abetting instruction <sup>14</sup>	Retried and acquitted <sup>15</sup>

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<sup>13</sup> The United States Supreme Court reversed and remanded, finding no federal constitutional error in the standard instruction not to be swayed by mere sentiment or sympathy. (*California v. Brown* (1987) 479 U.S. 538.)

<sup>14</sup> Absent some narrow exceptions, the state court held in *Croy* that omission of the intent element for aiding and abetting was held to require reversal per se. That standard was later rejected by the United States Supreme Court. (*California v. Roy* (1997) 519 U.S. 2 (per curiam) (reviewing erroneous aiding and abetting instruction).)

<sup>15</sup> Croy was charged with killing a police officer. On retrial he raised a claim of cultural self-defense based on his Native American heritage.

INMATE/SCOPE OF REVERSAL	APPEAL/HABEAS/ DATE/CITATION	REASONS FOR REVERSAL	SUBSEQUENT HISTORY
Richard Phillips [Penalty]	Appeal 1985 41 Cal.3d 29	Failure to instruct on reasonable doubt standard applicable to other crimes evidence offered in aggravation	Retried and sentenced to death; affirmed on appeal
Michael Leach [Penalty]	Appeal 1985 41 Cal.3d 92	Improper instruction not to consider sympathy per Easley	Retried and sentenced to life without parole
David Balderas [Special Circumstances]	Appeal 1985 41 Cal.3d 144	Carlos/Garcia error	Resentenced to 48 years to life
John Davenport [Penalty]	Appeal 1985 41 Cal.3d 247	Failure to instruct on reasonable doubt on other crimes evidence; inadequate instruction on mitigating circumstances; inadequate instruction on standard for determining death <sup>16</sup>	Retried and sentenced to death; affirmed on appeal
Steven Silbertson [Special Circumstances]	Appeal 1985 41 Cal.3d 296	Carlos/Garcia error	Retried and sentenced to life without parole
Ronald Deere [Penalty]	Appeal 1985 41 Cal.3d 353	Per se reversal for failure to introduce available mitigating evidence over defendant's objection <sup>17</sup>	Retried and sentenced to death; affirmed on appeal
Bernard Hamilton [Special Circumstances]	Appeal 1985 41 Cal.3d 408	Carlos/Garcia error <sup>18</sup>	Following remand from the United States Supreme Court the judgment was affirmed; death penalty reversed by federal court; retried and sentenced to death

<sup>16</sup> At least two of the grounds upon which *Davenport* was reversed, the instruction on mitigating evidence and the standard for determining death, were later rejected on constitutional grounds by the United States Supreme Court. (*Boyd v. California* (1990) 494 U.S. 370.)

<sup>17</sup> The per se reversal standard for failing to introduce any mitigating evidence was later disapproved by the state court. (*People v. Bloom* (1989) 48 Cal.3d 1194.)

<sup>18</sup> The United States Supreme Court reversed and remanded for reconsideration in light of a recent decision on harmless error. (*California v. Hamilton* (1986) 478 U.S. 1017.)

INMATE/SCOPE OF REVERSAL	APPEAL/HABEAS/ DATE/CITATION	REASONS FOR REVERSAL	SUBSEQUENT HISTORY
Michael Burgener [Penalty]	Appeal 1986 41 Cal.3d 505	Deere error; improper instruction not to consider sympathy per Easley; inadequate instruction on standard for determining death	Retried, death sentenced vacated by trial court; order reversed and remanded by Court of Appeal; death sentence imposed on remand
James Ratliff [Special Circumstances]	Appeal 1986 41 Cal.3d 675	Carlos/Garcia error	No retrial; resentenced to life without parole pursuant to plea bargain
Ronald Smallwood [Entire Judgment]	Appeal 1986 42 Cal.3d 415	Erroneous denial of motion to sever charges <sup>19</sup>	No retrial; convicted of second degree murder and sentenced to 15 years to life pursuant to plea bargain
Melvin Turner [Entire Judgment]	Appeal 1986 42 Cal.3d 711	Erroneous use of peremptory challenges by the prosecutor	Retried and sentenced to death; affirmed
Luis Rodriguez [Penalty]	Appeal 1986 42 Cal.3d 730	Death judgment vacated for reconsideration of automatic statutory motion to modify sentence	On remand trial court reduced the sentence to life without parole; affirmed on appeal
Fermin Ledesma [Entire Judgment]	Habeas 1987 43 Cal.3d 171	IAC	Retried and sentenced to death
Venson Myers [Special Circumstances]	Appeal 1987 43 Cal.3d 250	Ramos error; inadequate instruction on standard for determining death	Retried and sentenced to life without parole
Dale Bloyd [Penalty]	Habeas 1987 43 Cal.3d 333	Deere error	No retrial; sentenced to life without parole
Edgar Hendricks [Penalty]	Appeal 1987 43 Cal.3d 584	Failure to conduct sanity phase prior to penalty phase	Retried, found sane but jury hung on sentence; no retrial; sentenced to life without parole; affirmed on appeal

<sup>19</sup> The holding of *Smallwood* has since been disapproved by the California Supreme Court. (*People v. Bean* (1988) 46 Cal.3d 919.)

INMATE/SCOPE OF REVERSAL	APPEAL/HABEAS/ DATE/CITATION	REASONS FOR REVERSAL	SUBSEQUENT HISTORY
James Anderson [Penalty]	Appeal 1987 43 Cal.3d 1104	Ramos error <sup>20</sup>	Retried and sentenced to death; affirmed on appeal
Prentice Snow [Entire Judgment]	Appeal 1987 44 Cal.3d 216	Improper use of peremptory challenges	Retried and sentenced to death
Brian Hale [Entire Judgment]	Appeal 1988 44 Cal.3d 531	Failure to conduct hearing on competence to stand trial	Found incompetent to stand trial and confined at Patton State Hospital since 1991
Phillip Lucero [Penalty]	Appeal 1988 44 Cal.3d 1006	Exclusion of mitigating evidence	Retried and sentenced to death; affirmed on appeal
Lynn Milner [Penalty]	Appeal 1988 45 Cal.3d 227	Misleading instructions on standard for determining death	No retrial; sentenced to life without parole
Robert Warren Woodrow Warren <sup>21</sup> [Penalty]	Appeal 1988 45 Cal.3d 471	Ramos error	Both defendants retried and sentenced to life without parole
Jerry Bunyard [Penalty]	Appeal 1988 45 Cal.3d 1189	Ramos error	Retried and sentenced to death
Albert Brown [Penalty]	Appeal 1988 45 Cal.3d 1247	Death judgment vacated for reconsideration of automatic statutory motion to modify sentence	Death sentence reinstated on remand; affirmed on appeal
John Marks [Entire Judgment]	Appeal 1988 45 Cal.3d 1335	Failure to conduct hearing on competence to stand trial	Retrial limited to second degree murder because first jury failed to designate degree
Oscar Morris [Special Circumstances]	Appeal 1988 46 Cal.3d 1	Insufficient evidence of special circumstance based on Green	Double jeopardy barred retrial on special circumstance; judgment converted to straight life

<sup>20</sup> As discussed in note 10, *supra*, the court reversed its earlier holdings requiring an intent to kill for felony murder and multiple-murder special circumstances in this case.

<sup>21</sup> Defendants were tried together, and the appeals were heard together.

INMATE/SCOPE OF REVERSAL	APPEAL/HABEAS/ DATE/CITATION	REASONS FOR REVERSAL	SUBSEQUENT HISTORY
Elbert Easley [Penalty]	Appeal 1988 46 Cal.3d 712	IAC based on conflict of counsel	No retrial; sentenced to life without parole
Kenneth Crandell [Penalty]	Appeal 1988 46 Cal.3d 833	Misleading instructions	No retrial; sentenced to life without parole; reversed by 9 <sup>th</sup> Circuit
Donald Griffin [Penalty]	Appeal 1988 46 Cal.3d 1011	Ramos error	Retried and sentenced to death
Joe Johnson [Penalty]	Appeal 1988 47 Cal.3d 576	Ramos error	Retried and sentenced to death
Richard Garrison [Penalty]	Appeal 1989 47 Cal.3d 746	Ramos error	Retried and sentenced to life without parole
Lee Farmer [Penalty]	Appeal 1989 47 Cal.3d 888	Misleading instructions and improper argument by prosecutor	Sentenced to life without parole; reversed by federal court
Peter Edelbacher [Penalty]	Appeal 1989 47 Cal.3d 983	Misleading instructions	Retried and sentenced to life without parole
Von Harris [Penalty]	Appeal 1989 47 Cal.3d 1047	Ramos error	Retried and sentenced to life without parole
Richard Boyer [Entire Judgment]	Appeal 1989 48 Cal.3d 247	Improper admission of incriminating statements	Retried and sentenced to death
Louis Bonillas [Penalty]	Appeal 1989 48 Cal.3d 757	Death judgment vacated for reconsideration of automatic statutory motion to modify sentence	On remand reduced to life without parole
Jeffrey Sheldon [Penalty]	Appeal 1989 48 Cal.3d 935	Death judgment vacated for reconsideration of automatic statutory motion to modify sentence	Death sentence reinstated; affirmed on appeal
Felipe Sixto [Entire Judgment]	Habeas 1989 48 Cal.3d 1247	IAC	Retried and sentenced to life without parole

INMATE/SCOPE OF REVERSAL	APPEAL/HABEAS/ DATE/CITATION	REASONS FOR REVERSAL	SUBSEQUENT HISTORY
Robert Lewis [Penalty]	Appeal 1990 50 Cal.3d 262	Death judgment vacated for reconsideration of automatic statutory motion to modify sentence	Death sentence reinstated
Duane Holloway [Entire Judgment]	Appeal 1990 50 Cal.3d 1098	Jury misconduct	Retried and sentenced to death
Jose Fuentes [Entire Judgment]	Appeal 1991 51 Cal.3d 707	Improper use of peremptory challenges	Retried and sentenced to life without parole; affirmed on appeal
Gonzalo Marquez [Penalty]	Habeas 1992 1 Cal.4 <sup>th</sup> 584	IAC	Retried and sentenced to life without parole
Robert Wilson [Entire Judgment]	Habeas 1992 3 Cal.4 <sup>th</sup> 945	IAC and improper admission of statements by defendant	Retried and sentenced to death
Keith Hitchings [Entire Judgment]	Habeas 1993 6 Cal.4 <sup>th</sup> 97	Juror misconduct	Retried, convicted of two second degree murders and sentenced to life in prison; affirmed on appeal
Charles Neely [Entire Judgment]	Habeas 1993 6 Cal.4 <sup>th</sup> 901	IAC and improper admission of statements by defendant	Retried but prosecutor precluded from seeking death; convicted and sentenced to life without parole; affirmed on appeal
Troy Jones [Entire Judgment]	Habeas 1996 13 Cal.4 <sup>th</sup> 552	IAC	Charges dismissed because of inability to retry the case
Drax Quartermain [Entire Judgment]	Appeal 1997 16 Cal.4 <sup>th</sup> 600	Improper admission of statement by defendant	Retried after waiver of jury and sentenced to death
Shawn Hill [Entire Judgment]	Appeal 1998 17 Cal.4 <sup>th</sup> 800	Prosecutorial misconduct in argument	Retried and convicted; jury hung on penalty; sentenced to life without parole
John Brown [Entire Judgment]	Habeas 1998 17 Cal.4 <sup>th</sup> 873	Failure to provide discovery	Retried and sentenced to death

INMATE/SCOPE OF REVERSAL	APPEAL/HABEAS/ DATE/CITATION	REASONS FOR REVERSAL	SUBSEQUENT HISTORY
Kenneth Gay [Penalty]	Habeas 1998 19 Cal.4 <sup>th</sup> 771	IAC	Retried and sentenced to death
Mauricio Silva [Penalty]	Appeal 2001 25 Cal.4 <sup>th</sup> 345	Wheeler error	Further proceedings pending
Randall Cash [Penalty]	Appeal 2002 28 Cal.4 <sup>th</sup> 703	Errors in death qualification <sup>22</sup>	Further proceedings pending

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<sup>22</sup> Defense counsel was not permitted to ask prospective jurors what effect the commission of a prior murder might have on their determination of penalty.

## CALIFORNIA CAPITAL CASES REVERSED BY FEDERAL COURTS

INMATE/SCOPE OF REVERSAL	COURT/YEAR CITATION	REASONS	SUBSEQUENT HISTORY
Michael Williams [Penalty Only]	USDC-CD 1993 Unpublished	Ineffective assistance of counsel	No retrial - sentenced to life without parole
Bernard Hamilton [Penalty Only]	9 <sup>th</sup> Circuit 1994 17 F.3d 1149	Improper instruction on commutation	Retrial - death
Melvin Wade [Special Circumstance and Penalty]	9 <sup>th</sup> Circuit 1994 29 F.3d 1312	Improper instruction on torture special circumstance and ineffective assistance of counsel	No retrial - sentenced to life without parole
Edgar Hendricks [Penalty Only]	9 <sup>th</sup> Circuit 1995 70 F.3d 1032	Ineffective assistance of counsel	No retrial - sentenced to life without parole
Gary Howard [Penalty Only]	USDC-CD 1996 Unpublished	Ineffective assistance of counsel	No retrial - sentenced to life without parole
Charles Moore [Entire Judgment]	9 <sup>th</sup> Circuit 1997 108 F.3d 261	Denial of motion for self-representation	Retrial - death
Charles McDowell [Penalty Only]	9 <sup>th</sup> Circuit en banc 1997 130 F.3d 833	Refusal to give additional instruction	Retrial - death
Robert Bloom [Entire Judgment]	9 <sup>th</sup> Circuit 1997 132 F.3d 1267	Ineffective assistance of counsel	Retrial - death
Robert McLain [Penalty Only]	9 <sup>th</sup> Circuit 1998 134 F.3d 1383	Improper commutation instruction	No retrial - sentenced to life without parole
Michael Hunter [Entire Judgment]	USDC-ND 1998 Unpublished	Prosecutor's failure to provide discovery	Retrial on guilt and special circumstances; convicted of two murders; sentenced to life without parole
Alfred Dyer [Entire Judgment]	9 <sup>th</sup> Circuit en banc 1998 151 F.3d 970	Juror misconduct	Pleaded guilty to two second degree murders; sentenced to 15 years to life

INMATE/SCOPE OF REVERSAL	COURT/YEAR CITATION	REASONS	SUBSEQUENT HISTORY
Anthony Bean [One Murder Conviction and Penalty]	9 <sup>th</sup> Circuit 1998 163 F.3d 1073	Murder conviction reversed for improper joinder; penalty reversed for ineffective assistance of counsel	Retrial pending
Russell Coleman [Penalty Only]	9 <sup>th</sup> Circuit 2000 210 F.3d 1047	Improper commutation instruction	No retrial - sentenced to life without parole
Michael Jackson [Penalty Only]	9 <sup>th</sup> Circuit 2000 211 F.3d 1148	Ineffective assistance of counsel	Retrial pending
Maurice Keenan [Penalty Only]	USDC-ND 2001 Unpublished	Juror coercion	No retrial - sentenced to life without parole; appeal on guilt phase issues pending
Alfred Sandoval [Penalty Only]	9 <sup>th</sup> Circuit 2001 241 F.3d 765	Improper Biblical references in prosecutor's argument	Further proceedings pending
David Murtishaw [Penalty Only]	9 <sup>th</sup> Circuit 2001 255 F.3d 926	Instructions under inapplicable death penalty statutes	Retrial - death
Stephen Ainsworth [Penalty Only]	9 <sup>th</sup> Circuit 2001 268 F.3d 868	Ineffective assistance of counsel	No retrial - sentenced to life without parole
Demetrie Mayfield [Penalty Only]	9 <sup>th</sup> Circuit en banc 2001 270 F.3d 915	Ineffective assistance of counsel	Further proceedings pending
Bruce Wayne Morris [Penalty Only]	9 <sup>th</sup> Circuit 2001 273 F.3d 826	Erroneous instruction	Further proceedings on guilt pending in district court
Benjamin Silva [Penalty Only]	9 <sup>th</sup> Circuit 2002 279 F.3d 825	Ineffective assistance of counsel	Further proceedings on guilt pending in district court
David Ghent [Special Circumstance and Penalty]	9 <sup>th</sup> Circuit 2002 279 F.3d 1121	Erroneous admission of evidence obtained in violation of <i>Miranda</i>	Retrial pending
Fernando Caro [Penalty Only]	9 <sup>th</sup> Circuit 2002 280 F.3d 1247	Ineffective assistance of counsel	Retrial pending

## OTHER STATE CAPITAL CASES REVERSED BY FEDERAL COURTS

INMATE/SCOPE OF REVERSAL	STATE	YEAR/CITATION	REASONS
Larry Evans [Penalty Only]	Arizona	1988 855 F.2d 631	Ineffective assistance of counsel
John Adamson [Penalty Only]	Arizona	1988 865 F.2d 1011 (en banc)	Constitutional defects in state death penalty scheme
Bernard Fitzpatrick [Entire Judgment]	Montana	1989 869 F.2d 1247	Ineffective assistance of counsel and double jeopardy
Dewey Coleman [Penalty Only]	Montana	1989 874 F.2d 1280 (en banc)	Unconstitutional death penalty scheme
Ronald Smith [Penalty Only]	Montana	1990 914 F.2d 1153	Denial of expert and evidentiary issues
Thomas Creech [Penalty Only]	Idaho	1991 928 F.2d 1481	Denial of opportunity to present mitigation at penalty retrial
Kwan Fai Mak [Penalty Only]	Washington	1992 970 F.2d 614	Ineffective assistance of counsel
Mitchell Blazak [Penalty Only]	Arizona	1993 1 F.3d 891 (evenly divided court)	Failure to conduct competence hearing
Albert Beam [Penalty Only]	Idaho	1993 3 F.3d 1301	Improper admission of evidence
Michael Williams [Penalty Only]	California	USDC-CD 1993 Unpublished	Ineffective assistance of counsel
Henry Deutscher [Penalty Only]	Nevada	1994 16 F.3d 981	Ineffective assistance of counsel
Bernard Hamilton [Penalty Only]	California	1994 17 F.3d 1149	Improper instruction on commutation
Melvin Wade [Special Circumstance and Penalty]	California	1994 29 F.3d 1312	Improper instruction on torture special circumstance and ineffective assistance of counsel
Scott Clabourne [Penalty Only]	Arizona	1995 64 F.3d 1373	Ineffective assistance of counsel
Benjamin Harris [Entire Judgment]	Washington	1995 64 F.3d 1432	Ineffective assistance of counsel
Patrick McKenna [Penalty Only]	Nevada	1995 65 F.3d 1483	Improper instruction on aggravating factor
Edgar Hendricks [Penalty Only]	California	1995 70 F.3d 1032	Ineffective assistance of counsel
Mitchell Rupe [Penalty Only]	Washington	1996 93 F.3d 1434	Improper exclusion of evidence
Gary Howard [Penalty Only]	California	USDC-CD 1996 Unpublished	Ineffective assistance of counsel

Charles Moore [Entire Judgment]	California	1997 108 F.3d 261	Denial of motion for self-representation
Patrick Jeffries [Penalty Only]	Washington	1997 114 F.3d 1484 (en banc)	Juror misconduct
Gerald Gallego [Penalty Only]	Nevada	1997 124 F.3d 1065	Improper instruction on commutation
Charles McDowell [Penalty Only]	California	1997 130 F.3d 833 (en banc)	Refusal to give additional instruction
Paris Carriger [Entire Judgment]	Arizona	1997 132 F.3d 463 (en banc)	Brady violation
Robert Bloom [Entire Judgment]	California	1997 132 F.3d 1267	Ineffective assistance of counsel
Robert McLain [Penalty Only]	California	1998 134 F.3d 1383	Improper commutation instruction
Bernard Smith [Penalty Only]	Arizona	1998 140 F.3d 1263	Ineffective assistance of counsel
Michael Hunter [Entire Judgment]	California	USDC-ND 1998 Unpublished	Prosecutor's failure to provide discovery
Alfred Dyer [Entire Judgment]	California	1998 151 F.3d 970 (en banc)	Juror misconduct
Anthony Bean [One Murder Conviction and Penalty]	California	1998 163 F.3d 1073	Murder conviction reversed for improper joinder; penalty reversed for ineffective assistance of counsel
Donald Fetterly [Penalty Only]	Idaho	1999 163 F.3d 1144	Penalty reversed by USDC and not appealed by state
Brian Lord [Entire Judgment]	Washington	1999 184 F.3d 1083	Ineffective assistance of counsel
Joe Smith [Penalty Only]	Arizona	1999 189 F.3d 1004	Ineffective assistance of counsel
Russell Coleman [Penalty Only]	California	2000 210 F.3d 1047	Improper commutation instruction
Michael Jackson [Penalty Only]	California	2000 211 F.3d 1148	Ineffective assistance of counsel
Maurice Keenan [Penalty Only]	California	USDC-ND 2001 Unpublished	Juror coercion
Alfred Sandoval [Penalty Only]	California	2001 241 F.3d 765	Improper Biblical references in prosecutor's argument
David Murtishaw [Penalty Only]	California	2001 255 F.3d 926	Instructions under inapplicable death penalty statutes
Stephen Ainsworth [Penalty Only]	California	2001 268 F.3d 868	Ineffective assistance of counsel
Demetrie Mayfield [Penalty Only]	California	2001 270 F.3d 915 (en banc)	Ineffective assistance of counsel
Bruce Wayne Morris [Penalty Only]	California	2001 273 F.3d 826	Erroneous instruction

Benjamin Silva [Penalty Only]	California	2002 279 F.3d 825	Ineffective assistance of counsel
David Ghent [Special Circumstance and Penalty]	California	2002 279 F.3d 1121	Erroneous admission of evidence obtained in violation of <i>Miranda</i>
Fernando Caro [Penalty Only]	California	2002 280 F.3d 1247	Ineffective assistance of counsel
Gary Benn [Entire Judgment]	Washington	2002 283 F.3d 1040	Prosecutorial misconduct

Total Reversals By State

Arizona	7
California	23
Idaho	3
Montana	3
Nevada	3
Washington	6
<b>Total</b>	<b>45</b>

## NINTH CIRCUIT STATE EXECUTIONS

NAME	STATE	EXECUTION DATE
Jesse Bishop [Volunteer]	Nevada	October 22, 1979
Carroll Cole [Volunteer]	Nevada	December 6, 1985
William Thompson [Volunteer]	Nevada	June 19, 1989
Sean Flannagan [Volunteer]	Nevada	June 23, 1989
Thomas Baal [Volunteer]	Nevada	June 3, 1990
Donald Harding	Arizona	April 6, 1992
Robert Harris	California	April 21, 1992
Westley Dodd [Volunteer]	Washington	January 5, 1993
John Brewer [Volunteer]	Arizona	March 3, 1993
James Clark	Arizona	April 14, 1993
David Mason [Volunteer]	California	August 24, 1993
Keith Wells [Volunteer]	Idaho	January 6, 1994
Charles Campbell	Washington	May 27, 1994
Duncan McKenzie	Montana	May 10, 1995
Jimmie Jeffers	Arizona	September 13, 1995
William Bonin	California	February 23, 1996
Richard Moran	Nevada	March 30, 1996
Keith Williams	California	May 31, 1996
Darren Bolton [Volunteer]	Arizona	June 19, 1996
Luis Mata	Arizona	August 22, 1996
Douglas Wright [Volunteer]	Oregon	September 6, 1996
Randy Greenawalt	Arizona	January 23, 1997
Harry Moore [Volunteer]	Oregon	May 15, 1997
William Woratzeck	Arizona	June 25, 1997
Jose Ceja	Arizona	January 21, 1998
Terry Langford	Montana	February 24, 1998
Jose Villafuerte	Arizona	April 22, 1998

Arthur Ross [Volunteer]	Arizona	April 29, 1998
Douglas Gretzler	Arizona	June 3, 1998
Thomas Thompson	California	July 12, 1998
Roderick Abeyta [Volunteer]	Nevada	October 5, 1998
Jeremy Sagastegui [Volunteer]	Washington	October 13, 1998
Jess Gillies	Arizona	January 13, 1999
Darick Gerlaugh	Arizona	February 3, 1999
Jaturun Siripongs	California	February 9, 1999
Karl LaGrand	Arizona	February 24, 1999
Walter LaGrand	Arizona	March 3, 1999
Alvaro Calambro [Volunteer]	Nevada	April 5, 1999
Manuel Babbitt	California	May 4, 1999
Robert Vickers	Arizona	May 5, 1999
Michael Poland	Arizona	June 16, 1999
Ignacio Ortiz	Arizona	October 27, 1999
Anthony Chaney	Arizona	February 16, 2000
Darrell Rich	California	March 15, 2000
Patrick Poland	Arizona	March 15, 2000
Donald Miller	Arizona	November 8, 2000
Robert Massie [Volunteer]	California	March 27, 2001
Sebastian Bridges [Volunteer]	Nevada	April 22, 2001
James Elledge [Volunteer]	Washington	August 28, 2001
Stephen Anderson	California	January 29, 2002

Total Executions By State

*Volunteers*

Arizona	22	4
California	10	2
Idaho	1	1
Montana	2	
Oregon	2	2
Nevada	9	8
Washington	4	3
<b>TOTAL</b>	<b>50</b>	<b>20</b>

*Appendix*  
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## Non-California Cases of Alleged Innocence That Should be Removed from DPIC List

1. **David Keaton** – Conviction and sentence occurred prior to 1972 (pre-modern death-penalty statute era).<sup>1</sup>

2. **Samuel A. Poole** – Convicted of rape and sentenced under a defunct mandatory sentencing law that precluded consideration of mitigating evidence.<sup>2</sup> The United States Supreme Court has also declared the death penalty for rape to be cruel and unusual punishment.<sup>3</sup> Moreover, *Cooley* concedes that evidence of Poole's innocence is "weak."<sup>4</sup>

3. **Wilbur Lee**; 4. **Freddie Pitts** – Convictions and sentences occurred prior to 1972.<sup>5</sup>

5. **James Creamer** – Creamer was sentenced to death for a 1971 murder. According to Cobb County court records, his initial death sentence was imposed on February 4, 1973, but was then reduced to life on September 28, 1973. This reduction is understandable since the Georgia death-penalty law had been declared unconstitutional in 1972 in *Furman*.<sup>6</sup> There was some initial confusion about the actual sentence in this case since the original *Stanford* study and the reviewing courts' decisions simply stated that Creamer had received a life sentence. Of course, Creamer's case is not relevant to assessing today's post-*Furman* capital-punishment system.

6. **Thomas Gladish**; 7. **Richard Greer**; 8. **Ronald Keine**; and 9. **Clarence Smith** – These four defendants were tried and convicted under New Mexico's invalid mandatory death-penalty law that precluded consideration of mitigating evidence.<sup>7</sup> It is complete speculation whether they would have been sentenced to death under a "guided discretion" statute.

10. **Delbert Tibbs**<sup>8</sup> – Tibbs was convicted of raping a woman and murdering her boyfriend. The chief witness was the surviving rape victim who identified Tibbs as her boyfriend's murderer. Tibbs's conviction was reversed by a 4-3 vote of the Florida Supreme Court. The majority applied an anachronistic review standard that "carefully scrutinized" the testimony of the prosecutrix since she was the sole witness in the rape case "so as to avoid an unmerited conviction."<sup>9</sup> The conviction was not reversed because the Florida court found the evidence legally insufficient – but merely because the Florida court found the "weight" of the evidence insubstantial. The court found the prosecutrix's testimony to be doubtful when compared with the lack of evidence (other than her eyewitness testimony) that Tibbs was in the area where the rape-murder occurred.<sup>10</sup>

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1. *Anderson v. Florida* (1972) 267 So.2d 8.

2. *Woodson v. North Carolina* (1976) 428 U.S. 280.

3. *Coker v. Georgia* (1977) 433 U.S. 584.

4. *Cooley*, at 917.

5. *In re Bernard R. Baker* (Fla. 1972) 267 So.2d 331.

6. *Creamer v. State* (Ga. 1974.) 205 S.E.2d 240 (Creamer sentenced to four consecutive life terms);

*Emmett v. Ricketts* (N.D.Ga. 1975) 397 F.Supp. 1025.

7. *State v. Beaty* (N.M. 1976) 553 P.2d 688.

8. *Tibbs v. State* (Fla. 1976) 337 So.2d 788 (Tibbs I); *State v. Tibbs* (Fla.App. 1979) 370 So.2d 386 (Tibbs II); *Tibbs v. State* (Fla. 1981) 397 So.2d 1120, 1123 (Tibbs III); *Tibbs v. Florida* (1982) 457 U.S. 31 (Tibbs IV).

9. *Tibbs I*, at 790.

10. *Id.* at 791.

Subsequently, in a later opinion, the Florida Supreme Court repudiated this “somewhat more subjective” rule that permitted an appellate court to reverse a conviction because of the weight of the evidence rather than its sufficiency. In hindsight, the Florida Supreme Court candidly conceded that it should not have reversed Tibbs’s conviction since the evidence was legally sufficient.<sup>11</sup> The old review standard applied to Tibbs’s original case was a throwback to the long discarded rule that a rape conviction required corroboration of the rape victim’s testimony – an unenlightened rule that inherently distrusted the testimony of the rape victim.<sup>12</sup> The reversal of Tibbs’s conviction was a windfall for Tibbs, not a finding of innocence.

Subsequently, a debate in the Florida courts as to whether or not Tibbs could be retried under the Double Jeopardy Clause made its way to the United States Supreme Court. Justice O’Connor’s opinion explained that the rape victim gave a detailed description of her assailant and his truck. Tibbs was stopped because he matched her description of the murderer. The victim had already viewed photos of several single suspects on three or four occasions and had not identified them. She examined several books of photos without identifying any suspects. But when she saw Tibbs’s photo, she did identify Tibbs as the rapist-murderer. She again identified Tibbs in a lineup and positively identified him at trial.<sup>13</sup> At trial, the victim admitted drug use and that she used drugs “shortly” before the crimes occurred. She was confused as to the time of day that she first met Tibbs. Although not admitted as evidence, polygraphs showed that the victim was truthful. Tibbs denied being in the area during the time of the offense, and his testimony was partially corroborated. But the prosecution introduced a card with Tibbs’s signature that contradicted his testimony as to his location. Tibbs disputed that he had signed the card.<sup>14</sup> O’Connor’s opinion also noted the evidence that the Florida Supreme Court had originally believed weakened the prosecution’s case. Since the evidence of guilt was, however, not legally insufficient, the Double Jeopardy Clause did not bar Tibbs’s retrial.<sup>15</sup>

Ultimately, due to the current status of the surviving victim – a lifelong drug addict – the original prosecutor concluded the evidence was too tainted for retrial.<sup>16</sup> Nonetheless, the evidence recounted in the United States Supreme Court decision hardly supports a claim that Tibbs is actually innocent.

The state prosecutor who chose not to retry Tibbs recently explained to the Florida Commission on Capital Crimes that Tibbs “was never an innocent man wrongfully accused. He was a lucky human being. He was guilty, he was lucky, and now he is free.”

12. **Jonathan Treadaway**<sup>17</sup> – Treadaway was convicted of the sodomy and first-degree murder of a young boy in the victim’s bedroom. His conviction was reversed, and he was acquitted on retrial. Treadaway’s two palmprints were found outside a locked bedroom window of the victim’s home. When Treadaway was arrested, he had no explanation for these palmprints. Treadaway admitted being a peeping tom in the victim’s neighborhood, but did not remember ever looking in the victim’s house. He denied being at the victim’s house the night of the murder. But the victim’s mother testified she washed the windows the day before the murder,

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11. *Tibbs* III at 1126.

12. *Id.* at 1129 fn. 3 (Sundberg, C.J. dis. & conc.); see, e.g., *People v. Rincon-Pineda* (Cal. 1975) 14 Cal.3d 864.

13. *Tibbs* IV at 33 and fn. 2.

14. *Id.* at 34-35.

15. *Id.* at 35.

16. *In Spite of Innocence*, at 59.

17. *State v. Treadaway* (Ariz. 1977) 568 P.2d 1061, 1063-1065; *State v. Corcoran* (Treadaway I) (Ariz. 1978) 583 P.2d 229 (Treadaway II).

“raising an inference that the palmprints found the morning after the murder [were] fresh” and also raising the inference that Treadaway was lying. Pubic hairs on the victim's body were similar to Treadaway's. His conviction was reversed by the Arizona Supreme Court in a 3-2 decision because the trial court erroneously admitted evidence that Treadaway committed sex acts with a 13-year-old boy three years before the murder.

When Treadaway's retrial began, the Arizona Supreme Court reviewed several pretrial evidentiary rulings. It admitted evidence that Treadaway sexually attacked and tried to strangle a boy three months before the murder at issue in the boy's bedroom. The court, however, excluded the interrogation in which Treadaway failed to explain his palmprints outside the victim's bedroom window, specifically refused to provide any information, and made other incriminating statements. The exclusion was based on the police's failure to comply with the technical requirements of the *Miranda* decision, not because Treadaway's statements or failure to explain the palmprints on the window were somehow unreliable or involuntary.

This decision to exclude Treadaway's interrogation was a crucial difference between his two trials. Although there was defense evidence that the victim died of natural causes, the jurors who acquitted Treadaway on retrial later stated that they were actually concerned about the lack of evidence that Treadaway had been inside the boy's home.<sup>18</sup> Therefore, Treadaway's failure to explain the palmprints at the window could have been critical evidence since those palmprints at the very least would have connected Treadaway with a location just outside the boy's home on the night of the murder. Treadaway's inability to explain the suspicious presence to the police of his fingerprints would ordinarily indicate a “consciousness of guilt” about his presence at the boy's home. But the jury was never permitted to know that Treadaway had had no explanation for those palmprints – a circumstance consistent with his guilt. Thus, significant probative evidence of Treadaway's consciousness of guilt about the palmprints on the windowsill, directly relevant to the jury's concern about the case, was never disclosed to the jury at his second trial.

Since it cannot be known what the impact of that excluded evidence would have been on the second jury, Treadaway's acquittal on retrial did not demonstrate that he was innocent. And, in light of the recent United States Supreme Court decision in *Ring v. Arizona*, it is speculative now whether a jury would have found Treadaway eligible to be sentenced to death.

13. **Gary Beeman** – Convicted and sentenced under Ohio's invalid death-penalty statute that limited mitigating evidence.<sup>19</sup> Accordingly, it is speculative that he would have received a death sentence under appropriate law.

16. **Charles Ray Giddens** – In 1981, the Oklahoma appellate court reversed Giddens's conviction for insufficient evidence – not actual innocence – because the testimony of his alleged accomplice was “replete with conflicts.” In 1982, the state court held that retrial was barred under the Double Jeopardy Clause.<sup>20</sup> Thus, this was a case in which the evidence was found insufficient to prove guilt, not a case in which the defendant was exonerated.

17. **Michael Linder** – This defendant was acquitted on retrial based on grounds of self-defense.<sup>21</sup> Thus, this was not a case involving a “wrong-person” mistake as originally defined in the *Stanford* study.

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18. *Stanford*, at 164; *In Spite of Innocence*, at 349.

19. *Lockett v. Ohio* (1978) 438 U.S. 586.

20. *In Spite of Innocence*, at 306-307.

21. *Cooley*, at 948.

18. **Johnny Ross**<sup>22</sup> – This defendant’s name should be removed since he was sentenced under the unconstitutional mandatory Louisiana death-penalty statute, which precluded consideration of mitigating evidence.

19. **Annibal Jaramillo**<sup>23</sup> – This defendant’s double murder conviction and death judgment were reversed for legal insufficiency of evidence. The male victim had been bound with cord and then shot. Near the body was a coil of cord and near that coil was the packaging for a knife. Jaramillo’s fingerprint was found on the packaging and the knife, but not on the knife wrapper. A nearby grocery bag had Jaramillo’s fingerprint. Jaramillo testified that he was helping the victims’ nephew stack boxes in the garage the day before the murder. He asked for a knife to help cut the boxes. The nephew directed him inside to a grocery bag containing a packaged knife. According to Jaramillo, he removed the knife from the wrapper and returned to the garage. He claimed he later left the knife on the dining room table where it was found after the murder. Thus, Jaramillo’s testimony conveniently explained the fingerprints on the incriminating objects. According to the recent report of the Florida Commission on Capital Cases, the victims’ nephew, who could have either corroborated or contradicted Jaramillo’s version of events, was unavailable to testify at trial since his whereabouts were unknown.

Although there was circumstantial evidence of Jaramillo’s guilt in the double murder, the conviction could not be sustained under Florida law unless the evidence was inconsistent with any reasonable hypothesis of innocence. Proof of Jaramillo’s fingerprints on several items at the scene associated with the murder was not inconsistent with Jaramillo’s reasonable explanation of the fingerprints (helping the nephew stack boxes in the garage).

This Florida case illustrates a key point about our federal-state criminal-justice system. Florida’s “sufficiency of evidence” rule in this case was more stringent than the standard required under the Federal Constitution and applied by the majority of other states.<sup>24</sup> Ordinarily, it is not necessary for the prosecution to eliminate every hypothesis other than guilt.<sup>25</sup> As such, in both federal court and the majority of states, the evidence would have been sufficient to support Jaramillo’s conviction notwithstanding his alternative explanation for his fingerprints. The presence of Jaramillo’s fingerprints on items associated with the murder would have been sufficient for conviction.<sup>26</sup>

Under Florida law, however, Jaramillo’s innocent explanation was not inconsistent with the presence of the fingerprints on those objects. Accordingly, under state law, the conviction was reversed since Jaramillo’s innocent explanation for the prints could not be eliminated. The Florida Commission on Capital Cases described this case as an “execution-style” robbery and noted information that Jaramillo was a Colombian “hitman.” Jaramillo was subsequently deported to Colombia, where he was murdered. It was the opinion of local law enforcement that Jaramillo “got away with a double homicide.”

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22. *People v. Ross* (La. 1977) 343 So.2d 722.

23. *Jaramillo v. State* (Fla. 1982) 417 So.2d 257.

24. See, e.g., *Fox v. State* (Fla.App. 1985) 469 So.2d 800, 803; *Geesa v. State* (Tex.Crim. 1991) 820 S.W.2d 154, 161 fn. 9.

25. *Jackson v. Virginia* (1979) 443 U.S. 307, 326.

26. See, e.g., *Taylor v. Stainer* (9th Cir. 1994) 31 F.3d 907; *Schell v. Witek* (9th Cir. en banc 2000) 218 F.3d 1017.

20. **Lawyer Johnson** – Convicted under pre-*Furman* death-penalty law in Massachusetts.<sup>27</sup>

24. **Joseph Green Brown**<sup>28</sup> – Brown was convicted and sentenced to death based primarily on the testimony of potential accomplice Ronald Floyd, a witness who subsequently went through a series of recantations and retractions of his recantations. Associate Justice Brennan actually relied on Brown's case to note: "**Recantation testimony is properly viewed with great suspicion.**"<sup>29</sup> Brown was not granted a retrial because Floyd's testimony implicating Brown was false but because Floyd and the prosecution did not disclose that Floyd was testifying in return for an agreement that he would not be prosecuted in the case. Floyd initially failed a polygraph test about his general involvement in the murder, but then passed the test three times in terms of whether or not he was an actual perpetrator in the crime. Floyd, however, also recanted his testimony implicating Brown, then recanted that recantation during an evidentiary hearing. Subsequently, Floyd again repudiated his initial trial testimony, and the prosecution was unable to retry Brown. Given the inherent unreliability of the sequence of Floyd's multiple recantations (which are "properly viewed with great suspicion"), Brown cannot be deemed actually innocent.

27. **Henry Drake**<sup>30</sup> – This case is yet another example of release due to witness recantation, not actual innocence. Drake and William Campbell were tried separately for the murder of a local barber. The elderly barber was violently assaulted in his shop with a knife and a claw hammer. There were pools of blood and blood smears on the wall of his barbershop. There were two pocket-knives on top of the blood on the floor. One of the knives was similar to one owned by Drake.

When first arrested, Campbell implicated Drake as the murderer and stated he (Campbell) was not present. Campbell then told his own attorney that he (Campbell) alone was guilty of the murder and that Drake was innocent. Campbell actually offered many different versions to his lawyer before settling on a story that did not implicate Drake. But Campbell then took the stand at his own trial (which occurred before Drake's) and testified, to his attorney's surprise, that Drake attacked the barber while Campbell was getting a haircut. Campbell was nonetheless convicted of the barber's murder and sentenced to death.

Subsequently, Campbell reluctantly testified at Drake's trial and implicated Drake. The prosecution's theory was that Campbell, an older man of poor health with emphysema, could not have murdered the barber by himself. After Drake was convicted and sentenced to death, Campbell recanted his testimony against Drake. But his newest version of events also differed from Drake's own testimony. Furthermore, the testimony of Drake's girlfriend had also differed from Drake's testimony. The trial court rejected Campbell's recantation and Campbell died soon thereafter.

Drake's first conviction was reversed and, in two subsequent retrials, two different juries heard Campbell's recantation and also heard forensic evidence that was offered to contradict the prosecution's theory that the barber was attacked by two assailants. One jury hung in favor of

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27. *Stewart v. Massachusetts* (1972) 408 U.S. 845; *Commonwealth v. O'Neal* (Mass. 1975) 339 N.E.2d 676; *Limone v. Massachusetts* (1972) 408 U.S. 936.

28. *Brown v. State* (Fla. 1980) 381 So.2d 690; *Brown v. State* (Fla. 1983) 439 So.2d 872; *Brown v. Wainwright* (11th Cir. 1986) 785 F.2d 1457.

29. *Dobbert v. Wainwright* (1984) 468 U.S. 1231 (Brennan, J. dis.) (citing *Brown v. State*, 381 So.2d 690).

30. *Drake v. State* (Ga. 1978) 247 S.E.2d 57; *Drake v. State* (Ga. 1982) 287 S.E.2d 180; *Drake v. Francis* (11th Cir. 1984) 727 F.2d 990; *Drake v. Kemp* (11th Cir. en banc 1985) 762 F.2d 1449; *Campbell v. State* (Ga. 1977) 240 S.E.2d 828.

acquittal, but a second jury convicted Drake again. Five former jurors from Drake's original trial also advised the parole board that Campbell's recantation would not have changed their verdict convicting Drake at his first trial. Nevertheless, in a decision uncritically accepted by the DPIC, the state parole board "simply decided Drake was innocent."<sup>31</sup> Notwithstanding the parole board's decision, Campbell's numerous statements and recantations, which did not always coincide with Drake's version of events, do not establish Drake's actual innocence.

**28. John Henry Knapp** – Knapp had three trials for the house-fire murder of his daughters. Knapp stood outside and, while sipping coffee, calmly watched his daughters be incinerated. In the first trial, the jury hung 7-5 for conviction. The second trial resulted in a conviction and death sentence, but was reversed because of newly developed evidence that indicated that the fatal fire could have been set accidentally by his [now deceased] daughters. Nevertheless, the third trial still ended in a mistrial with the jury hung 7-5 for conviction. The evidence included Knapp's recanted confession, which he claimed he made because he suffered a migraine headache, and he was trying to protect his wife.

Finally, the prosecution concluded that the evidence was insufficient to obtain a unanimous jury verdict of guilt or innocence. The case was 19 years old and there had been losses in "some key evidence and witnesses." Knapp then pled "no contest" to second-degree murder and received a sentence of time served. The judge who presided at Knapp's first two trials indicated doubts about Knapp's guilt, but still said that the fire was purposely set by **either** Knapp or his wife. "Given the original evidence and subsequent proceedings in the case, we may never know if Knapp was guilty . . ." <sup>32</sup> Under the DPIC's current standards, Knapp's name should not be on the DPIC List since he pled to a lesser offense.<sup>33</sup>

Moreover, given the recent United States Supreme Court decision in *Ring v. Arizona*, it is speculative now whether a jury would have found Knapp death-penalty eligible under the now-applicable law.

**29. Vernon McManus**<sup>34</sup> – McManus's conviction was reversed because of jury-selection issues unrelated to his guilt or innocence. Ultimately, although the prosecution chose not to retry the case, there were no widespread allegations of innocence. McManus's case was not even included in the *Cooley* article as an "actually innocent" defendant.<sup>35</sup> There is no explanation for its inclusion on the DPIC List.<sup>36</sup>

**30. Anthony Ray Peek**<sup>37</sup> – Peek was acquitted after his two prior convictions for this 1977 murder were reversed for various evidentiary errors, including the admission of an unrelated rape. He was prosecuted for raping and strangling to death an elderly woman in her home. She lived a mile from the halfway house where Peek resided. Her car was also found abandoned even nearer the halfway house. Two of Peek's fingerprints were lifted from inside the victim's car window. Blood and seminal stains on the victim's clothes were consistent with Peek's identity as a type-O secretor. A hair with features similar to Peek's was recovered in a cut stocking in the victim's garage area. Peek claimed that his fingerprints got on the victim's car

31. *Atlanta Journal-Constitution* (12/24/87); *Los Angeles Times* (12/22/88, 12/23/88).

32. 33 *Ariz. T. L. J.* (2001) 665, 666.

33. *Arizona Republic* (8/27/91, 11/19/92, 11/20/92, 8/11/96); *Phoenix Gazette* (12/6/91, 11/20/92); *Associated Press* (11/19/92).

34. *McManus v. State* (Tex. 1980) 591 S.W.2d 505.

35. *Cooley*, at 912.

36. *Dallas Morning News* (6/4/00).

37. *Peek v. State* (Fla. 1986) 488 So.2d 52.

when he was out of his halfway house in the morning and tried to burglarize her abandoned car. Peek presented evidence that the periodic night checks at the halfway house did not indicate any unauthorized absences the night of the murder.

The acquittal represents a finding of reasonable doubt, not actual innocence. Prosecutors attributed the acquittal to the passage of time and loss of evidence. In particular, the state attorney told the Florida Commission on Capital Cases: “Mr. Peek is also on the List, as are several others from other circuits who got new trials and then were acquitted. I fail to see the rationale for including these people.”

**32. Robert Wallace** – Acquitted on retrial based on either self-defense or accidental-shooting defense. Accordingly, this is not a “wrong-person” mistake.

**33. Richard Neal Jones**<sup>38</sup> – Jones’s defense was that he was passed out in a car while three other men beat and shot the victim and then threw his weighted body in the river. Jones’s conviction was reversed in a 2-1 decision because the trial court erroneously admitted incriminating post-offense statements by Jones’s non-testifying codefendants, a violation of the hearsay rule. The dissent noted that the only hearsay statement that actually implicated Jones should still have been admitted as a prior consistent statement. At the very least, Jones was present at the murder scene and a party to the conspiracy leading to the murder. Accordingly, he would not have been considered “actually innocent” under the standards of the original *Stanford* study. His culpability would appear to be no less than that of the actual murderers.<sup>39</sup>

**35. Willie A. Brown; 36. Larry Troy**<sup>40</sup> – This is a prison murder. Three inmates testified against Brown and Troy. At least one defense witness was impeached with prior statements implicating Brown and Troy. The convictions of these two defendants were reversed because of a prosecutorial discovery error – the failure to timely disclose a prior taped statement by a witness that contradicted another state witness. Ultimately, the state dropped charges because one of the prison witnesses recanted. But the witness made the offer to recant his testimony against Brown to Brown’s girlfriend in return for \$2000.<sup>41</sup> The “recantation for hire” hardly inspires confidence that Brown and Troy are “actually innocent.”

**37. William Jent; 38. Earnest Miller** – These codefendants entered pleas to lesser offenses of second-degree murder and were sentenced to time served after their convictions were vacated because of the prosecution’s failure to disclose exculpatory evidence. Although Jent and Miller proclaimed their innocence, they inconsistently asked for the “pardon” of the victim’s family. It appears that the passage of time made a second trial problematic for both the prosecution and the defense. The prosecution had lost its key physical evidence and witnesses were scattered. Moreover, several witnesses had changed their testimony.<sup>42</sup> Under the DPIC’s current standards, these cases should not be on the DPIC List since the two men pled to lesser charges. In a statement to the Florida Commission on Capital Cases, the prosecution cited conflicting statements from Miller and Jent about their alibi to contradict assertions that the defendants did have an alibi for this murder.

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38. *Jones v. State* (Okla.Crim. 1987) 738 P.2d 525.

39. *See Mann v. State* (1988) 749 P.2d 115; *Thompson v. Oklahoma* (1988) 487 U.S. 815, 817, 859; *Thompson v. State* (Okla. Crim. App. 1986) 724 P.2d 780 (separate trial of codefendant with evidence directly implicating Jones).

40. *Brown v. State & Troy v. State* (Fla. 1987) 515 So.2d 211.

41. *Cooley*, at 930.

42. *Associated Press* (1/15/88, 1/16/88); *St. Petersburg Times* (1/16/88, 1/19/88).

40. **Jesse Keith Brown**<sup>43</sup> – This defendant was acquitted at his second retrial because evidence pointed also to his half brother as the “actual killer.” But the jury convicted Brown of armed robbery, grand larceny, and entering without breaking in connection with the homicide. The verdict indicates, therefore, that Brown was involved in the murder even if he was not actual perpetrator. At his first trial, he testified that he did not remember committing the murder, but was “sorry [if I’ve done anything].” At his second trial, on the other hand, he testified specifically that he was not involved in the murder. Brown’s case was not included in *In Spite of Innocence*, thus this appears to be one of the unidentified cases in which the *Cooley* study considered the evidence of innocence to be “relatively weak.”<sup>44</sup>

41. **Robert Cox**<sup>45</sup> – This first-degree murder conviction was reversed for insufficient evidence, not because of innocence. “Circumstances that create nothing more than a strong suspicion that the defendant committed the crime was not sufficient to support a conviction . . . Although state witnesses cast doubt on Cox’s alibi, the state’s evidence could have created only a suspicion, rather than proving beyond a reasonable doubt, that Cox, and only Cox, murdered the victim.” Again, this case is an example of a reversal due to Florida’s more stringent legal-sufficiency standard for proof beyond a reasonable doubt. The evidence obviously still indicated a “strong suspicion” of Cox’s guilt.

43. **James Richardson**<sup>46</sup> – Convicted and sentenced under invalid pre-*Furman* statute in Florida.

46. **John C. Skelton**<sup>47</sup> – In a 2-1 split decision, the Texas appeals court reversed the capital-murder conviction for insufficient evidence of guilt beyond a reasonable doubt. The majority opinion believed there was a possibility that another person committed the murder. Nevertheless, the majority explained: “Although the evidence against appellant **leads to a strong suspicion or probability** that appellant committed the capital offense, we cannot say that it excludes to a moral certainty every other reasonable hypothesis except appellant’s guilt . . . Although this court does not relish the thought of reversing the conviction in this heinous case and ordering an acquittal, because the evidence does not exclude every other reasonable hypothesis, we are compelled to do so.” [Emphasis added.] The dissent outlines the evidence of a “strong suspicion” of Skelton’s guilt. Once again, this reversal is based on a stringent standard of evidentiary sufficiency not required by the United States Constitution and no longer even applied in Texas. This appears to be another of the “relatively weak” innocence cases not included in *In Spite of Innocence*. The reversal of Skelton’s conviction was not a finding of “actual innocence.”

47. **Dale Johnston**<sup>48</sup> – This defendant was convicted and sentenced to death for slaying his stepdaughter and her fiancé. The stepdaughter had publicly complained in the past about incestuous advances by Johnston. A witness who had been hypnotized to refresh his recollection testified as to his pre-hypnosis recollection that he identified Johnston angrily forcing a couple into his car on or about the day of the murders. Feedbags consistent with feedbags found on Johnston’s farm were also found at the gravesite of the two victims. Some

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43. *State v. Brown* (S.C. 1988) 371 S.E.2d 523.

44. *Cooley*, at p. 914, 928-929.

45. *Cox v. State* (Fla. 1990) 555 So.2d 352.

46. *Richardson v. State* (Fla. 1989) 546 So.2d 1037.

47. *Skelton v. State* (Tex.Crim.App. 1989) 795 S.W.2d 162.

48. *State v. Johnston* (Oh.App. 1986) 1986 WL 8798 [2 unreported opinions]; *State v. Johnston* (Ohio 1988) 529 N.E.2d 898; *State v. Johnston* (Ohio 1990) 580 N.E.2d 1162.

bloodstained items were seized from a strip-mining pit on Johnston's property. Johnston's first conviction was ultimately reversed because of some problems with the hypnotized witness and the state's failure to disclose evidence that may have helped Johnston with his defense. Prior to retrial, the court excluded incriminating statements Johnston made during his initial interrogation as well as incriminating evidence seized due to the interrogation. The prosecution then dismissed the case due to the passage of time, poor recollection of the witnesses, and the suppression of evidence. Johnston's subsequent wrongful-imprisonment lawsuit was rejected since "although the evidence did not prove Johnston committed the murders, it did not prove his innocence."<sup>49</sup>

48. **Jimmy Lee Mathers**<sup>50</sup> – Mathers was convicted, along with two codefendants, of the murder of Sterleen Hill in 1987. In a 3-2 decision, the Arizona Supreme Court reversed Mathers's conviction for insufficient evidence. Since the reversal was based on insufficiency of the evidence, retrial was barred by the Double Jeopardy Clause. The dissent points out that there was still ample evidence of Mathers's guilt even if the majority of the court did not believe there was substantial evidence to support a conviction beyond a reasonable doubt. The appellate court's reversal of Mathers's conviction was not a finding of actual innocence, and the record of his case would not possibly justify such a finding.

50. **Bradley Scott**<sup>51</sup> – This case was reversed due to delay in prosecution and insufficient circumstantial evidence. The delay in prosecution appears to have hampered both parties to the extent that no assessment may be made of Scott's actual innocence. According to the appeals court, the available circumstantial evidence "could only create a suspicion that Scott committed this murder." Once again, even if the available evidence of Scott's guilt was not sufficient to support a conviction beyond a reasonable doubt, he certainly was not exonerated.

52. **Jay C. Smith**<sup>52</sup> – Smith was not freed because he was innocent, but because the Pennsylvania court believed that Pennsylvania's double-jeopardy clause barred a retrial due to prosecutorial misconduct in withholding exculpatory evidence. The Pennsylvania court conceded that the United States Constitution and other states would not necessarily have compelled such a harsh sanction. Without belaboring the evidence of Smith's guilt, which was unaffected by the evidence withheld by the prosecution, it is enough to note that the DPIC List does not mention Smith's subsequent loss in civil court when he sued the Commonwealth of Pennsylvania for wrongful imprisonment. As the appeals court explained, "**Our confidence in Smith's convictions for the murder of Susan Reinert and her two children is not the least bit diminished . . .** and Smith has therefore not established that he is entitled to compensation . . ." [Emphasis added.] Indeed, a jury in the federal trial ultimately found that the withheld evidence was not "crucial" at all, and that the prosecution's alleged misconduct did not undermine confidence in the outcome of Smith's trial. Thus, if anything, the courts have repeatedly reaffirmed their conclusion that Smith was "actually guilty." Smith's inclusion on the DPIC List is a "false exoneration" at its most extreme.

57. **James Robison** – Robison was accused of being one of three participants in the conspiracy to murder Arizona news reporter Don Bolles. The other conspirators were Adamson and Dunlap. Robison was acquitted on retrial because the jury did not believe the testimony of his

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49. *Cleveland Plain Dealer* (5/11/90, 5/12/90, 6/22/91, 9/13/93); *Associated Press* (5/11/90).

50. *State v. Mathers* (Ariz. 1990) 796 P.2d 866.

51. *Scott v. State* (Fla. 1991) 581 So.2d 887.

52. *Commonwealth v. Smith* (Pa. 1992) 615 A.2d 321; *Commonwealth v. Smith* (Pa. 1989) 568 A.2d 600; *Smith v. Holtz* (3rd Cir. 2000) 210 F.3d 186; *Smith v. Holtz* (M.D.Pa. 1998) 30 F.Supp.2d 468.

accomplice, Adamson. However, the separate trial of third codefendant, Dunlap, elicited evidence that Robison had received “hush money” to prevent him from revealing Dunlap’s role in Bolles’s murder. Dunlap admitted giving gifts and money to Robison, but only out of “friendship.” At Dunlap’s trial, evidence was admitted of incriminating diary entries made by Robison. Dunlap filed a new trial motion offering Robison’s testimony from Robison’s second trial in which Robison testified that Dunlap’s gifts to him were not offered to obtain his silence. The trial court denied Dunlap’s motion because it did not find Robison’s testimony credible. In particular, the trial court noted that Robison had admitted at his own trial that he had lied under oath and “would have no hesitation in testifying to whatever he felt was expedient.”<sup>53</sup> Robison has been subsequently convicted of plotting to murder alleged accomplice Adamson.<sup>54</sup> The Dunlap trial record does not support including the duplicitous Robison on a list of “actually innocent” defendants.

**58. Muneer Deeb**<sup>55</sup> – The evidence indicates that Deeb was not “actually innocent,” even if there was not enough evidence to convict him beyond a reasonable doubt. At his first trial, Deeb was convicted of conspiring with David Wayne Spence to murder Deeb’s girlfriend, Kelley, in order to collect insurance money. However, Spence and some confederates bungled the job by accidentally murdering the wrong woman and two other people. A jailhouse informant testified that Spence told him about numerous incriminating statements made by Deeb in which he (Deeb) stated he would benefit from Kelley’s death and that Deeb asked Spence if he knew someone who would kill Kelley. One of Spence’s confederates, Melendez, also testified that he was present when Spence and Deeb conspired to commit the murder. Deeb’s conviction was reversed because the trial court erroneously admitted Spence’s hearsay statements to the informant. Deeb was acquitted on retrial. The special prosecutor at Deeb’s retrial explained that Melendez had refused to testify a second time against Deeb. But the jury at Deeb’s second trial did not believe that Deeb was “actually innocent.” After the second trial in which Deeb was found not guilty, the jury foreperson more accurately put it: “We did not say that this man was innocent of the crime. We did not say that. We just could not say that he was guilty.”

Spence was tried separately for the triple murders and executed for them. Evidence was presented at Spence’s trial that Spence argued with Deeb about the murder, indicating that the murder had gone awry. There was also evidence that Deeb and Spence frequently discussed whether Kelley should be killed.<sup>56</sup> Thus, the record of Spence’s trial also indicates that Deeb was not “actually innocent.”

**59. Andrew Golden**<sup>57</sup> – The Florida Supreme Court felt compelled to reverse Golden’s conviction for murdering his wife to collect insurance money because the evidence was insufficient to prove guilt beyond a reasonable doubt, but the state court noted as follows: **“The finger of suspicion points heavily at Golden.** A reasonable juror could conclude that he more likely than not caused his wife’s death.” After his wife’s death, Golden denied having insurance. But it turned out he had \$300,000 in insurance, was heavily in debt, and that he filed for bankruptcy after her death. There was evidence he forged his wife’s signature on insurance applications. The “heavy finger of suspicion” indicates that Golden is not “innocent.”

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53. *People v. Dunlap* (Ariz. App. 1996) 930 P.2d 518.

54. *Arizona Republic* (12/19/93,7/27/95).

55. *Deeb v. Texas* (1991) 815 S.W.2d 692.

56. *Spence v. Johnson* (5th Cir. 1996) 80 F.3d 989, 1004 fn. 12; *Dallas Morning News* (11/4/93).

57. *Golden v. State* (1994) 629 So.2d 109.

62. **Robert Charles Cruz** – In light of the United States Supreme Court’s recent decision in *Ring v. Arizona*, this Arizona case should now be deleted from the DPIC List. Pursuant to *Ring*, the Arizona statute unconstitutionally denied defendants their Sixth Amendment right to a jury trial on the findings necessary for death-penalty eligibility by giving that power to state trial judges. As with the earlier cases in which the defendants were tried under now defunct death-penalty statutes, Arizona convictions are no longer appropriately considered in light of current death-penalty jurisprudence. It is simply speculative that Cruz would have been found eligible for the death penalty by a jury under a constitutional statute.

63. **Rolando Cruz**; 64. **Alejandro Hernandez**<sup>58</sup> – These defendants were charged with the notorious abduction, rape, and murder of 10-year-old Jeanine Nicarico. Cruz was convicted and sentenced to death twice, but both judgments were reversed. During the third trial, the trial judge lambasted the police for “sloppy” police work and accused a sheriff’s deputy of lying. He then directed a verdict for Cruz and freed him before the presentation of the defense case. The trial court did acknowledge that the prosecution had “circumstantial evidence” but did not consider it sufficient to support a conviction beyond a reasonable doubt.

Hernandez’s first conviction was reversed. After a hung jury ended his second trial, he was convicted in a third trial and sentenced to 80 years in prison. That conviction was reversed, however, and after the court dismissed Cruz’s case the prosecution dropped charges against Hernandez.

During this time, another convicted murderer named Brian Dugan announced he was willing to confess to being the lone perpetrator of the Nicarico murder in return for immunity from the death penalty. Dugan himself had been sentenced to two life sentences for other sex-related murders. A DNA test in 1995 implicated Dugan in Nicarico’s murder, but excluded Cruz and Hernandez as actual perpetrators. This test result, however, did not exclude Cruz’s and Hernandez’s potential culpability as accomplices to Nicarico’s murder.

Ultimately, after Cruz’s acquittal by the court, Illinois law-enforcement officers and prosecutors were prosecuted for their roles in Cruz’s case. The trial court excluded evidence that after the first trial for the Nicarico murder, Cruz looked at Nicarico’s sister and mouthed the words, “You’re next.” However, during this trial, the defense for the accused law-enforcement officers attempted to link Cruz with other suspects in the murder. There was evidence that raised a question as to whether Cruz and Dugan could have lived on the same block at the time of the murder, thus raising questions as to whether Dugan acted alone. Moreover, Dugan had a relevant modus operandi for burglaries that involved accomplices. Cruz himself took the stand and contradicted his previous testimony. He also testified that he was seeing a psychiatrist about his lying! The jury was advised that scientific evidence excluded Cruz as the rapist, but did not exclude Dugan. The jury was also told that the scientific evidence could not exclude the possibility that Cruz was present at the Nicarico murder. The police officers were acquitted. The trial court also acquitted one of the officers of a charge that he had falsely testified about incriminating statements Cruz made in jail. Some jurors stated they believed Cruz was guilty of the Nicarico murder. Other jurors observed that they could not believe Cruz’s testimony that he had not made a so-called incriminating “dream statement” to the police about the murder in which he described details of the Nicarico murder.<sup>59</sup>

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58. *People v. Cruz* (Ill. 1988) 521 N.E.2d 18; *People v. Cruz* (Ill. 1994) 643 N.E.2d 636; *People v. Hernandez* (Ill. 1988) 521 N.E.2d 25; *Buckley v. Fitzsimmons* (7th Cir. 1991) 919 F.2d 1230.

59. *Chicago Daily Law Bulletin* (4/28/99, 5/25/99); *Chicago Daily Herald* (4/21/99, 5/5/99, 5/26/99); *Chicago Tribune* (12/8/95, 4/30/99, 5/26/99); *Chicago Sun-Times* (12/9/95, 12/10/95, 5/26/99, 6/6/99);

The actual reliability of Dugan's confession that he was the lone murderer, including his actual motivation for that confession, is subject to question. Notwithstanding the DNA test, Dugan has nothing to lose by confessing to the Nicarico murder, but he also has no incentive to implicate or "snitch off" anyone else.<sup>60</sup>

65. **Sabrina Butler**<sup>61</sup> – Butler was convicted of murdering her infant son, Walter. She brought Walter to the hospital with severe internal injuries and gave numerous conflicting statements, including at least one version in which she admitted pushing on his protruding rectum and hitting the baby boy once in the stomach with her fist when he was crying. Other versions included statements by her that she had tried to apply CPR when the baby was not breathing.

Butler's first conviction was reversed because the prosecutor improperly commented on her failure to testify at trial. She was acquitted on retrial, but not necessarily because she was not the actual killer of her young baby. At both trials, the evidence indicated that the baby died from peritonitis, the presence of foreign substances in the abdomen. Although a witness substantiated one of Butler's versions of events about administering CPR to the baby, and the coroner admitted his examination had not been thorough, the jury foreperson indicated only that the jury had a "reasonable doubt" that Butler administered the fatal blow.

There does not appear to be any witness as to what occurred prior to the CPR. The jury was not told that Butler had lost custody of another child because of abuse. Apparently, the defense provided sufficient alternative explanations for the baby's injuries to "speculate" (but not establish) that the cause of death was either SIDS or a cystic kidney disease. There does not appear to be any definitive verdict as to the cause of death. Even Butler's own attorney stated that he "doesn't know what the truth is." Butler's co-counsel indicated that at best the case should have been prosecuted as a manslaughter – hardly an endorsement of Butler's innocence. Butler's acquittal on retrial does not represent a finding that she did not administer a deadly trauma to baby Walter's abdomen.<sup>62</sup>

69. **Gary Gauger** – Gauger was not actually sentenced to death. Although the trial court erroneously imposed a death sentence in January 1994, the court granted a motion for reconsideration and vacated the sentence less than 10 months later. The trial court found that it had not considered all the mitigating evidence and concluded that Gauger should not be sentenced to death.<sup>63</sup> Although Gauger served a brief time on Death Row, he was not properly sentenced to death by the trial court. He should never have been sent to Death Row because the trial court did not finally sentence him to be executed. Gauger's case is an example of how consideration of mitigating evidence under current law results in a sentence less than death. Whatever the reasons for Gauger's later release from prison, he is not properly considered as an innocent person released from Death Row since his initial death sentence was not legitimately imposed under Illinois law. Accordingly, Gauger's case is not appropriate for the DPIC List.

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*Chicago Daily Herald* (4/21/99;6/6/99); *Associated Press* (6/5/99, 7/22/02); *State Journal-Register* (6/14/99).

60. *People v. Cruz* (Ill. 1994) 643 N.E.2d 636-695, 676-687, 691-695 (plur.opn. of Freeman, J.) (dis.opns. of Heiple, McMorro, J.J.).

61. *Butler v. State* (Miss. 1992) 608 So.2d 314.

62. *Mississippi Clarion-Ledger* (1/22/96); *Baltimore Sun* (1/02/96); *Washington Times* (12/30/95).

63. *People v. Bull* (Ill. 1999) 705 N.E.2d 824, 843; *Chicago Tribune* (9/23/94).

71. **Carl Lawson**<sup>64</sup> – Lawson was convicted of murdering eight-year-old Terrance Jones. The victim’s body was found in an abandoned church. There was evidence that Lawson’s romantic relationship with the young boy’s mother had ended and that Lawson was upset about the breakup. Investigators discovered two bloody shoeprints of a commonly worn brand of gym shoe near the body. Lawson wore this type of shoes. The shoeprints were made near the time of the crime and were the only evidence capable of establishing Lawson’s presence at the scene of the crime at the time it occurred. Various items were removed from around the victim’s body. Lawson’s fingerprints were found on two of the items near the body, a beer bottle and a matchbook. Lawson’s first conviction was reversed because his attorney had a conflict of interest. He was acquitted at his second trial, apparently because the shoeprint evidence could not be associated only with him – the shoe was too popular. But this does not change the fact that Lawson’s fingerprints were on items found near the body and that other evidence, although some of it highly inconsistent, remains to incriminate Lawson, including evidence of motive.

72. **Ricardo Aldape Guerra**<sup>65</sup> – Guerra was convicted as the triggerman, but evidence indicates he may have only been the accomplice. It is noted in the federal court opinion that Guerra was not prosecuted as an accomplice although he was undoubtedly present at the scene and in the company of the triggerman. He fled with the shooter from the scene and was hiding at the site of a subsequent shootout with the police. Near him was a gun wrapped in a bandanna. Originally, this factual distinction was not considered proof of “actual innocence.”<sup>66</sup>

73. **Benjamin Harris**<sup>67</sup> – Harris was convicted of hiring a hitman named Bonds to murder a man named Turner. Harris made numerous inconsistent statements about his whereabouts and involvement in the murder. Ultimately, Harris admitted taking turns with Bonds in shooting Turner, but denied hiring Bonds to shoot Turner. Harris did admit having a motive to murder Turner. He admitted driving Bonds to the scene and providing a gun. Harris initially confessed, but then testified at trial that he and Bonds took turns pulling the trigger. By denying a contract killing, Harris hoped to avoid eligibility for the death penalty under Washington state law. A federal court vacated his conviction because of ineffective assistance of counsel. Although Harris’s counsel claimed that Harris fantasized his confession, the prosecution chose not to retry Harris because the alleged hitman (Bonds) was in prison and would not testify, other witnesses were unavailable, and the federal court had ruled Harris’s confession inadmissible. Since Harris could not be retried, the prosecution sought his civil commitment based on a petition from hospital psychiatrists. He was confined in a state mental hospital, but a jury subsequently found he should be kept in a less restrictive environment. These circumstances do not support placing Harris on a list of the actually innocent.<sup>68</sup>

74. **Robert Hayes**<sup>69</sup> – The initial conviction was based on a combination of DNA evidence, Hayes’s inconsistent statements about when he was last with the victim, and hearsay statements by the victim expressing fear of Hayes. The Florida Supreme Court reversed the case because the trial court erroneously admitted DNA evidence matching Hayes with semen on the victim’s shirt. The court held that a “band-shifting” technique used to identify the DNA had not reached the appropriate level of scientific acceptance – a Florida state opinion not

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64. *People v. Lawson* (Ill. 1994) 644 N.E.2d 1172.

65. *Guerra v. Johnson* (5th Cir. 1996) 90 F.3d 1075; *Guerra v. Collins* (S.D.Tex. 1995) 916 F.Supp. 620; *Guerra v. State* (Tex.Crim.App. 1988) 771 S.W.2d 543.

66. *Stanford*, at 43.

67. *Harris (Ramseyer) v. Wood* (9th Cir. 1995) 64 F.3d 1432.

68. *Seattle Times* (8/19/97, 4/16/00); *Portland Oregonian* (8/24/97); *Seattle Post-Intelligencer* (7/17/97, 8/23/97); *Tacoma News Tribune* (5/29/97).

69. *Hayes v. State* (Fla. 1995) 660 So.2d 257.

universally shared.<sup>70</sup> But the court also held that the trial court on retrial could consider admitting evidence of Hayes's semen in the victim's vagina. The appellate court's opinion noted that "evidence exists in this case to establish that Hayes committed this offense, physical evidence also exists to establish that someone other than Hayes committed the offense."

On retrial, the trial court admitted evidence that Hayes's semen was in the victim's vagina. However, there was also evidence that the victim was clutching hairs in her hand inconsistent with Hayes's hair. The state attorney explained to the Florida Commission on Capital Cases: "In the end, the jury disregarded the fact that Hayes'[s] DNA was found in the victim's vagina and acquitted of murder." Nothing about Hayes's retrial changes the appellate court's original observation that evidence existed to establish Hayes's guilt. The acquittal on retrial was based on reasonable doubt, not actual innocence.

**77. Curtis Kyles**<sup>71</sup> – After one vacated conviction and four mistrials in which a jury was unable to reach a verdict over a 14-year period, the prosecutor chose not to retry Kyles although the final jury hung 8-4 for conviction (an earlier jury hung 10-2 for acquittal). The man whom Kyles alleged did the killing was himself killed by a member of Kyles's family in 1986.<sup>72</sup> A 5-4 United States Supreme Court split decision vacating Kyles's conviction disagreed on the strength of the evidence against Kyles. That disagreement itself certainly refutes any judgment that Kyles was actually innocent.

**78. Shareef Cousin**<sup>73</sup> – Contrary to the DPIC List's summary, Cousin's case was not reversed because of "improperly withheld evidence ...." In fact, the Louisiana Supreme Court explicitly did not rule on that issue.<sup>74</sup> Rather, the Louisiana high court reversed Cousin's conviction because the prosecutor improperly impeached a witness with prior inconsistent statements recounting a confession made to him by Cousin. In other words, to prove the case against Cousin, the prosecutor brought out the fact that the witness had previously told the police that Cousin had confessed to the crime. Under Louisiana law, such prior statements cannot be used as substantive evidence of the defendant's guilt.<sup>75</sup> Other jurisdictions, of course, would not necessarily find this evidence inadmissible as substantive evidence.<sup>76</sup> Thus, Cousin's conviction may have been upheld in other states.<sup>77</sup> Without these statements, the prosecution determined that the remaining evidence (weak or tentative identifications and Cousin's incriminating comment that the arrest warrant had the wrong date for the murder) was insufficient to carry the burden of proof.<sup>78</sup> Cousin was not retried because the prosecution believed he was "actually innocent," but because Louisiana state law precluded evidence of guilt in this case that would actually have been admissible in other states.

**80. Steven Smith**<sup>79</sup> – In this case, Smith was accused of assassinating an assistant prison warden while the victim was standing by his car in the parking lot of a local bar. Various

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70. See, e.g., *State v. Copeland* (Wash. 1996) 922 P.2d 1304.

71. *Kyles v. Whitley* (1995) 514 U.S. 419.

72. *New Orleans Times-Picayune* (2/19/98, 6/27/98); *Baton Rouge Advocate* (2/19/98).

73. *State v. Cousin* (La. 1998) 710 So.2d 1065.

74. *State v. Cousin*, 710 So.2d at 1073 fn. 8.

75. *State v. Brown* (La.App. 1996) 674 So.2d 428.

76. See *State v. Owunta* (La. 2000) 761 So.2d 528 (acknowledging that Louisiana follows the minority rule in not allowing prior inconsistent statements to be used as substantive evidence).

77. See *California v. Green* (1970) 399 U.S. 49.

78. *Baton Rouge Saturday State Times/Morning Advocate* (1/9/99); *New Orleans Times-Picayune* (1/9/99).

79. *People v. Smith* (Ill. 1991) 565 N.E.2d 900; *People v. Smith* (Ill. 1999) 708 N.E.2d 365.

witnesses testified that they saw Smith and two other men in the bar and then saw them depart just before the victim left.

The prosecution's theory was that Smith murdered the victim at the behest of a local neighborhood criminal gang leader. One eyewitness, who knew Smith, identified him as the shooter. When Smith was arrested, he was talking to the leader of the local gang. There was testimony that, on certain occasions, Smith had been seen in the company of the gang leader. When the police searched Smith's residence, they seized 77 pages of documents, including regulations or bylaws of the criminal gang, other information relating to the gang, and two invitations to recent gang functions. At trial, the court excluded this evidence of Smith's association with the gang. But the trial court did allow evidence of gang-related activity in the Illinois prison system, that the victim was a strict disciplinarian, and that the leader of Smith's gang had had an altercation with the victim. The trial court excluded, however, the evidence seized in Smith's residence connecting him to the prison gang. On appeal, Smith's conviction was reversed because there was no evidence at trial connecting him to the prison gang. The irony was not lost on the dissenting judge: "If there was error at trial, it occurred not because the trial judge admitted too much evidence, but because he admitted too little."

Smith's conviction after retrial was then reversed for insufficient evidence. In any event, although various witnesses identified Smith in the bar before the victim was shot, only one eyewitness identified Smith as the actual shooter. The appellate court found that there were too many serious inconsistencies and impeachment of that witness at the trial to support Smith's conviction for shooting the victim. The court rejected the state's arguments reconciling some of the conflicting accounts of the shooting, although only because the state had not raised these arguments until it was too late for the defense to challenge the state's theory. It is not clear if the witness was confronted with previous statements that were consistent with the accounts of other witnesses. Ordinarily, the testimony of a single witness is sufficient to convict. However, the Illinois court explained that the conviction may be rejected if the witness testimony "is so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of defendant's guilt." At best, the circumstantial evidence "tending to link defendant to the murder merely narrowed the class of individuals who may have killed the victim ...." Given the evidence, Smith appears to have been an accomplice to the shooting even if he was not the actual triggerman. He was certainly not eliminated from the "class of individuals who may have killed the victim ...." Significantly, in reversing Smith's conviction and ending any chance for another retrial, the appellate court explained: "While a not-guilty finding is sometimes equated with a finding of innocence, that conclusion is erroneous. Courts do not find people guilty or innocent. They find them guilty or not guilty. A not-guilty verdict expresses no view as to a defendant's innocence. Rather, it indicates simply that the prosecution has failed to meet its burden of proof. While there are those who may criticize courts for turning criminals loose, courts have a duty to ensure that all citizens receive those rights that apply equally to every citizen who may find himself charged with a crime, whatever the crime and whatever the circumstances. When the state cannot meet its burden of proof, the defendant must go free. This case happens to be a murder case carrying a sentence of death against a defendant where the state has failed to meet its burden. It is no help to speculate that the defendant may have killed the victim." In short, as the appeals court took pains to emphasize, the evidence against Smith was legally insufficient, but it was not shown that he was "actually innocent."

**81. Ronald Keith Williamson** – Even widely touted DNA exonerations are sometimes less than they seem. For instance, the recent decision by the Oklahoma authorities not to retry Williamson after DNA testing established that the victim's body did not contain his semen did not automatically make him "poster material for Actual Innocence."

Recent Congressional testimony by the Oklahoma Attorney General indicates there is more to this story:

**“Williamson was not convicted ‘on the strength of a jailhouse snitch’ as reported. Among the direct and circumstantial evidence of his guilt was a statement he gave to the Oklahoma State Bureau of Investigation describing a “dream” in which he had committed the murder. Williamson said, “I was on her, had a cord around her neck, stabbed her frequently, pulled the rope tight around her neck.” He paused and then stated that he was worried about what this would do to his family.**

**“When asked if Fritz was there, Williamson said, ‘yes.’**

**“When asked if he went there with the intention of killing her, Williamson said ‘probably.’**

**“In response to the question of why he killed her, Williamson said, ‘she made me mad.’**

**“The Pontotoc County prosecutor had a tough decision to make on a re-prosecution of Williamson and Fritz and concluded that conviction was highly unlikely in the wake of the DNA evidence, even though the note left at the scene said “Don’t look fore us or ease,” [sic] indicating multiple perpetrators.”<sup>80</sup>**

Although Williamson suffered from mental problems that included delusional thinking, there was nothing presented to indicate that he would coincidentally “imagine” the actual facts of the murder. The victim had small puncture wounds and cuts. There was a semicircular ligature mark on her neck. The cause of death was suffocation due to a washcloth in her mouth and the ligature tightened around her neck. Thus, Williamson’s “dream” was consistent with the murder. Given the evidence of Williamson’s alleged mental problems, there is no more reason to believe his denials of guilt than his incriminating statements.

Furthermore, the DNA testing showed only that the semen in the victim’s body belonged to another man named Gore. However, as the Attorney General’s statement indicates, the evidence at trial indicated that more than one person could have been involved in the assault on the victim. The evidence of group involvement in the murderous assault means that the failure to find Williamson’s semen in the victim does not eliminate him as a participant in her assault. He may be exonerated as a perpetrator of the sexual assault, but he is not necessarily exonerated as an accomplice.<sup>81</sup>

**84. Warren Douglas Manning<sup>82</sup>** – There were five trials in this case, including two convictions that were reversed and two mistrials, before Manning was acquitted. Manning was convicted of murdering a state trooper who had taken him into custody for driving with a suspended license. Manning first stated that the victim had released him with a warning ticket, but then he explained that he escaped from the trooper’s car when the trooper stopped another car. However, the

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80. Testimony of the Honorable W.A. Drew Edmondson, Attorney General of the State of Oklahoma, Senate Judiciary Committee, 6/13/00.

81. Compare *People v. Gholston* (Ill.App. 1998) 697 N.E.2d 415; *Mebane v. State* (Kan.App. 1995) 902 P.2d 494; Note, 62 Ohio L.J. 1195, 1241 fn.46; *Nat’l Comm’n on the Future of DNA Evidence, Post Conviction Testing: Recommendations for Handling Requests*, September 1999; *NIJ Research Report, Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial*, June 1996 (all discussing potentially inconclusive DNA results in cases involving multiple defendants).

82. *State v. Manning* (S.C. 1991) 409 S.E.2d 372.

trooper was shot with his own revolver and that revolver was seized in a barn behind Manning's residence. Other circumstantial evidence was also consistent with Manning's guilt. Manning was acquitted in his fifth trial based on a defense of reasonable doubt. Hence, his defense lawyer conceded in argument to the jury that "[i]f there wasn't any case against Warren Manning, then we wouldn't be here. But the law requires that the state prove him guilty beyond a reasonable doubt. Without that, the law says you cannot find him guilty."<sup>83</sup> Manning's acquittal on retrial does not mean that Manning was "actually innocent."

**86. Steve Manning**<sup>84</sup> – The prosecution exercised its discretion not to retry Manning after his conviction was reversed. The Illinois Supreme Court forbade the use of certain evidence, including questionable informant testimony. However, the Illinois Supreme Court also excluded the victim's wife's hearsay testimony that the victim had told her that if ever he was killed, she was to tell the FBI that Manning did it. Apparently, the victim had told his wife that Manning "ripped him off for a lot of money" and he was going to get the money back. Thus, while legally inadmissible under state law, there was evidence that Manning had a motive to murder the victim. It was also "consolation" to the district attorney in not retrying the case that Manning, a former cop gone bad, was already serving two life sentences plus 100 years for kidnapping in Missouri.<sup>85</sup>

**88. Joseph N. Green, Jr.**<sup>86</sup> – The prosecution's case in this robbery-murder was based on the victim's dying declaration, an eyewitness, and "circumstantial evidence that Green had the opportunity to kill" the victim. Green's conviction and death sentence were reversed because the prosecution improperly cross-examined a defense witness and because the trial court erroneously denied a suppression motion. On retrial, the critical eyewitness was found incompetent to testify. This eyewitness had given inconsistent and contradictory testimony. The trial court then dismissed the case because there was no physical evidence connecting Green to the murder. The trial court found that there was a reasonable doubt about Green's guilt and it was "possible" someone else had committed the crime. However, the victim's dying declaration describing her assailant was generally consistent with Green's description, i.e., a slim Black man in his mid-20s. The victim also said the murderer fled toward the motel where Green resided. Furthermore, when Green was arrested, he gave inconsistent statements about his activities on the night of the murder, though one of his alibis was somewhat corroborated.<sup>87</sup> In sum, while there may not be sufficient evidence of Green's guilt, the evidence hardly establishes his innocence.

The recent report of the Florida Commission on Capital Cases sheds additional information on this case. Prior to the first trial, the court suppressed evidence of gunpowder residue in the pockets of Green's clothing. Although the trial court had originally found the eyewitness competent to testify at the first trial, it reversed itself on retrial and found the witness incompetent. The prosecution reiterated that Green had "been given the benefit of the doubt," but that his innocence was not established since he had motive, opportunity, and problems with his alibi. Green's defense attorney actually attributed his client's acquittal, at least partially, to the "bad search warrant" served in the case. Since the search warrant was "bad," evidence of Green's guilt such as the gun residue in his pocket was never presented to the jury.

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83. *Associated Press* 9/30/99.

84. *People v. Manning* (Ill. 1998) 695 N.E.2d 423.

85. *Chicago Tribune* (1/19/00).

86. *Green v. State* (Fla. 1997) 688 So.2d 301.

87. *St. Petersburg Times* (12/29/99, 3/17/00.)

90. **William Nieves**<sup>88</sup> – This Hispanic defendant was convicted of murdering Eric McAiley over to a drug debt. As the police sped to the scene of the murder, a bearded Hispanic in a Cadillac pointed out where the murder occurred and drove away. A witness ultimately identified Nieves as the man who got out of a Cadillac and shot McAiley. The witness also admitted that she initially failed to identify Nieves. McAiley’s nephew testified that McAiley sold drugs for Nieves. Another witness testified that before the murder he overheard Nieves warn McAiley, “Better get me my fucking money, I’m not playing with you.” Nieves did not testify at the guilt phase of his first trial because his lawyer erroneously advised him that he would be impeached with his prior record of firearms and drug-trafficking offenses. Nieves ultimately did testify at his penalty phase. He admitted he was a “small-time drug dealer” who had only a few drug transactions with McAiley. Nieves’s case was reversed because of his attorney’s faulty advice about whether he would be impeached if he testified.

Nieves was acquitted on retrial. His retrial defense again impeached the eyewitness who identified Nieves with prior conflicting statements she had made, including that she had initially identified two thin Black men and then a husky Hispanic. The witness denied identifying the assailant(s) as Black men. Nieves is Hispanic, but not “husky.” Another witness testified that he saw a Black man shoot McAiley, but this testimony was also rife with inconsistencies. The Philadelphia district attorney continues to maintain that Nieves is guilty. The Nieves case is not an example of a defendant who was found actually innocent, but of a defendant for which the prosecution could not prove guilt beyond a reasonable doubt.<sup>89</sup>

92. **Michael Graham**; 93. **Ronnie Burrell** – The Louisiana Attorney General dismissed charges rather than retrying these two defendants after their convictions were vacated due to a witness recantation and the discovery of significant impeaching evidence of a jailhouse informant. The Louisiana Attorney General’s decision was not based on “innocence,” but on the lack of sufficient credible evidence to establish guilt. Interestingly, Graham’s and Burrell’s own counsel acknowledge that new evidence could result in reinstatement of the charges, and they have instructed their clients not to discuss the case. Contrary to the DPIC summary, DNA played no role in this case. The case was not dismissed because Graham and Burrell have been established as “innocent,” but instead because there was insufficient evidence of guilt. The local prosecutor, now retired, indicated that he would have tried the case again.<sup>90</sup>

94. **Peter Limone**<sup>91</sup> – As with Lawyer Johnson (discussed earlier in this section) Limone was convicted and sentenced under Massachusetts’ defunct, pre-1976 death-penalty statute.

96. **Joaquin Martinez**<sup>92</sup> – Spanish-native Martinez was accused of murdering a couple at their home sometime between October 27, 1995 and October 30, 1995. One victim was shot and the other victim died of multiple stab wounds. There was no physical evidence of a forced entry, indicating that the victims knew their assailant. A phone list in the kitchen included a pager number for “Joe.” After the police left several messages for “Joe,” Martinez’s ex-wife, Sloane, called and explained she had the pager. She advised the police of her suspicions that Martinez was involved in the murders. The detective listened to a phone conversation Martinez had with his ex-wife in which he stated, “[T]his is something that I explained to you before, and I am going to get the death penalty for what I did.” When she asked him if he was referring to the

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88. *Commonwealth v. Nieves* (Pa. 2000) 746 A.2d 1102.

89. *Associated Press* (10/20/00, 5/14/01, 5/25/01).

90. *Baton Rouge Advocate* (3/20/01, 3/21/01, 3/30/02); *Minneapolis-St. Paul Star Tribune* (1/1/01).

91. *Limone v. Massachusetts* (1972) 408 U.S. 936.

92. *Martinez v. State* (Fla. 2000) 261 So.2d 1074.

murder, he cryptically replied, “No, I can’t talk to you about it on the phone right now.” Martinez’s ex-wife Sloane then had a surreptitiously recorded conversation at her home during which Martinez made “several remarks that could be interpreted as incriminating.” Martinez’s girlfriend testified that Martinez went out on October 27 and returned with ill-fitting clothes, a swollen lip, and scraped knuckles. Another witness testified he saw Martinez on October 27 and that he looked like he had been in a fight. Three inmates testified to incriminating statements by Martinez. The prosecution relied primarily on Sloane’s testimony and the surreptitious tape. Sloane testified about the contents of the taped conversations, Martinez’s behavior, and other statements he had made to her as well.

Martinez’s case was reversed because a police witness erroneously testified as to his opinion that Martinez was guilty. The case was returned for retrial and the prosecution suffered many of the problems that occur on retrial in terms of changes in the evidence. Due to the passage of time, a witness had died, another witness had refused to cooperate (apparently Martinez’s girlfriend), and the third witness (Martinez’s ex-wife Sloane) had recanted.

Furthermore, a major piece of prosecution evidence was excluded on retrial. At Martinez’s first trial, the trial court overruled Martinez’s objection that the incriminating tape of his conversation with ex-wife Sloane was unintelligible and incomplete. The trial court allowed the tape to be played while the jury read a transcript. On appeal, Martinez did not challenge the admission of the tape. However, several of the judges on the appeals court noted that the tape was of “poor quality and portions of the conversation are difficult to hear . . . .” But one concurring justice specifically stated that the tape recording was “sufficiently audible to be admitted . . . .” In any event, even if portions of the tape were inaudible, Sloane Martinez could herself testify as to what was said during her incriminating conversation with Martinez. There seems to be no question that Martinez made potentially incriminating statements on the tape.

On retrial and despite the appeals court indications that portions of the tape were audible, the trial court excluded the tape completely as inaudible.<sup>93</sup> Sloane Martinez now stated that she had lied about what her former husband had said. The tape was not available to contradict her. The prosecution chose not to call Sloane to testify and instead relied on a police officer to testify from memory about what he had heard when Martinez’s incriminating conversation with Sloane. However, the officer had no independent recollection and had to rely on a transcript of the recording. The jury’s request to hear the actual tape was denied.<sup>94</sup> Martinez’s acquittal on retrial appears attributable to a deterioration and gutting of the prosecution’s evidence, not proof of innocence. Both the prosecution and the defense advised the Florida Commission on Capital Cases that the prosecution was unable to present the same evidence at Martinez’s retrial.

97. **Jeremy Sheets**<sup>95</sup> – The appellate court’s decision explains that Sheets was convicted of a racially motivated murder of a young Black girl. The evidence of Sheets’s guilt included the tape-recorded statements of an accomplice named Barnett, who died prior to Sheets’s trial. The Nebraska Supreme Court reversed the conviction because Sheets could not cross-examine the dead accomplice.

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93. The appellate court’s holding about the tape was not binding on the trial court. Thus, the trial judge had the discretion on retrial to exclude the entire tape. The prosecution would not have been able to appeal the trial court’s ruling. The Martinez acquittal could have boiled down to no more than a disagreement between the prosecution and the trial court about the audibility of a tape.

94. *Associated Press* (6/6/01); *St. Petersburg Times* (6/7/01).

95. *State v. Sheets* (Neb. 2000) 618 N.W.2d 117.

According to newspaper accounts, the prosecutor chose not to retry the case because he believed there was insufficient evidence to convict Sheets beyond a reasonable doubt, not because the prosecutor believed that Sheets was innocent. In fact, Sheets's arrest originally resulted from a tip based on Barnett's statements that he and Sheets had murdered the victim. The tipster then recorded statements made by Barnett implicating Sheets as the murderer. Once again, there is no reason to doubt the reliability of this particular taped statement by Barnett, since it occurred before Barnett's arrest. Sheets's own testimony that he did not buy a car that was involved in the murder until after the murder occurred was contradicted by other police testimony. Testimony was also presented that Sheets had threatened a Black neighbor and had a fascination with Nazism, including shaving his head and drawing swastikas.

Most significantly, Sheets later requested a refund of the monies deposited in the Victim Compensation Fund on his behalf. The Nebraska Attorney General pointed out in denying Sheets's request that the reversal of Sheets's conviction is not even considered a "disposition of charges favorable" to the defendant unless the case is subsequently dismissed because the prosecution is convinced that the accused is innocent.<sup>96</sup> Since the dismissal was not on the basis of innocence, Sheets's request for compensation was denied.

98. **Charles Fain** – As with Arizona, Idaho's statute is now invalidated under the recent decision in *Ring v. Arizona*. It is speculative now as to whether a jury, as opposed to a judge, would have found Fain death-penalty eligible.

99. **Juan Roberto Melendez**<sup>97</sup> – Melendez was convicted of murdering a beauty salon owner in 1984. Melendez's conviction was based on the testimony of a friend, John Berrien, and of David Falcon, who claimed Melendez confessed to him in jail. The defense relied on alibi and presented evidence that a third party named James had confessed to murdering the victim. The defense also impeached Falcon as a paid informant. After his conviction, Melendez continued to attack the credibility of the prosecution's witnesses and to further support his defense that James actually committed the murder. Various witnesses testified as to incriminating statements made by James. But James never explicitly confessed to any of these witnesses or he otherwise gave conflicting explanations for murdering the victim. His accounts of the murder also conflicted. Berrien partially recanted, and it was revealed he had negotiated a deal for his testimony. However, none of these witnesses who provided this new information for Melendez were found to be credible.

Then, Melendez's original trial attorney suddenly discovered a long-forgotten transcript of a jailhouse confession by James. It was not explained why this transcript had not been used at trial. Apparently, according to this transcript, James had also confessed to a state investigator. The suddenly discovered transcript and the Berrien recantation coupled with the belated revelation of a deal for his testimony were sufficient for a court to order a new trial. But by this time, James and Falcon were both dead. Thus, any opportunity for the prosecution to explore and impeach their conflicting accounts no longer existed. On that basis, although the prosecution continued to believe that Melendez was the murderer, the prosecution decided there was insufficient evidence for a new trial and dismissed the case.<sup>98</sup>

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96. Neb. Op. Atty. Gen. No. 01036; *Omaha World Herald* (5/6/97, 6/13/01).

97. *Melendez v. State* (Fla. 1986) 498 So.2d 1258; *Melendez v. State* (Fla. 1992) 612 So.2d 1366; *Melendez v. Singletary* (Fla. 1994) 644 So.2d 983; *Melendez v. State* (Fla. 1998) 718 So.2d 746.

98. *Sun Herald* (1/6/02); *The Guardian* (1/5/02); *St. Petersburg Times* (1/4/02, 1/5/02); *Tampa Tribune* (1/3/02, 1/4/02).

101. **Thomas H. Kimbell**<sup>99</sup> – Kimbell’s acquittal on retrial is another example of a case in which the prosecution could not prove guilt beyond a reasonable doubt, but the acquittal did not establish Kimbell’s innocence.

Kimbell was convicted of four charges of first-degree murder for the brutal stabbing deaths of a woman, her two daughters (ages seven and four) and her five-year old niece. The victims’ bodies were found inside the family’s mobile home. His defense at trial was that another member of the victims’ family, probably the husband, committed the murders. The adult victim’s mother testified that she was talking on the telephone with her daughter shortly before the murders (between two and three in the afternoon) and her daughter said she had to go because “someone” had pulled into the driveway (possibly the murderer). Previously, the mother told the police that her daughter said that her husband had driven into the driveway. The Pennsylvania Supreme Court reversed Kimbell’s conviction because Kimbell’s lawyer was not allowed to impeach the mother with her prior inconsistent statement that her daughter had specifically said that her husband (not just “someone”) was arriving at the house. The court agreed that this testimony could have created a reasonable doubt about Kimbell’s guilt.

Despite the acquittal on retrial, the prosecution maintained that Kimbell was the murderer and noted that “the more time that elapses between a crime and a trial, the harder it can be to obtain a conviction.” Lost in the shuffle was evidence casting doubt on the credibility of the mother’s testimony and recollection in general, given her understandable grief about her daughter’s murder. At the first trial, a psychiatrist testified that the mother’s testimony “could be affected by the impact that the slayings have had on her.” Indeed, when the mother testified at the first trial, she repeatedly broke down, sobbing, and said she had talked to her daughter a “whole bunch” and that the conversations were “mixed up together.” She also told investigators previously that her daughter had hung up to make dinner, but she could not remember making that earlier statement. Another witness testified that he did stop briefly at the victims’ mobile home at around 2:00 p.m. to make a phone call and then left (although this person could have been the person whom the daughter referred to in the phone call with her mother, he is apparently not considered a suspect in the case). When Kimbell was interviewed by the police, he provided specific information about the murder, which he claimed he had overheard on police scanners. But interestingly this information was not broadcasted on the police radios.

At the first trial, a friend of Kimbell’s testified that Kimbell had pointed at the victims’ home after the murders and admitted killing the people. This witness died after the first trial. Other witnesses identified Kimbell as being near the victims’ home on the day of the murder, and other witnesses testified to incriminating admissions by Kimbell.<sup>100</sup> While there might have been “reasonable doubt” about Kimbell’s guilt, the available information does not exonerate him.

102. **Larry Osborne**<sup>101</sup> – Osborne was convicted of breaking into the home of an elderly couple, bludgeoning them, and burning their house down. Osborne was acquitted on retrial due to reasonable doubt, but not because the evidence established that he was not the actual culprit. A friend and potential accomplice of Osborne’s implicated Osborne in a grand-jury proceeding. However, this witness then died by drowning before the first trial. Instead, his grand-jury testimony was read at Osborne’s first trial. The conviction was reversed because of the admission of the dead witness’s grand-jury testimony – since there was no opportunity for Osborne to cross-examine the witness. On retrial, without the grand-jury testimony of the dead

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99. *Commonwealth v. Kimbell* (Pa. 2000) 759 A.2d 1273.

100. *Pittsburgh Post-Gazette* (5/4/02, 5/6/98, 5/2/98, 2/4/97); *Associated Press* (5/6/98).

101. *Osborne v. Commonwealth* (Ky. 2001) 43 S.W.3d 234.

witness, the prosecution had insufficient evidence to convince the jury of Osborne's guilt beyond a reasonable doubt. Nevertheless, there was evidence that Osborne and his mother staged a phony 9-1-1 call to the police in order to divert police attention to another potential perpetrator. There was also a dispute whether Osborne possessed a set of wire cutters removed from the victims' home.<sup>102</sup>

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102. *Louisville Courier-Journal* (8/2/02, 8/3/02); *Associated Press* (8/2/02).