

Selected Reports and Written Testimony on the Death Penalty Presented to the California Commission on the Fair Administration of the Justice

Instructions: To find the material described here, go to www.ccfaj.org. Select (1) Reports & Recommendations, (2) Fair Administration of the Death Penalty, and (3) Expert Testimony—this link is right above the “Official Recommendations.” Links to all of these items may be found there.

1. CLEMENCY

Clemency in Capital Cases

Prof. Linda E. Carter and Prof. Mary Beth Moylan
University of the Pacific, McGeorge School of Law

Professors Carter and Moylan conducted a study of clemency in capital cases throughout the years of California’s use of the death penalty. This is new research, commissioned by the CCFAJ. The professors explain that clemency is an executive function with very little judicial oversight or review of the procedures or decisions. They discuss past reasons for denying or granting clemency petitions. They conclude it is difficult to generalize about these reasons because of the intricacies of each individual’s case, but list factors that were raised by petitioners. They conclude with a discussion of alternatives and suggested modifications to the clemency process in California.

Testimony of James S. Thomson

Attorney at Law

Mr. Thomson testified that clemency is not the fail-safe mechanism alluded to by the Supreme Court in *Herrera*. Rather, Mr. Thomson argues, clemency lacks uniformity in its procedures and in the criteria a Governor uses to grant or deny clemency. In addition, the procedures that do exist for clemency today do not provide clear guidelines and therefore do not ensure a fair opportunity to be heard. Mr. Thomson represented capital defendants in three clemency petitions.

2. COSTS

Investigating the Costs of the Death Penalty

Susan S. Everingham
RAND Corporation

CCFAJ asked the RAND Corporation to conduct a study of the costs of the death penalty in California. Ms. Everingham presented two possible approaches that could be employed to develop estimated costs of the death penalty. However, RAND did not actually use either approach due to the lack of appropriate data and because the data that was available was not collected in a manner that would facilitate the cost comparisons. This lack of useful data is largely due to the fact that prosecutors and public defender offices do not have any need to keep such records. Prosecutors, public defenders, justices and their staff work on multiple cases simultaneously without maintaining records of the hours spent on particular cases.

The Hidden Death Tax: The Secret Costs of Seeking Execution in California
Natasha Minsker, Death Penalty Policy Director
American Civil Liberties Union of Northern California

Ms. Minsker identified the known costs of the death penalty at the state level and analyzed the records of actual trial expenses, revealing some of the hidden costs of death penalty trials to counties. Counties receiving reimbursement from the state for expensive homicide trials kept unusually detailed records of the costs of these trials. This report is the first to review these records. Ms. Minsker concludes that death penalty trials cost at least \$1.1 million more than non-death penalty trials and that overall, California spends at least \$139 million each year in pursuit of execution.

3. JURY COMPOSITION AND SELECTION

Jury Selection Issues: Highlights of Testimony
Prof. Craig Haney, UC Santa Cruz
Lois Haney, Consultant, National Jury Project West

Professor Haney and Ms. Heaney testified that juries are not representative of the community for several reasons. They noted that people of color and of lower social-economic status are the most underrepresented group on jury panels because of the minuscule payment provided to jurors. Unsurprisingly, the most significant determinant of whether a juror seeks to be excused is the potential juror's employer's policy on paying employees during jury service. Moreover, California jurors are worse off than jurors of other states: 31 states and the Federal courts pay their jurors more than the state of California. These problems are exacerbated by the limited sources from which jury lists are comprised and the death qualification process.

4. PROPORTIONALITY, FAILURE TO NARROW AND OVERBREADTH

The Eighth Amendment, the Death Penalty, and Ordinary Robbery-Burglary Murderers: A California Case Study
Prof. Steven Shatz
University of San Francisco School of Law

Professor Shatz testified that California's current death penalty statute is substantially overbroad. Professor Shatz reiterated the Supreme Court's concern that the death penalty must be a proportionate punishment for the offense committed and therefore must be reserved for the "worst of the worst." Professor Shatz suggested that California does not currently adhere to that teaching of the Supreme Court since ninety percent of all first-degree murderers are death eligible.

A Review of Special Circumstances in California Death Penalty Cases: Special Report to the California Commission on the Fair Administration of Justice
Prof. Ellen Kreitzberg, Santa Clara University School of Law
Director, Death Penalty College

Professor Kreitzberg investigated how California applies its special circumstances in death penalty cases at the request of the CCFJA. Professor Kreitzberg first concludes that a centralized,

systematic, and funded system to collect data is needed; one that provides not only an overview of the death penalty system but also can be used to compare cases in which a sentence of death was imposed with cases in which life without the possibility of parole was imposed. Second, Professor Kreitzberg concludes that consideration should be given narrowing the available special circumstances that make a case death eligible in California. Professor Kreitzberg finds significant disparity from county to county in which special circumstances result in a death sentence.

Less is Better: Justice Stevens and the Narrowed Death Penalty

Prof. Lawrence C. Marshall, Stanford Law School
Co-Founder, Center for Wrongful Convictions, Northwestern University

Professor Marshall surveys the conflicting arguments surrounding the administration of the death penalty and argues that the current court should embrace Justice Stevens' "less is more" approach. Professor Marshall concludes that it was not sensible for the Court to construct its death penalty doctrine out of two contradictory views as identified in *Furman*, namely numerosness and narrowing. Essentially, the former view breeds racial disparity, results in error, risks the execution of innocent persons, and overburdens the system whereas the latter view mitigates these problems.

Comparative Proportionality Review in California Death Penalty Cases

Natasha Minsker, Death Penalty Policy Director
American Civil Liberties Union of Northern California

Ms. Minsker surveys the legal landscape of proportionality review, finding that a majority of states require comparative proportionality review in death penalty cases. Ms. Minsker argues that California should also require comparative proportionality review and that there should be comprehensive data collection in all homicide cases to facilitate this review.

5. PROSECUTORIAL CHARGING PRACTICES AND MISCONDUCT

Structure and Administration of the Exercise of Discretion by California District Attorneys in Prosecuting Homicides as Death Cases

Prof. H. Mitchell Caldwell, Prof. Carol A. Chase, and Prof. Christine Chambers Goodman
Pepperdine University School of Law

CCFAJ requested that Professors Caldwell, Chase and Goodman analyze how the various California district attorneys exercise their discretion to prosecute a homicide as a death penalty case. To facilitate the study, a survey was sent to each county. Thirty-four counties failed to respond or expressly declined to participate; five counties indicated that they had not filed any capital cases during the relevant time period; and eighteen counties responded fully or partially. The report included the information that was disclosed, but unfortunately because the information received was minimal and incomplete the data could not serve as the basis for drawing any firm conclusions. The professors conclude by criticizing the wariness of district attorneys about disclosing information concerning the death penalty decision-making process.

Prosecutorial Misconduct in Death Penalty Cases
Natasha Minsker, Death Penalty Policy Director
American Civil Liberties Union of Northern California

Ms. Minsker discusses how prosecutorial misconduct affects the outcome of a significant number of death penalty cases. Ms. Minsker notes that prosecutors face unique pressures in death penalty cases and in turn may commit misconduct that increases the likelihood that the jury will return a death sentence. Courts often overlook such misconduct when conducting review of the case post-conviction due to the application of the harmless error standard.

Charging Practices of California District Attorneys in Death Penalty Cases
Natasha Minsker, Death Penalty Policy Director
American Civil Liberties Union of Northern California

Ms. Minsker sent a survey to California defense attorneys asking about district attorney procedures for charging special circumstances and deciding whether to pursue death. The survey results conveyed that the charging practices of district attorneys statewide are inconsistent. Ms. Minsker also finds that, in some counties, a prolonged decision making process of whether to pursue death needlessly overburdens the judicial system. Ms. Minsker notes that the individuals who charge special circumstances and decide whether to pursue death do so largely without community input and do not reflect the diversity of the community.

6. RACIAL, ETHNIC AND GEOGRAPHIC DISPARITIES

The Impact of Legally Inappropriate Factors on Death Sentencing for California Homicides 1990-1999

Prof. Michael Radelet, University of Chicago
Prof. Glenn Pierce, Northeastern University

Professors Radelet and Pierce demonstrate that the race and ethnicity of the victims and the characteristics of the counties where the crime occurred impact death sentencing in California. A death sentence is significantly more likely if the victim is white, rather than Latino or African American. In addition, death sentencing rates are higher in counties with low population density and low diversity.

Death by Geography: A County by County Analysis of the Road to Execution in California
Romy Ganschow, Policy Program Assistant
American Civil Liberties Union of Northern California

Ms. Ganschow analyzes the use of the death penalty county by county in California. She finds that the majority of counties have abandoned use of the death penalty while only ten counties account for nearly 85% of death sentences since 2000. She looks for potential drivers of whether a county sends many people to death row and concludes that high rates of death sentencing cannot be explained by murder rates, political views of location within the state. She concludes that California's death penalty is arbitrary, unnecessary and a waste of critical resources needed by the counties.

7. STANDARDS AND FUNDING FOR INDIGENT DEFENSE

Remedies for California's Death Row Deadlock

Hon. Arthur L. Alarcon, Senior Circuit Judge
United States Court of Appeals for the Ninth Circuit

Judge Alarcon explains the delays in processing appeals and habeas corpus cases in California and why these delays are a problem. Not only do such delays create a backlog within the judicial system, but they are costly to taxpayers and undermine two often stated purposes for the death penalty, retribution and deterrence. Judge Alarcon argues that inmates on death row lack adequate representation due to an absence of funding available to lawyers who take such cases. He concludes that the inadequate funding for defense counsel is the main cause of the undue delay in the judicial and appellate proceedings.

Summary of Testimony on Focus Questions 5, 7 & 9

Prof. Elisabeth Semel
Director, Death Penalty Clinic
School of Law, University of California at Berkeley

Professor Semel discusses how California fails to comply with the American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases at both the trial and post-conviction level. One example of such noncompliance is that the ABA Guideline mandate for “qualified counsel” in death penalty representation is decoupled from the provision of necessary resources at both the trial and post-conviction stages. Professor Semel finds that, at the trial level, compliance with the Guidelines is the exception, not the rule. In conclusion, Professor Semel argues that compliance can only be achieved by overhauling California’s current defense services at the trial stage and by eliminating the gross disparities between the resources available to state agencies in the post-conviction system.

Summary of Testimony from Barry Melton

Yolo County Public Defender
California Public Defenders’ Association

Mr. Melton testified that the professional standards of capital defense as set by the Supreme Court in *Wiggins v. Smith* are difficult to achieve because of the statutory scheme for reimbursement of homicide costs. Mr. Melton points out that counties cannot be reimbursed for ordinary salaries and expenses incurred by the district attorney, prosecution, sheriff, public defender or court-appointed attorney or attorneys in the investigation and defense of a case. While reimbursement is supposed to be available for ancillary services and investigation, in reality, the Legislature has not approved such funding for over a decade.

Summary of Testimony from Greg Fisher
Deputy Public Defender, Special Circumstances Case Coordinator
Los Angeles County Public Defender's Office

Mr. Fisher imparts that there is inadequate compensation and limited access to resources for defense counsel in death penalty cases which surely impacts the quality of representation. The ethical obligations involved in preparing for a possible penalty phase trial require counsel to expend an immense amount of resources in attorney time, investigatory time, and funding for experts. This, coupled with the large number of potential death penalty cases, overwhelm the system and strain defense resources. Mr. Fisher suggests early identification of cases that will not be pursued as death penalty cases as a partial solution.

Summary of Testimony of J.T. Philipsborn
California Attorneys for Criminal Justice

Mr. Philipsborn's testified that trial procedures and access to resources vary greatly county to county. Mr. Philipsborn uses Tulare County as an example but notes that these issues are not particular to this county, but, rather, are prevalent in counties throughout the state. These problems included the failure to comply with the minimum requirements established by the ABA Guidelines, routine handling of death penalty cases without the appointment of second counsel, and the lack of funding and resources to challenge rulings which affect litigation of cases.

8. OTHER ITEMS OF INTEREST

Testimony of Honorable Ron George
Chief Justice of California

Chief Justice George presented a proposal to change the capital appellate process. This proposal was born from the concern about growing delays in death penalty appeals and specifically addressed the backlog of cases ready for consideration by the Court. The proposal would permit the Supreme Court to transfer fully briefed appeals to the Courts of Appeal, rather than require that the appeal be filed directly in the intermediate court. Chief Justice George concludes that changes are needed to the post-conviction process because California's death penalty is "dysfunctional."

Direct Appeals on Death Penalty Convictions in Other States
Stephen A. Edwards
Kilpatrick Stockton LLP

Mr. Edwards provides a review of the post-conviction procedures in other death penalty states. Specifically, Mr. Edwards reviews whether appeals in death penalty cases are handled by the supreme court of the state, or an intermediate court. He concludes that, besides California, all but two states provide for direct appeal to the state's supreme court.

Summary of Testimony on behalf of California Attorney General Jerry Brown
Dane Gillette, Chief Assistant Attorney General
Office of the California Attorney General

Mr. Gillette responds to the questions presented by the commission in his statement on behalf of the Attorney General. First, he comments that collecting and making public data regarding charging decisions by prosecutors would be time consuming and costly and would only lead to additional litigation. Mr. Gillette also concluded that no persuasive study has been able to establish a correlation between racial bias and capital sentencing.

Wrongful Convictions in California Capital Cases
Stefanie Faucher, Program Director
Death Penalty Focus

Death Penalty Focus' report details the cases of fourteen individuals on California who were freed after the court concluded they were wrongly convicted. These cases turned on commonly known causes of wrongful conviction including inadequate defense, false testimony, mistaken eyewitness identification, false confession, and police or prosecutor misconduct. These cases, Death Penalty Focus concludes, demonstrate two points. First, had the rate of California executions been faster, there is a substantial likelihood that an innocent person would have been executed. Second, we have no way of knowing how many wrongfully convicted people remain on death row in California.

Mandatory Justice: The Death Penalty Revisited
Report of the Constitution Project

The Constitution Project is a bi-partisan commission based in Washington, D.C., that has considered problems with the death penalty. Their report contains many recommendations for protecting the innocent from wrongful conviction, reducing racial disparities in death sentencing and generally improving the fairness and accuracy of the death penalty.