

A Taxpayers Guide to the California Death Penalty

Why Death Penalties cost ten times as much as life without parole.

Why Death Penalty Appeals last more than thirty years.

Why Death Penalty trials are more likely to convict innocent people.

Why Executions are like getting struck by lightning.

Why the Death Penalty causes suffering for crime victims.

Why Abolition of the Death Penalty would make us all safer.

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The opinions expressed in this report are those of the authors and not the official position of the Center on Juvenile and Criminal Justice.

INTRODUCTION: PAMPHLET POWER

The late Thurgood Marshall was a prominent civil rights lawyer for the NAACP and later a Justice of the United States Supreme Court. He wrote one of the concurring opinions in *Furman v. Georgia*, the case that abolished the Death Penalty in the United States for a few years after 1972. Something curious he said was that he was relying on public opinion to find the death penalty to be Cruel and Unusual Punishment in violation of the Eighth Amendment. He said that if people were familiar with the truth about the death penalty they would want to abolish it. This pamphlet is an effort to familiarize you, Mr. And Ms. California taxpayer, with the truth about the California Death Penalty so you will want to abolish it.

There are solid reasons why a pamphlet is the tool of choice to communicate with California taxpayers. Pamphlets have played an important role in my life. I was convinced at an early age that the American Revolution would not have happened without the pamphlets distributed by Tom Paine. As a schoolboy, I read pamphlets by a kindly Jesuit priest named Daniel Lord who described his life as being very happy. When I met a live Jesuit for the first time at age twenty two, I was already sold. I spent in the next thirty years in the Society of Jesus as a priest and lawyer. The Jesuits are the largest order of Priests and Brothers in the Catholic Church. At age fifty two, I left the Jesuits to marry my wife, Cynthia. A novel problem confronted me. I had to find a way to make a living to support myself, Cynthia, and her five year old daughter, Marilyn, whom I later adopted. We decided to start a criminal law trial practice in Sacramento.

The going was slow and tough until I decided to produce a pamphlet to market my law practice. It told people how to defend themselves when they were going through a criminal prosecution. They picked up the pamphlets from display racks on the backs of five three wheel bicycles that I parked each day by the jail and the courthouse. I distributed over one hundred thousand pamphlets. The pamphlet was wildly successful and so was my law practice. After twelve years I was able to retire to Comiskey Park, our beautiful home with a large pond near Folsom Lake in Placer County.

This pamphlet would not have been born without the generous support of the Van Loben Sels/Rembe Rock Foundation and the kind sponsorship of Daniel Macallair and the Center on Juvenile and Criminal Justice. I am grateful to them. We will continue to publish and distribute the pamphlet again and again until we have told the people of California the truth about the Death Penalty in our state. I believe in what Justice Thurgood Marshall said. If people really know about the death penalty, they will want to abolish it.

PROPOSITION 7, THE CALIFORNIA DEATH PENALTY LAW

California voters were angry and frustrated when they went to the polls on November 7, 1978. They saw crime as a rising problem and thought a tough death penalty law would cure it. The last person executed in California, at that time, was Aaron Mitchell. He went to his death in the spring of 1967, crying out that he was Jesus Christ. The California Supreme Court stopped executions after that and in 1972 declared the death penalty to be cruel and unusual punishment in violation of the state constitution. (Peo. V. Anderson, 6 Cal. 3d628). Ronald Reagan was governor and he and then State Senator George Deukmajian leaped into action to get this ruling overturned by constitutional amendment voters approved in the same year. (California Constitution, Article 1, Section 27) Their effort didn't help because the US Supreme Court ruled in Furman v. Georgia (408 U.S 238), also in 1972, that the death penalty was cruel and unusual under the US Constitution. The court did allow, however, that the problem could be fixed by less arbitrary laws. Gregg v. Georgia (428 U.S. 153), decided by the U.S. Supreme Court in 1976, approved the death penalty schemes adopted by five states. Jerry Brown was elected Governor in 1974 and was well known for his opposition to the death penalty. He vetoed a bill in 1977 that allowed the death penalty for limited crimes such as train wrecking resulting in death, killing a witness to prevent testimony or killing a police officer or fireman to prevent them from doing their duty. The legislature passed the bill into law over his veto. This was not enough for the crime fighters.

John Briggs was a state senator from Orange County. He led the effort to put propositions Six and Seven on the November 1978 ballot. Proposition Six would prevent homosexuals from teaching in public schools and Seven would expand the death penalty law. Proposition Seven was touted as a tough, effective alternative to the death penalty passed by the legislature in 1977. The ballot argument talked about the plague of violent crime terrorizing law-abiding citizens. It told voters that if they were killed on their way home tonight because the murderer was high on dope and wanted the thrill, Proposition Seven would supply the death penalty. It said that Proposition Seven would give every Californian the protection of the nation's toughest, most effective death penalty law. Proposition Six failed passage while Proposition seven became law with a two to one margin.

The new death penalty law was indeed tough. In order to get a death penalty the prosecutor has to prove that someone murdered someone and the murder was accompanied by a "special circumstance", for example, a murder accompanied by a robbery. Proposition Seven added five more special circumstances relating to the victim that permitted the death penalty. There were four more crimes that could get the death penalty if someone were murdered during their commission. Two more motives for the murder were added. It removed the requirement that the state had to prove the murderer intended to kill. It also removed the requirement that an accomplice was present and physically helped for that person to be death eligible. The California death penalty law is the most expansive in the nation. Eighty seven percent of first-degree murderers are eligible for the death penalty. (California Commission on the Fair Administration of Justice: Final Report, hereafter ccfaj).

PROP 7 AFTER THIRTY ONE YEARS

While the law was tough it was not effective. Thirty one years and more than 45,000 California homicides later, a total of thirteen people have been executed, beginning with Robert Alton Harris in 1992. Another inmate condemned in California was executed in Missouri. Five of those executed voluntarily gave up their appeal and probably would be alive today had they not done so. Forty three death row inmates have died of natural causes. Sixteen death row inmates have committed suicide. Five

others have also died. One was stabbed to death on the exercise yard. A guard shot one to death. One died of a heart attack after being sprayed with pepper spray. One died of a drug overdose and another of acute drug toxicity. California has the largest death row in the nation with 680 inmates and the longest time between judgement and execution. The next person scheduled to die is Anthony Morales for a murder committed in 1982. A date was set but the execution is now delayed by a lawsuit over the lethal injection protocols and methods used by the Department of Corrections and Rehabilitation. Executions are twenty to thirty years after the crime and that time length is growing. The system hemorrhages money costing approximately one hundred and forty million dollars a year for courts, lawyers and the prison system. This does not include trial costs and the cost of federal appeals. Housing an average prison inmate costs thirty four thousand dollars a year but the prison system spends ninety thousand for death row inmates. The Department of Corrections and Rehabilitation is building a new death row at San Quentin that will hold a thousand inmates and cost half a million dollars for each cell if the courts allow two prisoners to a cell. It will be a million dollars a cell if single cells are required. Construction is scheduled to begin in Spring 2009. That Death Row will be filled a few years after completion.

After many years on Death Row, ten percent of the prisoners will have their death verdict overturned by the California Supreme Court. Another sixty two percent of the death verdicts will be overturned by federal courts. Alex Kozinski is the Chief Judge of the Ninth Circuit Court of Appeals and an ardent Death Penalty Advocate. He said in a 1995 Law Review article that the Death Penalty in California is an illusion. Those few who ultimately die will be the unlucky ones rather than the carefully chosen "worst of the worst". (46 Case Western Law Review, 1)

A CHANGE IN PUBLIC ATTITUDES

The last two decades have not been good for death penalty proponents. One hundred and thirty one people on death rows across the nation have been declared innocent and freed. Twelve people convicted of murder in California have been exonerated in recent years. Thirteen death row prisoners in Illinois were exonerated. Governor George Ryan commuted the sentences of

the rest, on January 31, 2003, after reforms recommended by a commission he appointed were not enacted by the legislature. One hundred and sixty four death row prisoners were sentenced to life without parole and three others were given the same sentences as their codefendants. The notion that the Death Penalty deters crime has been totally discredited. Decisions of the US Supreme Court and other courts acknowledge this fact. The courts also openly acknowledge that the death penalty is racially biased. (*McKleskey v. Kemp* (481 U.S. 279)). Every execution in California is accompanied by serious questions of the death penalty's benefits and harms.. There were many calls in recent years for a moratorium on the Death Penalty to examine the system to see how it could go so wrong.

THE CALIFORNIA COMMISSION ON THE FAIR ADMINISTRATION OF JUSTICE

The legislature, led by Senator John Burton, created the California Commission on the Fair Administration of Justice in August 2004. The Commission was charged with the duty to study the criminal justice system in California to determine if it has failed by convicting or executing innocent persons, to examine ways to provide safeguards and improve the criminal justice system, and to make recommendations to ensure that the administration of criminal justice in California is fair, just, and accurate. The legislature appointed John Van de Kamp (former Attorney General) as the chair and Gerald Ulemen (law professor) as chief executive officer. They put together a marvelous group of commissioners from criminal defense and prosecutors, judges, office holders, law professors, law enforcement, victim advocates, business leaders and others. Twelve of the twenty two commissioners were either active or retired law enforcement professionals. The commission worked diligently for four years and issued its final report in June 2008. The commission concluded that the death penalty system in California is totally dysfunctional and that a death sentence really amounts to a life in prison. It laid out three alternative proposals for reform which consisted of doubling the spending on the system to hire more lawyers, or narrowing the criteria for who gets the death penalty or eliminating the death sentence. The costs and effects of each of these alternatives was projected. The commission's report is a

great source of information about the death penalty in California. It is available online at www.ccfaj.org. This pamphlet will refer frequently to the report and will cite it as (ccfaj). If you know nothing about the death penalty in California the ccfaj report is one of the best places to begin.

This pamphlet has several goals. It will lay out each step of the California death penalty process in simple terms to give the reader a good understanding of how it works. It will also look at the conclusions of the Commission and give a critique of them. Ultimately, it will conclude that the death penalty in California can't be fixed and shouldn't be fixed and should be replaced with a sentence of Confinement in Prison Unto Death. This pamphlet will be enormously helpful to understand the Commission's report and to help the reader decide what should be done about the California death penalty.

DEATH IS DIFFERENT

"Death is different." This was the argument of several Justices in *Furman v. Georgia*. Justice William Brennan said that death is "in a class all by itself because of its severity, finality and enormity. He said that a death penalty differs from all other punishments not in degree but in kind. Justice Potter Stewart identified three ways in which death is different in kind. First it is unique in its total irrevocability. Second it is unique in its rejection of rehabilitation of the convict. Finally, says Stewart it is unique in its absolute renunciation of all that is embodied in our concept of humanity. (Cf. *Dead Certainty: The Death Penalty and the Problem of Judgement*, pp. 156-157) The lasting impact of *Furman v. Georgia* has been that death is different. The ordinary limits on time allotted for a case, money spent in litigation and the appeal process do not apply.

Defense Attorneys repeat the statement "Death is Different" like a mantra during the proceedings of a death penalty case. They say it when they are asking for more money to defend the case. They say it when they are trying to get more time to prepare the case. They say it when they are asking for the appointment of additional help to prepare the case. Death Penalty cases typically take three to five years to be brought to trial and typically cost ten times as much as an ordinary murder case. They create a

heightened sense of awareness in the Judge, Prosecutors and Defense Attorneys that their actions will be scrutinized and reviewed by higher courts. They are trying to avoid the three most common causes of reversal: judicial error, prosecutorial misconduct and ineffective assistance of counsel.

It is a long road to a death Judgement. Only twenty of every one hundred death Penalty Cases filed will result in a Judgement of Death. This was the conclusion of a study by the State Public Defenders Office in the 1990's. (ccfaj) The percentage of death judgements is probably lower now. No one keeps track. Appellate courts will overturn Seventy two percent of those verdicts. Those left who do not die from old age or medical causes or who do not commit suicide May one day face execution.

DEATH ELIGIBLE CRIMES

How does a Death Penalty prosecution begin? The U.S. Supreme Court has limited the Death Penalty to crimes of murder. (Cf. Coker v. Georgia (433 U.S. 584, Kennedy v. Louisiana, (U.S. 128). It can't be just any murder. In California it has to be a murder with "special circumstances". California law further defines what crimes of murder are death eligible. It has to be a First-Degree Murder as defined by California Penal Code Section 189. First Degree Murders are those committed by bombs or certain ammunition or those that are willful, deliberated and premeditated, or those committed during certain felonies such as arson or robbery or some sex crimes or by someone in a vehicle shooting at someone outside the vehicle, or those committed by someone lying in wait or accompanied by torture. (Cf. Penal Codes Sections 189, 190.1, 190.2, 190.3, 190.4, 1239 for the California Death Penalty Scheme)

If the District Attorney determines that a First-Degree Murder has been committed, he may then look to see if there are "special circumstances". Penal Code Section 190.2 lists the special circumstances that would make a crime of murder eligible for the punishment of death or life without parole. The list is several pages long. It could be a murder for financial gain, or a crime in which more than one person was murdered or a murder committed by a person who had previously been convicted of murder. It could involve the motive of the murder such as killing

a police officer to retaliate. It could be a racial killing. It could be a murder committed during the commission of certain felonies. It could be a murder committed by poison or accompanied by torture. There are many murders that have special circumstances. The CCFAJ tells us that eighty seven percent of first-degree murders qualify for the death penalty. California has what is called the felony murder rule. A murder committed during the commission of certain crimes becomes a First Degree Murder by that fact. The law does not prohibit that same fact from also being a special circumstance. The Felony Murder Rule is generally attributed to greatly expanding death penalty possibilities.

The decision whether to seek the death penalty lies solely in the discretion of the District Attorney of the county. There are fifty-eight counties in California. The reasons why these decisions are made are seldom revealed. Some offices have a written protocol to evaluate cases and others do not. There are stark differences in the rates at which counties seek the death penalty. The ACLU of NORTHERN CALIFORNIA published a report in 2008 that shows that the county in which a crime occurs may be the most important factor to determine whether death will be sought. There is no accounting for why these differences occur. Sacramento County, for example, has smaller population but very similar demographics to Santa Clara County. It sentences almost five times as many people to execution as Santa Clara does. (Cf. *Death by Geography: A County by County Analysis of the Road to Execution in California*, A Report of the ACLU of Northern California, available online). It is also notable that Santa Clara County has a lower murder rate than Sacramento County. San Francisco County does not seek the death penalty while across the bay Alameda County seeks it vigorously. The counties that do seek the death penalty disproportionately are in Northern and Southern California, on the coastal areas and in the central valleys. The latest report from Natasha Minsker of the ACLU is that the death penalty is now becoming confined to five large counties in California. No others can afford it.

HOW AND WHY DISTRICT ATTORNEYS CHOOSE TO SEEK DEATH

The most important question about a decision to seek death is whether the prosecutor believes he can succeed. Had OJ Simpson been convicted of First Degree Murders for killing Nicole Brown Simpson and Ron Goldman there would have been at least three "Special Circumstances: Lying in Wait and Killing more than one person in the commission of the crime and killing a witness. The Los Angeles District Attorney did not seek the death penalty because he feared the jurors would not impose it because of OJ's fame and popularity. It turned out that he couldn't even get a conviction.

The family of the victim is very important in a death penalty decision. The desires of the family are frequently the determining factor. The District Attorney does not want to be seeking the death penalty while family members are telling the media they do not want it. During the sentencing phase of the trial the prosecutor is allowed to put on "victim impact" evidence to show the jury "the unique characteristics of the person who was killed. (Payne v. Tennessee, 501 U.S. 808). This is an important part of the trial and requires enormous cooperation of the victim family members. Sometimes families split over the issue of the death penalty. In a little book titled Dignity Denied a number of family members tell of being excluded from information and other forms of discrimination by the prosecutor because the family did not want the death penalty. A notable example of this discrimination is the fact that victim survivors of the Oklahoma bombing were not allowed to give victim impact statements if they opposed the death penalty.

Many other factors may decide whether a death penalty is sought in a case. The personal convictions of the District Attorney, availability of resources, the number of death penalty cases being pursued by the office, the state of the economy, the date of the next election, the publicity given to a case could all be factors. Some like to imagine that death penalty decisions are based on careful evaluations and screenings that precisely sort out the "worst of the worst". The U.S. Supreme Court judges who decided *Furman v. Georgia* were shocked by the randomness of the death penalty and the fact that it was heavily weighted toward the poor and

minorities. Justice Stewart likened it to being struck by lightning. He said that it was a punishment freakishly and wantonly imposed. It was like being killed in a freak accident. It is difficult to conclude that the California death penalty is any less arbitrary.

Gregory D. Totten, the District Attorney of Ventura County and one of the CCFAJ Commissioners wrote a little piece in the Journal of the Institute for the Advancement of Criminal Justice about the DA's decision to seek death. (www.iacj.org) He titled it "The Solemnity of the District Attorney's Decision to Seek Death " He made it seem almost like a religious event. He described a line of attorneys, investigators and police officers silently entering a conference room. They had all read a memorandum about the case they were going to discuss. They listened intently to a defense attorney who had been invited to address them. They then discussed the case and the life of the defendant using the same aggravating and mitigating factors that a jury would use. The final decision, Mr. Totten said, belongs to the District Attorney. He said this procedure is followed in every county he knows about.

There is another picture of choosing death decisions in a book titled The Prosecutors. A Sacramento Bee reporter named Gary Delsohn spent a year embedded in the Sacramento District Attorneys office. He became part of the background and people spoke freely around him. Justin Weinberger, the son of a high level official in the Attorney General's office had kidnapped a twelve year old girl named Courtney Sconce and raped and strangled her in the neighboring county.

Special circumstances were abundant and the crime was dreadful. Would this be a death penalty case? The questions revolved around whether the jury would vote death for a young man who grew up in bizarre circumstances. He had told the detective that he had sex with his mother when he was thirteen. They also questioned whether the public would criticize the DA's office for not seeking death because Michael Weinberger, Justin's father, was the head of a Death Penalty Appeal Unit in the Attorney General's Office. While these discussions were going on, Jan Scully, the District Attorney was meeting with Courtney's family. In the meantime, the District Attorney of Sutter County was up for reelection and he was begging to try the case there so he could go for the death penalty. John O'Mara who headed the

homicide unit finally decided the case was too risky to try for the death penalty and he would be happy with a Life Without Parole plea. His decision was to offer that deal. If it were not accepted the case would be tried as a death penalty case. He had Marjorie Koller, the Deputy DA assigned to the case write him a memo advocating Life Without Parole. He was going to put it in a binder that he kept on his desk so he could show that he was not showing favor to a white defendant over poor black defendants. It goes into a file along with the cases of many poor black defendants who were offered Life Without Parole. When they refused they were tried for the death penalty. Justin took Life Without Parole. Probably a great percentage of those on death row are there because they refused a plea bargain not because they were the carefully chosen "worst of the worst". Delsohn quoted O'Mara as saying that if it is a high profile case it is all politics. Jan Scully, the District Attorney announced that her office was not seeking death because the victim's family were religious people and they did not want the death penalty.

DEREK AND JOHNNY

It seems profitable to illustrate the difference between a case where the death penalty is not sought from one where it is. Lets take a hypothetical case of two young men living in south Sacramento named Johnny and Derek. They are in their mid twenties. They are drug dealers who sell marijuana and cocaine. They know of a rival in their neighborhood who is selling drugs out of his house. He lives there with his girlfriend. They decide to pay him a visit with guns drawn, rough him up, rob him of his drugs and money, and threaten him with worse if he doesn't get out of business. Early one afternoon they embark on this mission. When the girlfriend opens the door they push their way in. They meet the man but he has a gun drawn too. There is a shoot out and the man is killed in the shoot out. The girlfriend is also killed because she is a witness.

Special Circumstances abound in this case. Two people were killed. It was during a home burglary and a robbery. The girlfriend was killed to prevent her from being a witness. The head of the homicide unit evaluates the case and decides that he is going to try this as a robbery murder. He is not even going to allege the special circumstances that could carry a penalty of life without parole even

if the death penalty were not sought. He sees too many possible problems with the case. It looks like a drug deal gone bad. Johnny and Derek may have a good self defense case. A video camera on the house did record their approach to the house but didn't show the guns drawn. There are no witnesses to the event.

A witness testifies at trial that he overheard a conversation between Johnny and Derek after the murder and they are convicted. The trial was fairly simple and lasted a month. It took place about two years after the crime. The judge sets the sentencing date for six weeks away. Two weeks after the verdict Johnny and Derek are visited in the jail by a probation officer who interviewed them to prepare a pre sentencing report. The interviews lasted about thirty minutes each. Both Johnny and Derek refuse to talk about the crime. The report consisted of accounts of the crime from the police reports and information that the probation officer had about Derek and Johnny from previous probation reports that were done about them. There are also statements of the family members of the victims, a calculation of the amount of restitution due and a statement about the impact of incarceration of Derek and Johnny on their family members.

On the day of the sentencing, the judge announces the case and asks if both defendants had received a copy of the pre sentencing report and had an opportunity to review it. Both attorneys answer in the affirmative. The judge asks for comments on the case and there are none. Family members of both of the victims are present and wish to exercise their rights to make a victim impact statement. They speak briefly about the loved ones they have lost and express their desires for maximum punishment for the defendants. The judge then sentences them each to twenty five years to life in prison for first degree murder and another twenty five to life for the use of the firearm in its commission for a total of fifty years to life. He then sentences them to another fifty years to life for the second victim and makes it consecutive. The jury had found that the girlfriend was killed to prevent her from being a witness. This fact justified the consecutive sentences. He then adds some more years for previous convictions for violent felonies. Derek and Johnny leave the court headed to prison. They each have sentences of over one hundred years to life. They will only leave prison in a casket.

THOUSANDS OF CALIFORNIA PRISONERS WILL DIE IN PRISON

Derek and Johnny's cases are not unique. There are currently many California prisoners who will never live to be eligible for parole. The parole board is required to see life prisoners three years after they arrive in prison to tell them what they need to do to get parole. This is called a documentation hearing. The commissioners will tell Derek and Johnny to behave themselves as best they can in prison to have some options for their life of incarceration. They will not be given any hope that they will ever get out of prison. Since 1977 only seven prisoners serving life without parole have left prison and they had to prove they were innocent to do it.

DEREK AND JOHNNY'S APPEAL

The lawyers for Derek and Johnny Each file a "Notice of Appeal" in the court where the conviction occurred. The courtroom clerk then prepares the record on appeal. It consists of the notes made by the court clerk during the trial, a transcript of all the proceedings in court, the official court documents, and copies of motions and other documents filed by the attorneys. Since neither can afford a lawyer the Appellate Court contacts The Central California Appellate Project to get two private attorneys to represent them on appeal. The lawyers go over the case and identify what they consider errors made by the judge, the DA or the Defense Counsel and write them into a document called the Appellants Opening Brief. A Deputy Attorney General handling both appeals for the state files a response. The appellate lawyers respond to those briefs. The lawyers appear before a three judge panel of the appellate court for oral argument. Sometime later the court of appeal issues a ruling affirming both the conviction and the sentences of both of the defendants. It usually takes about three years at the most for an appeal. Only one of about ten thousand of these kinds of cases get any sort of reversal and that is usually a sentencing error that is corrected by bringing the defendant back to court so the judge can sentence him correctly. California sentencing law is more complex than the federal tax code and mistakes get made. Reversals that require a retrial of the case are rare.

Derek and Johnny are at the end of the line. Their appeals are over. They can't even get any credit for good behavior to get to the parole board sooner than one hundred plus years. Twenty five year old Derek would be one hundred and twenty five years old before he is able to go to the parole board. If he behaves himself long enough he can lower his custody status enough to get a job and earn some money. He can have visits on weekends. He can marry but he can't have sex with his wife. He can appeal his case through petitions he files in the court himself but his is not likely to succeed. He will join many other people in prison who have sentences longer than they are ever likely to live and will have to make whatever kind of life he can for himself in prison.

LIFE WITHOUT PAROLE

If the District Attorney wanted she could have alleged special circumstances and asked for life in prison without parole. If the first Degree Murder and Special Circumstances were proven beyond a reasonable doubt the judge would have had no other sentencing choice. This verdict would result in an appeal to the same three judge panel of the local court of appeal. If the verdict were upheld on appeal the defendants would be very certain to spend their lives in prison. The governor could only commute their sentences to life with the possibility of parole if four of the seven judges on the California Supreme court concurred. (Article V, Section 8, California State Constitution.) This is indeed a very difficult hurdle. The whole case would be over in about four years from beginning to end. Derek and Johnny would join about four thousand other prisoners who are serving life without parole. When California says "Life Without Parole" it means it.

A DEATH PENALTY CRIME

Let us change the scenario of the crime. Suppose that Derek and Johnny decide to do a home invasion robbery of a wealthy Vietnamese couple rather than some drug dealers they know. The Vietnamese couple own three Asian supermarkets in Sacramento and a jewelry store. An employee told Derek and Johnny that large amounts of cash and jewelry are kept in the home. As Derek and Johnny are rushing into the house after knocking on the door they see the man reaching into a drawer. One of them shoots

him. They then kill the wife to keep her from being a witness and flee. If it bleeds it leads and this is a crime that sends shock waves through the community. The wealthy couple lived in an enclave of expensive homes surrounded by poor neighborhoods. The video camera has images of two people who look like Derek and Johnny. A neighbor saw a car that looked like the one they drive. The police arrest Derek and Johnny about two weeks later. The Asian American Political Association representative calls the District Attorney demanding the death penalty. The couples son and daughter in their thirties also want death. A week later the District Attorney holds a press conference and announces that her office will be seeking death.

THE DEATH PENALTY TRIAL

Death Penalty trials are unique. The trials have two parts. The first trial is to decide whether the defendant is guilty of First Degree Murder with Special Circumstances. If the jurors so decide they then determine in a separate trial whether the defendant shall be sentenced to death or Life Without Parole. Death Penalty Cases are the only ones where the jurors in California decide the Punishment. If the jury votes death, the trial judge reviews the evidence to decide whether the decision was contrary to law or evidence presented but it is rare that judges do not go along with the jury's verdict. (Cf. Penal Code Section 190.4) The same jury decides both trials. They are called the "guilt phase" and the "penalty phase". If the jury gets hung in the Guilt Phase, that is comes to a point where it tells the judge that it can't unanimously decide the case, the judge declares a mistrial and the parties are back to where they were before the trial began. If the jury decides the guilt phase but hangs on the question of penalty the judge declares a mistrial as to that phase only. A hung jury at either phase is usually a victory for the defense. The prosecution has failed and this usually leads to another round of plea bargaining for a sentence less than death.

The prosecutor's strategy at the guilt phase is not only to get a conviction of First Degree Murder with Special Circumstances but bring in whatever evidence he can to convince the jurors that the defendant deserves death. The defense attorneys may be trying to get a finding of not guilty or to get a finding of a lesser crime that would not allow the death penalty. If the defendant is found

guilty of second degree murder the case is over and does not proceed to the penalty phase. Defense attorneys know from jury studies that the most effective strategy at trial short of acquittal or a lesser verdict is “lingering doubt.” If they can leave the jurors feeling a little uncertain about their verdict of guilt they will be less inclined to vote death. The defense will also consider whatever evidence they can find to show that the defendant was mentally ill or suffering from some other impairment of judgement. This has to be presented in the form of evidence leading to a lesser verdict but it will serve a double purpose. The defense attorneys have to be concerned about consistency. It is hard to argue that he didn’t do it and at the same time to argue that he did it because he was crazy. The defense attorneys also have to worry that showing the defendant to be crazy may lead to the jury wanting to execute him. They will fear him more.

If the jury finds a defendant guilty of First Degree Murder and finds beyond a reasonable doubt there were special circumstances the case goes to the penalty phase. This is like another trial where the jury decides whether the defendant should get a sentence of death or life without parole. The penalty phase has the same jury and it usually begins a week or so after the guilt phase.

WHY DEATH PENALTY TRIALS COST SO MUCH

This brief overview of a death penalty trial serves to show the reader some of the complexities of preparing a death penalty case for trial and why it usually takes three to five years. A defendant in a death penalty case will usually be represented by a team of two lawyers and a “mitigation specialist”. There may also be a “Fact Investigator and a Paralegal. One lawyer will be the lead counsel and will usually be primarily responsible for the guilt phase of the trial. The other lawyer is commonly referred to as “Keenan Counsel” after the California Supreme Court decision that requires a judge to appoint two lawyers in a death penalty case. The second lawyer usually concentrates on filing legal challenges to the proceedings and preparing for the penalty phase of the trial.

The penalty phase adds enormously to the complexity and cost of a death penalty case. The defendant will almost always

have a “mitigation specialist” as part of the defense team. At the penalty phase of the trial the jurors are asked to weigh the aggravating and mitigating factors relating to both the defendant and the crime. If the aggravating factors “substantially outweigh the mitigating factors “ they are told to vote for death. (Cf. Penal Code Section 190.3) If the mitigating factors substantially outweigh the mitigating factors they are told to vote for life without parole. This part of the trial is very controversial because jury experts seriously question how much the juries really understand and are able to apply these criteria. (Cf. Death by Design, by Craig Haney).

Mitigation Specialists usually have a background in psychology or the social sciences. They investigate the defendant’s entire life to find anything that will mitigate what the defendant did. This involves school records, medical records, court records, juvenile records, jail and prison records, military records, and any other kinds of records about the defendant. It involves interviews with anyone who knew the defendant. The investigation is not limited to the defendant but goes extensively into his family background. If the mother, for example, were an alcoholic the defendant may have suffered from fetal alcohol syndrome. Sometimes the investigation will go back for several generations. If the defendant is a first or second generation American the investigation may lead to other countries such as The Ukraine, Mexico or Cuba.

There are frequently complex medical procedures such as brain scans to look for residual injuries. Medical experts will need to be hired to perform and evaluate the results of these procedures. Mental illness, residual effects of drug abuse, head injuries, brutal family backgrounds, significant losses and traumas are all fertile areas for research by a mitigation specialist. The U.S. Supreme Court decided in *Atkins v. Virginia* (536 U.S. 304) that it violates our Constitution to execute a mentally retarded person. Possible mental retardation may also be an extensive area of investigation. If mental retardation is not severe enough to prohibit the death penalty it may still be used as a factor in mitigation. Defense lawyers will be doing two things while looking for mitigation. One is for the defendant and one is for themselves. Failure to investigate possible mitigation is one of the most frequent bases for a finding of “ineffective assistance of counsel” No lawyer wants to be told by a court that he failed to provide an adequate

defense. He would have to report himself to the State Bar. The lawyers will turn over every rock looking for mitigation.

While the defense attorney is looking for mitigation, the prosecutor will be looking for aggravation. He will be looking for any instances in which the defendant used “force or violence” (Penal Code Section 190.3,) It could have been an instance in which the defendant was convicted of a crime but it could also be an instance in which the defendant was never arrested. If the defendant beat a case in a trial the acquittal bars its use.

If the Defendant decides to bring a witness to trial, the attorney is required to notify the prosecutor thirty days before the trial begins. The prosecutor will begin his own investigation of any mitigation witnesses to challenge their credibility. The defense side will be doing the same with the prosecution witnesses. Preparation of a death penalty case is a never ending process.

A certain dynamic sets in very early in a death penalty case that maintains throughout until the end. It applies even as the case changes hands as it proceeds through various stages. All the parties consider themselves to be involved in a desperate struggle. They all know that whatever they do will be analyzed and scrutinized by those who follow them. They know that the ultimate stake, human life, is involved in the outcome of the case. They will do everything they can think of to fight the case.

JURY SELECTION IN A DEATH PENALTY CASE

Jury selection is another unique aspect of a death penalty case that adds greatly to the length and cost of a death penalty trial. Jury selection may have lasted about a week when Derek and Johnny were charged with crimes that carried less than death. There is a strong possibility that the same jury decided both their fates. They may also have had separate juries sitting during the same trial. During the selection process the jurors would have been told that the punishment for the crimes is solely the responsibility of the judge and they are not to consider punishment. They would have been questioned about whether they could be fair and impartial, had they or relatives been victims of similar crimes, would the length of the trial be a problem, did they know any of the participants, would race be a factor for

them, does the subject of drugs cause them concern about whether they could be fair. The first batch of jurors would have been questioned extensively. Succeeding jurors would simply be asked if they had any of the issues discussed with the other jurors before them. They would have been told to listen to the questions asked the prospective jurors who proceeded them.

A DEATH QUALIFIED JURY

In a Death Penalty Case the jury has to be "Death Qualified". Jury decisions have to be unanimous in California criminal cases. Many people do not believe in the death penalty or would have extreme difficulty imposing it. At the beginning of jury selection, prospective jurors are questioned about their attitudes toward the death penalty. In an ordinary jury trial a pool of about sixty five jurors is brought into the courtroom. Twelve jurors are seated in the jury box and asked questions. As they are eliminated another takes their place. They are questioned as a group and the prospective jurors in the courtroom are told to listen to the questions and answers and think about what their answers would be.

A death penalty case requires a much larger pool of prospective jurors. Many will be disqualified because they do not believe in the death penalty. The questioning takes much longer. A juror who would always vote for death if there were a conviction will be excused as will one who would not vote for death. An ideal juror as defined by the U.S. Supreme Court would listen to all the evidence and find the defendant guilty if the juror were convinced beyond a reasonable doubt of the defendants guilt. At the penalty phase this same juror would listen to all the evidence presented and then weigh the factors they find in "aggravation" against those they find in "mitigation". If the juror finds that the aggravating factors substantially outweigh the mitigating factors then the juror would be required to vote for death. If they do not, the vote would be for life without parole. The aggravating factors in California would be the crime itself and any other acts of violence committed by the defendant. There is a list of mitigating factors in the Penal Code but the defendant is not limited to that list when he brings in evidence of mitigation. The juror would be expected to be able to conscientiously follow the instructions as given by the judge. The notion of "weighing" the aggravating and mitigating factors

is a metaphor. This is not a good way to give legal instructions. The individual jurors can assign whatever weight they want to the various factors in aggravation and mitigation they consider. Each can decide for themselves whether this crime and this defendant merit a death sentence. It is not a mechanical process. California is what is called a “weighing state” where the jury considers factors in aggravation and mitigation and “weighs” them. In some other states the jury simply has to find aggravating factors that allow the death penalty and then they decide whether the penalty should be life or death.

THE DEATH QUALIFIED JURY VOTES

The Capital jury Project is a group of lawyers, psychologists and others who study jurors who have served on Death Penalty cases. The project is funded by the National Science Foundation. Over the years they have interviewed over thirteen hundred jurors in fourteen states including California. The interviews last between three and four hours. The conclusions of their study have become well known to prosecutors and defense lawyer who try death penalty cases and they make jury selection the key battleground in a death penalty trial. The selection of a single juror may be the determining factor deciding whether the jury votes for death or life. Jurors typically select a Presiding Juror, discuss the case for a while and then take a vote to see where they are. If the vote is eight for death and four for life there is a fifty-fifty chance that it will be one or the other. If nine jurors vote for death then death will almost always be the verdict. If five jurors vote for life that will almost always be the verdict.

These numbers result in the use of jury consultants, extensive jury questionnaires and very lengthy “voir dire” or questioning of the jury. They also make change of venue motions to get the trial moved to another county to much more likely. A “change of venue motion” requires very expensive polling within the county to show that pre trial publicity makes it impossible to get a fair trial there. Jury selection in a death penalty case make take longer than the entire trials of other homicide cases where death is not being sought. It is also a very costly part of the process and when anyone is calculating the cost they rarely look at the loss of productivity while these hardworking citizens are being questioned.

WHY SPEND ALL THAT MONEY FOR 'MITIGATION' ?

Taxpayers will certainly question why huge amounts of money are being spent on "mitigation". Blame the United States Supreme Court. The only thing the jurors knew about William Henry Furman when they sentenced him to death in 1968 was that he was a twenty six year old black man who said he worked at Superior Upholstery. He killed the victim when he was surprised in a home burglary. He shot through the closed kitchen door when he was escaping. Furman said he tripped over a wire and the gun went off. The trial lasted one day and the jury deliberated for one hour and thirty five minutes before finding Furman guilty of the crime and sentencing him to death. The lawyer was paid one hundred and fifty dollars. Furman suffered serious mental illness. The diagnosis was "mentally deficient" with convulsive disorder and psychotic episodes. While he was awaiting trial he was found to be incompetent and taken to the state mental hospital. He was sent back to court after six weeks of treatment but the diagnosis was not changed. The jury knew nothing about him.

When the U.S. Supreme Court approved the death penalty schemes of five states in *Gregg v. Georgia*, Justice Lewis Powell extolled at great length the sentencing schemes that required jurors to know everything possible about the defendant. He was writing the majority opinion. Decades passed with the opinion being an empty promise but the court is beginning to enforce its mandate. The American Bar Association recommended guidelines for the type of defense a defendant should receive in a death penalty case. The U.S. Supreme court affirmed that the guidelines lay out what is constitutionally required if the federal government and the states wish to have a death penalty law in three different opinions. These guidelines have not been declared applicable to the states but they certainly influence judges when they decide whether a condemned person has received an adequate defense.

The American Bar Association Guidelines require two lawyers, a paralegal, a mitigation specialist and an investigator. One of the investigators has to be trained to detect psychological problems. It is further required that this defense team be paid the prevailing hourly rate for their work and that there not be "flat fee" contracts. The courts are finding that contracts to

represent someone for a set amount of money create a conflict of interest between the lawyer responsible for the case and the client. Consider a situation where the lawyer is paid Fifty Thousand dollars to handle the whole case. The lawyer will get paid less as he spends more defending the client. The U.S. Supreme Court is telling us that the defense of death penalty cases is very expensive and it is going to cost more, not less, in the future.

The French have a saying that to know all is to forgive all. As mitigation improves in death penalty cases the rate of death judgements goes down. Failure to adequately investigate mitigation is also one of the most prevalent reasons why defense attorneys are found to have ineffectively assisted their clients. In those cases, death judgements are reversed after twenty to thirty years usually end up with a plea bargain for less than death. Seeking the original death judgement was an enormous waste of money and human suffering for all parties. There is also the specter of innocent people being executed. We have an adversarial criminal justice system. The prosecutor does everything he can to find the defendant guilty while the defense attorney does all he can to prove not guilty. Our founders believed this was the best way to arrive at the truth. A failure on one side can be disastrous. (Cf. In Spite of Innocence: The Ordeal of 400 Americans Wrongly Convicted of Crimes Punishable by Death, Northeastern University Press, 1992)

Lets suppose that Derek and Johnny are both found guilty of First Degree Murder and Special Circumstances and are sentenced to death. They are likely to have had separate juries and probably even separate trials. The District Attorney may have presented a different theory to each jury arguing that Johnny was the shooter in his trial and Derek was the shooter in his trial. This has happened six times in California for a total of twelve people in prison and the courts seem to have no problem with the practice. Both Johnny and Derek will go to the men's death row at San Quentin.

HOW MUCH DO DEATH PENALTY TRIALS COST?

How much do death penalty trials cost? That is a difficult question to answer. The CCFAJ tried to get the Rand Corporation

to study the cost of death penalty trials but they were unable to do so because the Prosecutors would not cooperate. We can get some insight into the costs through compensation made to counties for defense costs for experts and investigators by the state. This reimbursement is pursuant to Penal Code Section 987.9. Over the years since 1978 the Legislature has sometimes funded these costs and not at other times. Natasha Minsker, an attorney for the ACLU of Northern California has written a report titled *The Hidden Death Tax: The Secret Costs of Seeking Execution in California*. She obtained records from the Controllers Office for compensations made by the state. She reviewed ten trials where the compensation paid to the counties for death penalty cases ranged from 1.8 million to 8.9 million dollars. In *Death by Geography*, Romy Ganschow translates the costs into the number of teachers, police officers and other public servants who could be hired for the money spent on death penalty trials. She calculated, for example, that Ventura County spent 5.5 Million dollars seeking executions since the Year 2000. She reports that this amount of money could have funded the salaries for twelve additional experienced high school teachers per year or eleven additional homicide investigators per year. The reports are available online and in print from the ACLU of Northern California in San Francisco. (aclunc.org or 415-621-2493, ext. 358).

APPEAL AFTER A DEATH VERDICT

It often happens that a lawyer who has lost a case will make a dramatic announcement that he will appeal. Many people believe this means the case will be tried over again by another court. An appeal simply means that a higher court will review the record of the trial to see if any errors were made that required the verdict to be reversed. In California, indigent defendants are given a free lawyer on appeal. It would be malpractice for a lawyer not to file a Notice of Appeal in a criminal case that he lost. In death penalty cases the appeal goes directly to the California Supreme Court. This is intended to make the appeals faster. Reading the Penal Code would make one think that appeals happen very quickly. Penal Code Section 190.6 requires the appellate lawyer to file the Appellant's opening brief within seven months after the trial court has issued a "Certificate of Completeness" of the record on appeal. A certificate of completeness means that the judge assures the court that the entire record of the trial has been

sent to the Supreme Court. This means all the paper documents generated by the lawyers and judge during the trial, the records of proceedings kept by the clerk of the court, and a transcript of the court reporter that records everything that happened in court during the case including the trial and sentencing. There are rules that require the judge and the lawyers to stop periodically during the trial to make sure the record is complete up to that point. All this is to avoid the delays that occur when the appellate lawyer finds something missing in the record and has to delay the appeal for the trial court to find it. The law requires all the records to be sent to the Supreme Court within four months unless a longer time is necessary because of the length of the trial. Reading the Penal Code would make a person think that the appellant's opening brief would be filed in the California Supreme court within a year after Derek and Johnny arrive at San Quentin's Death Row.

THE CALIFORNIA COURT SYSTEM

The court system in California consists of three levels. All fifty eight counties have superior courts where criminal and civil cases get tried, divorces are granted, people get adopted, and all the things that happen at the first level of the court system occur. There are about fourteen hundred superior court judges in California. The State of California is divided into appellate districts and if someone wants to appeal a Superior Court ruling that is done in the local Court of Appeal. There are about one hundred and seven appellate court judges in California. They make decisions in three judge panels. Appeals from the Appellate Courts go to the California Supreme Court. There are seven judges on it. The judges pick and choose the cases they want to decide. Sometimes they decide because they don't like an appellate court decision. Sometimes there are different rulings on an issue from different appellate panels that need to be resolved. Sometimes an issue such as gay marriage seems very important and the Supreme Court judges decide to hear it.

DIRECT APPEAL TO THE CALIFORNIA SUPREME COURT

A man was mistakenly executed at San Quentin in 1957 before his appeal got to the Supreme Court. The legislature's response was a

law that makes a death penalty appeal go automatically from the Trial Court to the Supreme Court. The California Supreme Court has created the institutions and procedures of the death penalty appeal system on the state level. This had to be done with the approval and funding of the Legislature and Governor. Ronald George is now the Chief Justice of the California Supreme Court. Chief Justice Rose Bird and Associate Justices Joseph Grodin and Cruz Reynoso were thrown off the court by California voters in 1986 for reversing too many death penalty convictions. The governors who have since appointed Supreme court judges have applied a strict litmus test. You have to love the death penalty and be willing to uphold it. The California Supreme court has not disappointed. It reverses from three to ten percent of the death penalty cases that come before it, the lowest rate of any court in the nation.

Derek and Johnny will be on death row for three to five years before they even get a lawyer to represent them on appeal. There is a shortage of death penalty appeal lawyers. There are more than two hundred and twenty eight thousand lawyers in California but only about two hundred able and willing to represent death row inmates on appeal. The Office of the State Public Defender was created during Governor Jerry Brown's administration (1974-82) to handle criminal appeals. It has about fifty lawyers who do death penalty appeals. The balance come from the California Appellate Project in San Francisco. It is a non profit organization set up by the court and legislature to do death penalty appeals and recruit private attorneys to do them. CAP has some lawyers on staff who do appeals and they train and supervise others. The supervisors are called "Cap Buddies".

It takes a very intelligent and extremely dedicated attorney to do a death penalty appeal. One day a moving truck shows up and unloads thousands of pages of documents from the Supreme Court. The lawyers job is to go through all those documents and transcripts and write a brief arguing that the Court should reverse the finding of guilt and the verdict of death. There are time pressures and money pressures. The lawyers are paid one hundred and forty five dollars an hour but they frequently have to argue with the court when their billings get cut. As they go through the record of the trial they frequently find documents missing from the record or transcripts that are unclear. This means going back to

the Superior Court to get the record corrected which sometimes takes years. The lawyers are given a record in paper and a copy of it electronically. They need enormous computer skills. They typically do their work with three to five computer screens in front of them. One contains the record of the trial, another has case law they wish to apply, another is the brief they are typing and the other two may contain the deadlines they have to follow and other housekeeping information. They spend their lives reading the facts of a horrible crime trying to save a prisoner on death row from lethal injection.

A lawyer who finishes an appeal has to apply again to the Supreme Court to get another. This is a job that not everybody can do. One lawyer was recently disciplined by the state bar because he had an appeal for ten years and never managed to file the opening brief. Most death penalty lawyers get five or six cases and they are set with enough work to keep them busy for a lifetime.

Jerry Brown is the Attorney General of California. He is considered to be the state's lawyer. He has a division of attorneys in his office who represent the state and file the briefs arguing that the death verdict should be upheld. He is known for his opposition to the death penalty but said he would do his duty to carry out the law. He appointed Dane R. Gillette, the Deputy Attorney General most known for his vigorous defense of death verdicts, to head up the Attorney General's Criminal Division. His nickname is "Doctor Death".

APPEAL PROCEEDINGS IN THE CALIFORNIA SUPREME COURT

After the lawyer is appointed the first task will be to go through the entire record to check for completeness. Documents may be missing. Parts of the transcript may not be there because the regular court reporter went to the doctor one day and she didn't get what her substitute did. Dialogues in the record may be missing names. There are many other possibilities. Getting the record complete may take years. After that the Supreme Court will issue a "Certificate of Completeness" and the time deadlines will begin. The lawyer may need to seek delays because

of completing work on another case. It takes years to get the appellant's Opening Brief filed after the lawyer is appointed. The Attorney General files the responding brief within about nine months.

After the briefs are filed the case is set for oral argument in the Supreme Court. The Supreme Court can only hear between twenty and twenty five cases each year. The CCFAJ issued its final report in June, 2008. At that time there were eighty fully briefed cases waiting for oral argument to be set in the Supreme Court. One fully briefed case had been continued for seven years.

It may take between ten to fifteen years for Derek and Johnny to get their appeals completed by the California Supreme Court. There is a ninety percent chance that their verdicts of guilt and death will be affirmed. The next stage of proceedings will be Habeas review in the California Supreme Court.

HABEAS PROCEEDINGS IN STATE COURT

An appeal is limited to what is in the record, that is, everything that happened in the courtroom that got recorded. Issues about matters that happened outside the record have to be raised by a Petition for Writ of Habeas Corpus. This is an ancient legal recourse for anyone who claims to be imprisoned illegally. Suppose that Derek was hit by a car while riding his bicycle at age twelve. He suffered a brain injury. He began to have troubles in school and troubles with the law after that. If this matter were not investigated by his defense attorney as possible mitigation that would give rise to a claim of ineffective assistance of counsel. If there were home invasions robberies in the neighborhood by another pair who resembled Derek and Johnny and that information were not given to defense counsel before trial that could give rise to prosecutorial misconduct for failure to provide discovery. If the judge's marriage were to unravel because of because of a long time affair with the prosecuting attorney in Derek and Johnny's case that may be a matter raised in a Petition for Writ of Habeas Corpus. Many other issues can be investigated. Sometimes it is revealed that an informant was rewarded by the prosecutor although he swore at trial that he was not. Sometimes evidence never tested for DNA is found. Sometimes new DNA techniques are available that were unknown at time of trial. Sometimes new witnesses

are found. One critical witness was found in Illinois case by a journalism class.

It was originally contemplated that the same lawyer would do both the appeal and the Petition for Writ of Habeas Corpus. The appellate lawyers did not want to do that. The CCFAJ explained that there are two different skill sets involved. The appellate lawyer sits in front of a computer all day and writes. The Habeas lawyer has to read the entire trial record and appeal briefs and begin to investigate issues that were not properly raised in trial. The process basically involves investigating the case all over again ten or fifteen years after the crime occurred. California law now provides for one lawyer to do the appeal and another to do the Habeas Petition.

THE HABEAS CORPUS RESOURCE CENTER

The Supreme Court and Legislature established the Habeas Corpus Resource Center in 1998 to prepare the Habeas petitions after the Appeal to the Supreme Court is completed. It has about fifty lawyers on staff. The original concept was that the Habeas center would recruit private attorneys and private law firms to prepare the habeas petitions and the HCRC would provide an attorney to supervise. The courts originally established a maximum of two hundred thousand dollars as reasonable compensation with an additional twenty five thousand dollars for investigation. Few law firms have taken the invitation.

One large California law firm, Cooley Godward, accepted the invitation and overturned a conviction and got the prisoner off death row. They rightfully bragged that they spent eight thousand attorney hours and seven thousand paralegal hours and three hundred and twenty eight thousand dollars out of their own pocket doing it. (In Re Lucas, 33 Cal. 4th 682). This is not the kind of publicity that attracts law firms to accept the appointments to do these Habeas petitions.

Private attorneys who do habeas petitions are paid one hundred and forty five dollars an hour and the cap has been raised several times depending on the complexity of the case. The investigative fees have been increased to fifty thousand dollars. The maximum fee that can be paid to the attorney has been raised to five hundred

thousand dollars. Private attorneys are generally advised not to accept these appointments because the hourly rate is too low to pay for paralegals and the other office assistance necessary to do an adequate job. When the CCFAJ issued its final report in June 2008, most of the Habeas Petitions were being handled by HCRC attorneys with some private attorneys. There were two hundred and ninety one prisoners on death row who were still awaiting appointment of their Habeas attorney. There was a time lag of about ten years after a prisoner arrives on the row before habeas counsel is appointed.

When the California Supreme Court receives a Petition for Writ of Habeas Corpus it has several alternatives. It can issue an “order to Show Cause” and order a hearing to be held where witnesses would be called to testify about the allegations in the Petition. The court would then rule on the merits of the Petition. It can order the Attorney General to file an informal response to the petition and then decide whether to issue an Order to Show Cause or a Summary Denial. It can read the petition and then simply deny it. Most of the responses to a Petition for Writ of Habeas Corpus are a post card from the Supreme Court with the name of the case and “denied” stamped on it. This has important implications for proceedings in federal court as we shall see.

THE FEDERAL BILL OF RIGHTS APPLIED TO THE STATES

Every fifth grader knows that after the U.S. Constitution was written there were serious concerns about giving the federal government too much power. The concerns were answered by passing the first ten amendments which we call the Bill of Rights. Fifth graders may not know how some of these rights became protected by the federal government against actions by the states. After the Civil War the Reconstruction Congress proposed the thirteenth and fourteenth amendments to the U.S. Constitution. The amendments were ratified by the state legislatures. One of the clauses in the Fourteenth Amendment guarantees that no state shall deprive any person of life, liberty or property without due process of law. In *Palko v. Connecticut* (302 U.S.319, 1937), Justice Benjamin Cardozo enunciated for the U.S. Supreme Court what has come to be called the Principle of Selective Incorporation.

Some of the rights in the U.S. Bill of Rights are considered to be so fundamental to ordered liberty that they have to be applied to the states. Supreme Court decisions after Palko have decided which of the rights in the Bill of Rights apply to the states and which do not.

The U.S. Supreme Court declined to “selectively incorporate” the rights that protect a criminal defendant from actions by the states for years. The court ruled, for example, that the double jeopardy clause did not apply to the states. A state court was allowed to try a person twice for the same crime unless it was prohibited by the state constitution. There was a similar ruling regarding the right to be tried by a jury.

In 1965, the U.S. Supreme Court began to selectively incorporate the rights of persons accused of crime into the Fourteenth Amendment. Every crime show has the police giving the person being arrested his Miranda Warning. This requirement came from a ruling by the United States Supreme Court.

Today, almost all of the rights of a person accused of a crime are protected not only by the Bill of Rights of the state constitution where they are prosecuted but also by the federal constitution. If you watch a death penalty trial in a state court you will see one of the defense attorneys at every opportunity objecting not only on state grounds but also under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments of the U.S. Constitution. They recite it like a mantra and it is very important that they “federalize” their case because it may determine whether their clients will live or die.

PETITION FOR HABEAS CORPUS IN FEDERAL COURT

When Derek and Johnny get the post card from the California Supreme Court summarily denying their Petition for Writ of Habeas Corpus their federal appeals begin. It may have taken fifteen years or longer to get to this point but federal appeals will take at least this long if not longer. Some lawyers will take a death penalty appeal through the California Supreme Court, then do the state habeas petition and then accept an appointment to represent the client in federal court. These lawyers are exceptions. The preparation of Johnny and Derek’s petitions for Writ of

Habeas Corpus in federal court will probably be handled by an attorney in the Federal Public Defenders Office or a private attorney who specializes in federal habeas petitions. It is also likely that they would have had a separate attorney to represent them on appeal to the California Supreme Court and in state habeas proceedings. Changing lawyers means delays but each stage has a complex set of rules and lawyers tend to specialize. The first filing will be a Petition for Writ of Habeas Corpus in the federal district court where the case was originally tried.

THE FEDERAL COURT SYSTEM

The federal courts have three levels like the California courts system. Most of the larger cities in California have federal district courts. They are in the Eastern, Central, Northern, or Southern District depending on their location. At the district level federal crimes get prosecuted, there are civil suits by parties from different states, people seek federal bankruptcy protection and file claims under federal civil rights laws. An appeal from this court would go to the Ninth Circuit Court of Appeals. The Ninth Circuit has its headquarters in San Francisco but it sprawls over thirteen western states. It decides cases in three judge panels but some issues can be appealed to an eleven judge panel. An unhappy litigant can appeal to the U.S. Supreme Court but it like the California Supreme Court, only takes the cases it wishes to take from the appellate courts.

THE DEATH PENALTY IN FEDERAL COURTS

The United States Supreme Court largely left the states on their own to administer their death penalty for generations of our history. In 1868 it allowed Utah to execute by firing squad and approved electrocution as a method of death in 1890. The court said it would provide a painless and instantaneous death. The court's prescience proved lacking two weeks later at Auburn Prison in New York. William Kemmler was still breathing after seventeen seconds of current. Another thousand volts for four minutes set his coat on fire. One witness fainted and another vomited. The sheriff left with tears in his eyes. The experiment was reported around the world and news editors prayed that the first try at electrocution would be the last. *Powell v. Alabama* (287

U.S. 45), is considered the courts beginning case on the criminal procedures of the death penalty. Nine black teenagers were taken off a train in Scottsboro, Alabama and accused of raping three white girls on the train. They were tried and sentenced to death a few weeks later. Powell reversed the death judgements because the record was devoid of their having a lawyer. The State of Louisiana attempted the electrocution of a young black man named Willie Francis in 1946. The electric chair was not working properly. Sheriff Resweber told the Board of Pardons and Paroles that the portable electric chair was not working properly and the electricity went into the ground instead of the “nigger.” A diligent and conscientious local lawyer took his case all the way to the U.S. Supreme Court. The justices declared themselves to be disturbed but ultimately had no problem with a malfunctioning electric chair. Willie Francis died the second time. (cf. a recent book, *The Execution of Willie Francis*.) The court declared the death penalty to be unconstitutional in 1972 in *Furman v. Georgia* in what at that time was the longest opinion ever issued. The states scrambled to write new laws which were approved in *Gregg v. Georgia* in 1976.

Since *Gregg* the United States Supreme Court has taken firm control of the death penalty. It has required a two phase trial. The decision has to be left to the jury to make an individual decision in every case. The court has rejected the death penalty in two different opinions for any crime except murder. Someone who is under age eighteen at the time of the crime’s commission cannot be executed nor can someone who is mentally retarded. The Court in 2008 approved lethal injection as a method of execution. The American Bar Association recommendations for the qualifications and composition of the defense team have been adopted as the required standard in federal death penalty cases and it is expected that they will also be applied to the states. The eighth amendment prohibits the execution of anyone who is insane. These are only a few of the many cases governing the administration of the death penalty. (Cf. Cases and Materials on the Death Penalty, Second Edition, Rivkind and Shatz.) Although it took fifteen years for Derek and Johnny’s appeals to be completed in the California Supreme Court not much happened. In the years immediately following the ouster of Rose Bird and two other judges the California Supreme Court affirmed all but about three percent of the cases it heard on appeal. The current

rate is about ten percent. The rate for cases being reversed in Habeas Proceedings is almost zero since hearings are rare and post card denials are the norm.

DEATH PENALTY REVERSALS IN THE FEDERAL COURTS

Death penalty cases fare very differently in the federal courts. Howard Mintz, a reporter for the San Jose Mercury News, calculated the rates a few years ago and found that the federal courts reverse California death verdicts about sixty two percent of the time. The reversal rate of sixty percent or above is fairly typical of the federal circuits around the country but the California state reversal rate is extremely low. In California Supreme Court judges have to run for election every twelve years and they can be recalled. Federal judges have lifetime tenure unless they are removed for wrongdoing.

ATTEMPTS TO SPEED FEDERAL HABEAS PETITIONS

Congressman Dan Lungren is an ardent death penalty advocate. He chafed at the reversals by the federal courts and the fact that a person on the row could file one petition after another in the federal courts. The Oklahoma City Bombing in 1995 gave him an opportunity. He had previously served in Congress but was now the California Attorney General. The Republicans were a majority in the Congress. President Bill Clinton firmly believed in the death penalty and a cataclysmic event had created the impetus for change. Lungren lobbied for changes to federal court procedures. The Congress passed and Clinton signed a bill called the Anti Terrorism and Effective Death Penalty Act in 1996. It did not have a lot to do with terrorism. It expanded the federal death penalty law by sixty crimes and amended federal statutes in an attempt to greatly speed federal death penalty appeals. The law is commonly referred to as AEDPA.

Some of AEDPA's provisions took effect immediately. Others were to be triggered by a certification by the Federal Circuit Court of Appeals after the state had passed certain laws. They regarded the qualifications of appellate counsel, their

compensation, one lawyer doing both the appeal and the habeas petition in one proceeding and other provisions. The part of AEDPA that took effect immediately requires that a Petition for Writ of Habeas Corpus be filed within one year after the completion of the appeal in the state court. No issue could be raised in that petition unless it had been finally ruled upon by the highest court in the state. All of the issues raised in the Petition have to be filed in one pleading. The Petitioner had to show that the state courts ruling on federal issues resulted in a decision that was contrary to , or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States. These provisions apply to all federal habeas petitions that are filed regardless whether it is a death penalty case

THE “OPT IN” PROVISIONS OF AEDPA

The other part of AEDPA is commonly referred to as the “opt in” provision. If a state were to pass certain laws regarding qualifications of appointed counsel, their compensation, one lawyer doing both the appeal and the habeas proceedings in state court and other provisions, strict time limits would be instituted for the proceedings in federal court. The Petition for the Writ of Habeas Corpus would have to be filed in the federal court within one hundred and eighty days after the final ruling by the state court. The district court would have to issue a final ruling within one hundred and eighty days of the filing, the court of appeal would have to issue its final determination about the petition within one hundred and twenty days of the last responsive brief. In the nature of court proceedings this pace would be absolutely breath taking. No state has yet been able to implement the opt in provisions.

The adoption of the Patriot Act during the Bush administration gave Lungren , who was now back serving in Congress, the opportunity to change AEDPA to make it easier for states to get certified. The Ninth Circuit Court of Appeal had denied California certification in the year 2000. (Cf. *Ashmus v. Woodford*, 202 F. 3 , 1160) Congressman Lungren teamed with Senator Kyl of Oklahoma to change the law to make federal death penalty procedures go faster. They put some provisions in the Patriot Act to loosen the certification requirements and

this time to get the state certified by the Attorney General of the United States rather than the federal court. They made some other changes in the “opt in” procedures such as giving more time to the litigants. The Bush administration had proposed some regulations for the certification process. The proposed rules never became final and now they are being reviewed rather than implemented by the Obama administration. In the meantime, California Chief Justice Ronald George has written a comment on the proposed regulations that he does not believe California should become an “opt in” state. The State of California is probably farther away than ever from being certified because of the lengthening time for death row defendants to be appointed counsel.

The political tide is now flowing in the other direction. It is doubtful that Eric Holder, the present Attorney General, will be anxious to speed executions. The public is deeply troubled by the death penalty and the fact that one hundred and thirty one prisoners on death row have been exonerated and freed. Two states, New Jersey and New Mexico have recently abolished the death penalty. California is perennially in financial difficulties and even unlimited amounts of money would probably not produce more lawyers willing to do death penalty appeals. Congressman Lungren, in the meantime, has written an article in a magazine produced by the California District Attorneys Association lamenting the lack of progress since 1989 and the fact that not a single state has qualified for the sped up process. (Cf. The Journal of the Institute for the Advancement of Criminal Justice, Issue 2 available at www.iacj.org.)

THE FATE OF DEREK AND JOHNNY ON CALIFORNIA DEATH ROW

What will be the fate of Derek and Johnny? If they do not have their convictions reversed by the California Supreme Court they will be on death row many years before anything happens. It is likely to be about fifteen years before they will know if they are part of the lucky ten percent who have their convictions reversed by the California Supreme Court. California law provides for separate counsel to represent them on the Habeas Petition filed in the California Supreme Court so if they do not get a reversal on

appeal they will join the two hundred and ninety one waiting for a lawyer to do their habeas review. After they get the post card denial which will take many more years their cases go to federal court. Eighty two percent of the cases in federal court get sent back to the California court because some issues were not decided in the California Supreme Court. This failure is attributed to lack of sufficient budget to do the state habeas petition. (ccfaj) It is safe to predict that a large part of the litigation in the federal courts will be over procedural issues before the merits of the petitions are ever reached. The federal appeals will take so long that the greatest risk to their health will be dying from old age. The procedural barriers intended to limit the federal appeals and speed them will just give the lawyers more issues to fight about.

In the federal courts the habeas process will start all over again. The investigation of the case will begin anew and different experts will be hired. When the CCFAJ issued its final report in June 2008 fifty four habeas petitions had been completed with thirty eight resulting reversals for a seventy percent reversal rate.

Cases do not march in linear fashion through the appeal process. Sometimes a case will go all the way to the US Supreme Court to decide if some issue is properly being raised. This is a matter of procedure and doesn't even deal with the merits. Sometimes a death verdict gets reversed and the DA tries the case again years after the original verdict. If he gets a death verdict the second time there is great likelihood that the client will die on the row from natural causes before the appeal of the second verdict gets completed. Some cases have been tried three times. Some cases will be affirmed by the California Supreme Court and the Federal District Court and get reversed by the ninth Circuit. Death is different and the search for enough evidence to make the decision final goes through many twists and turns.

THE CCFAJ RECOMMENDATIONS TO FIX THE DEATH PENALTY

The CCFAJ did not settle on a single recommendation to fix this system. Three alternatives were presented. The first alternative was to hire more lawyers to do the appeal and habeas petitions in

the state court. This involved hiring more lawyers for the State Public Defenders Office and the Habeas Corpus Resource Center. More lawyers would also be needed for the Attorney Generals Office. None of this would fix the problem of the terrible logjam in the California Supreme Court. The CCFAJ suggested that the law be changed to allow some of the cases to be decided preliminarily by Appellate Courts and then be reviewed by the California Supreme Court. This was a plan proposed by Chief Justice George in January 2007 but it was almost universally rejected. He did not want to give some of his staff to the appellate courts to help with the additional work. Additional lawyers might get the appeals and habeas petitions in state court prepared more quickly but that would only add to the cases waiting to be decided by the California Supreme Court.

The second proposal was to narrow the criteria for who eligibility for the death penalty. The former Chief Justice of the Florida Supreme Court came to the Commission and expressed astonishment that a person in California can get the death penalty for two hundred and fifteen different crimes. The Constitution Project of Washington D.C. has narrowed death eligibility to five factors and this list is being widely circulated.

1. The Murder of a Police Officer doing his duty to prevent him from doing his duty.
2. The murder of any person in a Correctional Facility.
3. The murder of two or more persons when the perpetrator knew that two or more deaths would occur or that there was a strong probability of two or more deaths.
4. Murder with Torture
5. Murder of a Witness to prevent testimony.

Felony Murder as a basis for the death penalty would be eliminated. (CCFAJ, Pg. 139) Presumably all death penalty verdicts not meeting these criteria would be converted to sentences of Life Without Parole. Most death verdicts in California are probably for felony murders and the second proposal would no doubt greatly reduce the numbers on death row. The second proposal would have to be adopted by initiative. There would undoubtedly be a parade of the horrible crimes committed by some of the death row inmates during the election campaign. There would be the additional problem of whether this new law

would be left alone or there would be new crimes increasing death eligibility added during every election.

The last alternative and certainly the most sure and simple would be to abolish the death penalty in California. If this proposal were adopted it would probably include a provision that all death verdicts would be converted to a sentence of Life Without Parole. Appeals and Habeas Petitions pending in the California Supreme Court on issues of guilt would presumably be sent to the appropriate Appellate Court for a decision by a three judge panel. An initiative passed by California voters could not determine how the federal courts would handle the habeas petitions pending in them but it could reduce the sentence from Death to Life Without Parole. Many of the issues pending in federal court would be moot. Probably about ninety percent of the spending we are currently doing on the death penalty would be eliminated.

WHAT IF WE FAIL TO ACT?

If the People of California fail to act the problem will only get worse. Prisoner natural deaths and suicides will continue to greatly outnumber executions. The length of time for cases to be finally resolved will increase. Costs will continue to rise as a result of longer incarceration on death row and the need for a new facility to house death row inmates. Who will suffer for the failure to act? The answer is everyone.

THE FAMILIES OF THE VICTIM

The first set of victims for failure to act will be the families of deceased victims. They are the people who chose to support a death penalty at the time of trial. They have invested themselves in an execution. They have been promised closure and they are waiting for it.

Franklin Zimring was trained as an attorney but he has morphed himself into a first rate criminologist. He teaches at U.C. Berkeley law school. He studied the notion of closure by researching the number of times it appears in media articles regarding the death penalty. He found it in one article in the early nineteen eighties and noted that it now appears thousands of times each year.

There is almost no article about victim family members that does not quote them as waiting for the closure that will come with an execution. Barbara Christian's daughter, Terri Winchell, was murdered by Anthony Morales in 1982. A date was set for his execution. His execution, however, has been delayed by court litigation over the lethal injection protocol. Ms. Christian is always quoted in interviews saying that she can not wait for the closure that will come although she does not intend to witness the execution. She said: "As long as the murderer is alive and breathing, the crime scene is replayed constantly before the eyes of the loved one of the victim. Let these victims see the case closed and put to rest the murder scene. The pain and loss will never end, but they can rest by realizing that justice has been served." Zimring opines that closure is the reason most people support the death penalty. The Governor of Nebraska refused to support a moratorium in that state because he did not want to cause delay for the victim survivors who were waiting for closure. Zimring says that since the death penalty is viewed as a private service for victims of crime the question of capital punishment is insulated from public review. (Cf. Zimring, The Contradiction of American Capital Punishment). A recent example occurred when San Bernadino District Attorney Michael Ramos was asked if he considers expense in deciding whether to seek the death penalty. Ramos replied: "When you are deciding for a victim's family who has lost a loved one, it is hard to think about money." Law Professor Elizabeth Semel recently quoted Ramos in an editorial piece in the Sacramento Bee. She commented that prosecutors know this is the answer that shuts down debate.

Webster's dictionary defines closure as the end of bad things happening. Serious questions are raised as to whether there is such a thing as closure and whether an execution brings it. There is a strong argument that the notion of closure causes victim family members far more suffering than it alleviates. Some suggest that the waiting for closure causes people to put off the grief of their loss as they focus on a future execution only to find that after it happens they don't feel any better. When witnesses left the execution of Terry McVeigh they did not express the healing of closure. One said that if he had been executed one hundred and sixty eight times, once for each victim, it would not have been enough. Another said that he died far too easily for the pain he caused. John M. Johnson attended twenty three executions

in Arizona and kept in contact with victim family members in all of them. He reports that there may be some expression of satisfaction immediately after an execution but it is short lived. When survivors see the family members of the condemned at an execution they may also become sad realizing that another set of victims will be created. (Cf. The Top Ten Death Penalty Myths: The Politics of Crime Control)

There is another problem with support for the death penalty as a source of closure for crime victim survivors. Since 1977, when the death penalty was reinstated in California, there have probably been about fifty thousand homicides. The percentages of those that result in arrest varies from one county to another. In some counties more than thirty percent do not result in an arrest. The arrests that do occur result in a wide disparity of sentences for offenders. Most do not result in a death sentence. Most death sentences do not result in an execution. There have been thirteen executions since 1977, and five of those have been volunteers. Supporting the death penalty as a means of giving closure to crime victims means spending huge sums of money for a tiny group of people and leaving thousands of others neglected and frustrated. There is also an assumption that all crime victim survivors want the death penalty and this is simply not true. Putting an enormous share of our resources into the death penalty process uses money that could provide other victim services.

THE FAMILY MEMBERS OF THE EXECUTED ALSO BECOME VICTIMS

The family members of the person we execute also become victims. They will go to the prison and see their loved one killed. Many times those executions get botched. The victim survivors will suffer from the loss of their loved one but they may receive some sympathy and help from those around them. The family members of the person executed will suffer grief, hostility, isolation and a feeling of being branded by society. Sometimes the family members of the condemned lead a criminal lifestyle but for the most part they mirror the families of the victim survivors. They are probably economically poor. They will not have the benefit of the meager resources we make available to the survivor families. Their sufferings start with the arrest of their loved one

and continue through a trial, years of incarceration and appeals and finally an execution. Often enough the person on death row will have grown and matured and the execution will be more cruel for its lack of necessity. (Cf. Hidden Victims: The Effects of the Death Penalty on Families of the Accused)

THE DEATH ROW PHENOMENON

Most of the people we put on death row are not going to be executed. Whatever does happen, however, will take years. Living on death row is very hard on people. It is an environment that will damage them. The term "death row phenomenon" refers to the large percentage of people on death row who become mentally ill after many years. It has been observed on death rows all over the world. The death row at San Quentin is an old, deteriorating environment. It takes a heavy toll on physical and mental health. The fact that there have been sixteen suicides and only thirteen executions gives us some indication of the death row phenomenon. Since the vast percentage of these people are not going to die by execution, we would do better to abolish the death penalty than to damage the large numbers of people who will ultimately live the rest of their lives in the prison system or in free society.

THE DEATH PENALTY IS A TERRIBLE WASTE OF MONEY

Another cost of the failure to act is the huge sums of money that are essentially wasted on the death penalty. There have been over eight hundred California death verdicts since 1977 that have resulted in thirteen executions. We do not know how much trials cost because prosecutors refuse to cooperate in the calculation. We do know that the U.S. Supreme Court will require more money to be spent on trials for investigation of mitigation and paying more for lawyers and assistants. The Prosecutors will probably spend more in response. If there are attempts to speed the appeal process in the California courts the costs will probably double to hire more lawyers on both sides and court personnel. It is estimated by CCFAJ that the State of California spends about one hundred and forty million dollars each year for the appeal costs and costs of incarceration. If the recommendation of the CCFAJ were adopted to hire more lawyers the annual cost would

increase to two hundred and thirty three million. If the death penalty were abolished the annual cost would be eleven million five hundred thousand dollars.

The one consistent number we have about the death penalty is the one hundred and forty million dollars each year for the appellate and incarceration costs spent by the State of California. It is easy to begin to think of this as the only cost. A true calculation of the cost of the death penalty in California would be much more complex. We would have to know the costs of all the death penalty cases that end in a plea bargain. There are the additional costs of the trials that result in a life sentence instead of death. We would then add to that number the costs of incarceration and appeals in the California Courts. Finally we have to add the costs of federal appeals. Federal appeals last as long or longer than the appeals in the state court and they cost more. The federal government pays more and does not have limits on spending. It is easy to forget that those costs come out of the same pocket of the taxpayer. Another cost that is never calculated is the loss of production of the jurors who go through the long death penalty trials. They are almost invariably state employees or other workers whose companies pay them while they serve on a jury with a few retired people. We then have to add the cost of the failed attempt to get an execution because the death verdict gets reversed on appeal and the case gets plea bargained to a life without parole. A reporter for the Sacramento Bee estimated a few years ago that each execution costs three hundred and fifty million dollars but the true cost is probably much higher.

THE HUMAN COST OF THE DEATH PENALTY

Killing does not come naturally to people. Those who do kill suffer the same traumatic conditions as victims of violent crime. The death penalty makes killers out of Judges, Prosecutors, Jurors and Prison Officials. Carroll Pickett was the Chaplain at the Huntsville, Texas prison where executions occurred. The Warden assigned him to spend the entire day from early morning until midnight with the person who was going to be executed. His job was to get the prisoner to go quietly. He would convince him of the inevitability of his fate and tell him that if he didn't lay quietly on the gurney and give up a vein the guards would rip into him with a knife and find one. It is hard to imagine that the victim

family members who go see someone die become better people for it. Carroll Pickett witnessed ninety executions until he could take it no more. He wrote a book about his experiences and a documentary film has been made. He now goes about the country speaking against executions.

WHAT WOULD WE GET IF WE DOUBLED OUR SPENDING ON THE DEATH PENALTY

What would we gain if we doubled our spending on appellate lawyers and court costs to try to speed the death penalty? The CCFAJ calculates that executions could occur an average twelve years after a jury verdict. This is the speed with which Texas and Virginia execute. This is all speculation. All of the death penalty institutions we have established in California were designed to speed the process and they have slowed it down. It is also ironic to hire more lawyers whose job is to keep executions from happening to make them go faster. One Appellate lawyer described his job as to keep his client breathing air. Franklin Zimring points out that when we send someone to prison that person is serving their sentence while their case is being appealed. If we want to execute someone the sentence has not been served until they are executed. Defense appellate lawyers consider that they have won if they delay the appeal long enough until the client dies a natural death.

California executed Clarence Ray Allen in 2006. He was seventy five years old, diabetic, legally blind and unable to walk. He was taken to the gurney in a wheelchair and helped onto it. The prosecutor in the case attended the execution. He later wrote in the California Lawyer Magazine that he felt sorry for Allen. Allen's lawyer said that he wished he could have come up with one more issue to delay the case until Allen died naturally. Cases like Allen's will be the norm in the future.

It is no doubt possible with enough spending to speed the death penalty process. In Texas, for example, they have the equivalent of another supreme court that does nothing but criminal appeals. Speeding the process, however, takes political will. Judge Alex Kozinski said in his law review article that we live in a democracy and a sufficiently large minority can block what a majority wants.

There are also serious questions whether the people of California want executions. When they hear that Texas and Virginia are the fastest execution states but they also have the highest rate of exoneration they may think twice about how speedy they want the process to be.

THE RISK OF MISTAKES

Another cost of the continuation of the death penalty is the risk of error. Governor Richardson of New Mexico said this risk was the main reason he signed the law to abolish the death penalty there. We have no reason to believe that California is immune from the mistakes that could result in killing an innocent person. Governor George Ryan appointed a commission of experts from law enforcement and the prosecution and defense bar to study the system in Illinois to determine why so many innocent people were put on death row in that state. There was a litany of reasons. Some were faulty eyewitness identification, false confessions, police mistakes or misconduct, prosecution mistakes or misconduct, inept defense representation, shoddy or dishonest forensic experts, reliance of jail house informants, police focusing too early on one suspect and failure to keep an open mind in their investigation.

The CCFAJ made a number of recommendations to prevent errors in the prosecution of criminal cases. A number of these recommendations were passed by the legislature only to be vetoed by Governor Schwarzenegger. Robert Sanger, a California attorney, analyzed California laws to see how many of the recommendations of the Illinois Commission were in place in California. He found that a paltry six percent of the Illinois recommendations to be in place here. (Cf. Comparison of the Illinois Commission Report on Capital Punishment with the Capital Punishment System in California, Santa Clara law Review, Volume 44, 2003) All the same reasons that errors occurred in Illinois are alive and well in California and there is no reason to expect different results here.

DEATH PENALTY TRIALS ARE MORE PRONE TO ERROR

The U.S. Supreme Court has stated in a number of opinions that Death is Different. The penalty is the most extreme that can be imposed and is irreversible. The court insists on a standard of “Super Due Process” in death penalty trials. On the other hand, the Court’s procedures result in a system where death penalty trials are considerably more prone to error than ordinary criminal trials.

Craig Haney is a Clinical Psychologist and Lawyer who teaches at Stanford University. He has studied the California death penalty over his entire career. He uses experiments with mock juries and then corroborates findings with interviews of real jurors who have served on death penalty cases. In his important book, Death by Design, he shows that a defendant in a death penalty case would be much less likely to get a fair trial than a defendant in a case where the penalty is less than death. I will attempt a brief summary of his reasons but this is a book that needs to be studied by those interested in a fair system of criminal justice.

Haney finds that death penalty cases get more pre trial publicity. The crimes are more shocking and adding the death penalty makes them more newsworthy. Jurors frequently come with information about the case and in spite of their assurance that they can put what they have heard aside they already have an opinion. The remedy would be to move the trial to a more neutral place but judges are reluctant to grant a change of venue motion because of added costs. A death penalty trial that will last longer increases their reluctance. Transportation, hotels, restaurants, and other costs will mount. Fairness gets compromised to save money.

The process of selecting a “death qualified” jury adds other problems to fairness. There is the lengthy process of questioning of prospective jurors regarding their beliefs about the death penalty. This happens at the beginning of the case before the jurors have even decided whether the defendant is guilty of the crime. The prospective jurors may sit for weeks and hear hypothetical facts of a crime and be asked how they would vote on the question of death in such a case. The hypothetical facts are exactly the same as those the Prosecutor wants to prove. Judges

can admonish until they are blue in the face that this is only hypothetical but the result is that the jurors become convinced of the defendant's guilt before the trial even begins. The California supreme court ruled that jurors had to be questioned individually outside the presence of other jurors. This ruling was overturned by the U.S. Supreme Court.

Research has shown that jurors who believe in the death penalty are not only more likely to vote for death they are also more likely to vote for guilt. Haney found that a large proportion of possible jurors who are more concerned about due process or fairness are more likely to oppose the death penalty. Certain groups who oppose the death penalty in larger percentages such as Jews and African Americans are less likely to serve on the jury because of they will not be death qualified. These issues were brought to the U.S. Supreme Court in an effort to get the court to rule that the guilt phase of the trial should be composed of both jurors who believe in the death penalty and those who do not. If the defendant were found to be death eligible then a death qualified jury would be selected to determine the penalty. The court rejected this solution. It questioned the research that was being used and said that defendants may benefit from "lingering doubt" if they sit on both phases of the trial. The court ruled that even assuming the research were correct the Constitution does not prohibit the States from "death qualifying" juries in capital cases. (Cf. Lockhart v. McCree, 476 U.S. 162)

Killing does not come naturally to the twelve jurors on a death penalty case even though they may come believing in the death penalty. The prosecutor has to condition the jurors to want to kill. This is done by convincing the jurors that the defendant is different than they are. He is less than human. He is a monster or an animal. In any war the enemy has to be killed by words before he can be killed in fact. The enemy is called by such names as Jap, Huns, Gooks or Charlies. They can't be referred to in human terms. Haney points out in Death by Design that this same process of verbal killing happens in a death penalty trial.

The process of verbal killing begins during jury selection while the prospective jurors are being death qualified. It continues subtly during the guilt phase. It becomes more open and blatant during the penalty phase. When jurors first come into a courtroom and

see a defendant sitting at the defense table their first question is “what did he do”? When it is announced that it is a death penalty trial the question becomes why is he so bad they want to kill him? The entire process of attacking the defendant as someone less than human is designed to get the jury to vote to kill him but it has to also have an effect on the fairness with which the jury decides whether the defendant is guilty.

Scott Turow is a lawyer in Chicago who writes novels and served on the Illinois Commission that investigated the state’s administration of the death penalty. He wrote a book titled: Ultimate Punishment: A Lawyers Reflections on Dealing With the Death Penalty. He states his opinion that death penalty cases are more error prone because they involve such terrible crimes the jury is overwhelmed by them and their judgement is affected. He opined that death penalty cases are more likely than others to be decided erroneously. Haney gives us other reasons internal to the death penalty trial that make errors more likely. The death qualified jury is going to be less concerned about fairness. The death qualification process prejudices the jury. The attacks by the prosecutor on the humanity of the defendant have an effect. It is noteworthy that since 1977 one hundred and thirty one people were freed from death row because they were innocent. This high percentage of exoneration could be because the cases of death row prisoners get more attention. It could also be caused by the death penalty process being flawed and creating more errors.

The only way to assure that innocent people are not executed is to abolish the death penalty. Some says that exonerations are proof that the system is working. In the past two decades so called “Innocence Projects” have sprung up across the nation. There are eighty of them. Some are connected to law schools and other are independent non profit organizations. They use lawyers, law students, journalism students and other volunteers. The one in California is called the Northern California Innocence Project and it operates out of The University of Santa Clara School of Law. These people are freeing people from prisons and death rows and they are not part of the system. Sometimes “the system” ferociously resists their efforts.

CALIFORNIA WITHOUT A DEATH PENALTY

What would happen if we abolished the Death Penalty in California? We would save a great deal of money. The criminal justice part of their ordeal for victims would be over much sooner. We would save survivors the frustration of looking for an execution that in so many cases does not happen.

Would we lose the benefit of deterrence? Some think so. Former President George Bush presided over one hundred and thirty five execution as Governor of Texas and frequently proclaimed that he was saving lives. Senator Diane Feinstein of California believes the death penalty is a deterrent. The District Attorneys of California have established an organization to promote their views about the criminal justice system and they recently published a paper claiming the deterrence value of executions. (www.iacj.org/PDF/IACJournalIssue2pdf.) Roy Adler is a professor of Marketing at Pepperdine University. He states in his article that each execution reduces the number of murders by 74 in the following year. Dan Lungren in his article says that every execution saves between three and eighteen lives. Some modern economists have claimed that the death penalty is a deterrent but their methodology has been severely criticized by others. The common criticism is that these studies assume a very rational calculation of the benefits and consequences of the decision to kill. Another criticism that would be particularly relevant to California is that the death penalty is applied so rarely and randomly that any valid conclusion about deterrence is impossible.

The authors of The Top Ten Death Penalty Myths reached back to 1764 and Cesare Beccaria to find a very common sense way to determine if a punishment is a deterrence. He was one of the earliest opponents of the modern death penalty. Becarria said there are four requirements for a punishment to be a deterrent. It would have to be swift, certain, sufficiently severe and public to be an effective deterrent. Let's apply this to California. Our death penalty is not swift. The greatest risk on death row is old age. It is not certain. The kinds of murders that might be deterred by the death penalty are stranger homicides and we have a very low clearance rate for them in many of our counties. Even if an arrest is made the penalty of death is very uncertain. Between seventy and eighty percent of death verdicts are overturned on

appeal. The death penalty is severe but one wonders if some might not prefer it to a life in prison. Finally, we do not try to publicize executions. We try to hide them. We try to mask them with the medical model. Instead of a noose or gas chamber we visualize a gurney. Most people in California probably have little consciousness of the death penalty. Between 1967 and 1992 there were no executions. In the seventeen years since 1992 there were thirteen executions. The death penalty as a deterrent is totally irrelevant in California.

The theories that the death penalty is a deterrent come out of a computer not real life. I have represented about twenty people who were accused of murder at the trial level. I have represented about a hundred murderers at the parole board. I cannot think of a single murder that made any sense at all. Not a single one of those people ever showed any sign of thinking about the consequences of their actions or considering alternatives. Most of them did not even plan how they would do the crime and get away with it. They were mired in mental illness, drug addiction, hatred, jealousy, desperation, fear and other passions. They had little awareness of what was going on around them in the larger community. They showed no evidence whatsoever of thinking about executions.

No executions are currently occurring in California. They are suspended because of litigation in two different courts. A law suit was brought in the Federal District court in San Jose, California over lethal injection procedures. A death by execution occurs when the prisoner is given a three different drugs one after another. The first drug is intended to render the prisoner unconscious. The second is intended to paralyze him so there is no movement of his body. It is also intended to stop his breathing. The last drug is intended to stop his heart from beating. The allegation of the plaintiffs is that the first drug sometimes does not work, that is, it does not make the prisoner unconscious. The second drug causes extreme pain but the prisoner is unable to express it because he is paralyzed. There is substantial and unnecessary suffering before the prisoner finally succumbs to the drug that stops his heart from beating.

Prison officials in California have responded in various ways to satisfy the Honorable Jeremy Fogel, the Federal District Judge.

They built a new execution chamber that would allow closer observation of the prisoner while he is dying. They developed a more detailed protocol of the execution procedures. They attempted to involve anesthesiologists but they objected to participation in the process on ethical grounds. In the meantime the lawsuit in federal court proceeds. Whatever ruling Judge Fogel makes is sure to be appealed to the Ninth Circuit Court of Appeals. The U.S. Supreme Court ruled in *Baze v. Rees* (128 S.Ct.1520) that similar procedures used in Kentucky did not violate the Eighth Amendment of the U.S. Constitution. The Court developed and applied what they called “the substantial risk” test. The majority found that there was not a substantial risk that the Kentucky procedures caused unnecessary suffering.

Denny Walsh, a Sacramento Bee reporter, stated in an article on May 2, 2009 that the evidence presented in Judge Fogels court is far more extensive than what was presented in the Kentucky trial court. The case will certainly go to the Ninth Circuit and maybe even to the U.S. Supreme Court. He opined that more years will pass before California resumes executions.

After the Department of Corrections and Rehabilitation developed the new protocol for executions they were sued in Marin Superior Court. Petitioners complained that the protocol needed to be adopted in accordance with the Administrative Procedures Act. The rule making process consists of proposing regulations, receiving comments, holding a hearing , responding to objections and ultimately putting the rules into the California Code of Regulations. The May 2, 2009 article reported that the protocol was posted by the CDCR and a hearing would be held on June 30, 2009. The subject of this litigation is Anthony Morales who is next scheduled to be executed. His crime was committed in 1981 at age eighteen and he is now forty nine years old.

ESCAPING THE INSANITY OF THE DEATH PENALTY

How can California escape the insanity of the death penalty? Abolition is the only answer. How do we get there from here? It would have to be by an initiative. An initiative is a device by which voters can make laws or amend the constitution. First you

draft what is proposed and then submit it to the Secretary of State. Then you get voters to sign a petition for the law to be proposed to the voters. You need five percent for statutes and eight percent for constitutional amendments of the number of voters who voted in the last gubernatorial election. After the required signatures are presented to the Secretary of State, the matter is voted on at the next general election. (Cf. Article II, Section 8, et. Seq., California Constitution). The California Constitution prohibits the legislature changing a law adopted by an initiative. Since our current death penalty law was adopted by initiative it can only be changed by one.

An initiative can be proposed to the voters by the legislature or by any citizen or organization that collects the required number of signatures. Paid signature gatherers are frequently used in California. A wealthy individual can use the process all by himself. This how "Marsys Law", Proposition 9 was adopted in the November 2008 election.

Thomas Elias is a newspaper columnist who writes about California government. He says there are certain requirements for an initiative to pass. It has to be positive. Voters do not like negativity. He also says that eighty five percent of the voters read only the description of the proposition on the ballot before they decide. The ballot description should say "This measure replaces the Death Penalty with a sentence of Confinement in Prison Unto Death. It uses one hundred and fifty million dollars of the money saved each year to assist victims of violent crime and to improve to the use of DNA to catch violent criminals."

The major provisions of the initiative would be that all death sentences would be converted to Confinement in Prison unto Death. This would apply to the people on death row, people who have pending cases in trial courts and to all the laws currently allowing the death penalty. The death penalty cases being appealed would have the sentences converted to Confinement in Prison unto death. The appeal would be transferred to the appropriate appellate court to be decided by a three judge panel. The issues relating to a death verdict would now be moot.

Confinement in Prison Unto Death is the same sentence as our current life without parole. We would simply call it by a

different name. It sounds more positive and sounds like a death sentence. There would still be the requirement of the concurrence of four justices of the Supreme court before a sentence could be commuted to life with the possibility of parole.

The federal courts would have to figure out what to do about the death penalty cases pending there. The prisoners would no longer be sentenced to death so death judgements would be moot. The remaining issues would be those relating to guilt.

The cost of the death penalty in California would overnight change from the two to three hundred million dollars we are spending each year to about twelve million dollars a year for confinement costs. The California Department of Corrections and Rehabilitation has many failures as an agency. It is very good, however, at keeping people safely locked up. Escapes are almost non existent except for an occasional walk away from a forestry camp where there are no fences.

HELPING VICTIMS OF VIOLENT CRIME

How would victims of violent crime be helped? One hundred million dollars each year would be allocated for grants to police departments and sheriffs to set up programs to assist victims in their communities. The programs would operate as part of the department but would use community volunteers. Grants would be awarded on the basis of matching contributions by the departments and the number of volunteers enlisted. All existing victim assistance programs would continue as they are. The Police Department of Austin, Texas has such a victim assistance program.

This program would considerably improve services to crime victims in California. It would be based in police and sheriff departments. They have the first contact with crime victims and probably the only contact when no arrests are made. Victims would receive direct services from members of their community. Much of the assistance now given to victims is compensation they apply for after services have been rendered by paid service providers. Services may be in the form of crime scene clean up, legal advice, transportation, child care and myriad other needs that crime victims have.

USING DNA TO DETER CRIME

California citizens made a major investment in the use of DNA evidence to fight crime by passing Proposition 69 in November 2004. It requires a vast expansion of the statewide DNA Database and Data Bank Program. From 2004 until January 1, 2009 it required the collection of DNA samples from persons arrested for homicide and sexual offenses. After January 1, 2009, any person arrested for a felony would have his DNA put into the Databank. The Department of Justice was lagging far behind when the CCFAJ reviewed the program in January 2007. The DOJ 's pay scale was too low to hire technicians and there was a vacancy of twenty technicians and six supervisors and the backlog of samples was piling up. The Department had received 895 thousand samples and had uploaded 737 thousand leaving a backlog of 158 thousand. The DOJ estimated that when samples were taken from every felony arrestee the backlog would jump from 160 thousand to 400 thousand a year. The CCFAJ made an urgent plea for more funding for the DNA Database Project.

The State of California was having fiscal difficulties before 2007. Since then the stock market was down nearly 45 percent from its October 2007 high. The State of California has been in a major financial crisis since. The State has probably been unable to respond in spite of the CCFAJ's urgent plea. If the death penalty were changed to Confinement in Prison unto Death it would free fifty million dollars each year that could make the DNA Database a far more effective crime fighting tool. The computer at the DOJ Lab goes to work when the staff leave searching for cold case hits in the database. It results in fifty hits a week and nine of them turn into arrests.

Los Angeles police recently arrested John Floyd Thomas. They suspect he was most prolific killer in the county. They believe he may have raped and strangled more than thirty women. He was arrested after a cold case DNA match. Similar arrests, though not of this magnitude, are reported weekly in California. This is the kind of crime fighting that is effective. Fifty million dollars a year could help enormously. We burn through this much money in a matter of months for death row housing and lawyers. The money is spent trying to kill aging convicts whose death verdicts are likely to be reversed or who may die naturally before their appeal is completed.

California priorities are misplaced. We should be spending money on methods that catch and deter criminals and prevent others from becoming victims. The certainty of being caught has to be a far more effective deterrent than the possibility of an unlikely death sentence.

BETTER ALTERNATIVES TO FIGHT CRIME

What would happen if California were to pass an initiative to change all death sentences to Confinement in Prison Unto Death and use one hundred million of the dollars saved each year for community based victim programs and fifty million for increasing the use of DNA to catch violent criminals? There would probably be a drop in homicides. Non death penalty states consistently have lower homicide rates.

California would probably try to focus more on preventing homicides. Most of them occur in families. More innovation and resources to prevent domestic violence would help. More creative ways to reduce gang violence would also help.

More resources put into the use of DNA would catch more violent criminals. The heightened use of DNA would probably also be a deterrent for some. The chances of being caught for some homicides would no doubt be more effective as a deterrent than the remote possibility of the death penalty.

Citizen involvement in the problem of violent crime would increase as a result of the grant money given to police and sheriff departments to set up programs to assist the victims of violent crime. The existence of the programs would rapidly spread throughout the State of California. Violent crime happens much more frequently in poor neighborhoods but the victim assistance programs would involve more influential citizens in the problem and they would become advocates for safer neighborhoods as well as helpers of victims.

If California were to give up the death penalty as an attempt to help victims of violent crime we may devote some study see if there are some structured programs that would help ease their suffering. We may also become more involved in a program like the one that operates in Texas prisons. If some members of a victim family want to speak to the inmate perpetrator specially

trained prison employees assist in the process. Counsellors spend some time with both the family member and the inmate and the program has developed structures and practices based on experience.

BENEFITS OF ABOLITION FOR CALIFORNIA

California, by giving up the death penalty, would be leaving the company of the worst human rights abusers of the world. China, Iran, Saudi Arabia and the United States perform eighty one percent of the executions in the world. We would be leaving the company of Texas, Georgia, Florida and Oklahoma where eighty percent of the executions in the United States happen. We would join the majority of the nations of the world (112) who have abolished the death penalty. In the past decade an average of three countries a year abolished the death penalty. Since 1990, over thirty countries worldwide have abolished it.

Forty five member nations of the Council of Europe, virtually the entire continent, have abolished the death penalty in law and in fact. California visitors to Austria hear the contempt for Governor Schwarzeneger from cab drivers and citizens on the street because of his support for the death penalty. Over eight hundred million people have declared life to be a human right. The leader of one of those nations with a violent history said he would never restore the death penalty.

“If the hypothesis that we suffer most from the evil existing within ourselves is true, then we can say that by making punishment harsher-and the death penalty is in fact not punishment, but rather vengeance on the part of the state-then, by increasing the severity of punishments, the state is not eliminating cruelty but merely reproducing it again and again. The state ought not to assume a right that can belong to the Almighty alone-taking life from a human being. As a result, I can firmly state that I am against the restoration of the death penalty.”

These words were uttered by Vladimir Putin, The President of Russia. (Cf. Death Penalty Beyond Abolition, Council of Europe Publishing)

One of the most beautiful prophecies of The Bible is Isaiah declaring that “they shall beat their swords into plow shares and their spears into pruning hooks.” He was talking about taking the resources and instruments that we use for violence and using them to make peace. This pamphlet has tried to suggest that real peace cannot come from violence. We can take the resources we put into the death penalty and turn them into help for crime victims and for utilizing the powerful tool we have in DNA forensics to deter and stop violent crime. This plea is being made to you, Taxpayers of California. We can never show that killing is wrong by more killing.

Let’s stop this madness.

APPENDIX A: THE CRIME VICTIM ASSISTANCE PROGRAM OF THE AUSTIN, TEXAS POLICE DEPARTMENT

A family wedding in Austin happily converged with the completion of this pamphlet. I decided to visit the Austin Crime Victim Assistance Program to flesh out my ideas to improve victim assistance in California. They take assistance to crime victims seriously in Austin. The program has a Four Million dollar annual budget, thirty two full time employees and eighty five volunteers. The program is operated by the police department and is now thirty years old.

The Crime Victim Assistance Program (hereafter, CVAP) is an integral part of the police departments operations. It consists of a unit of Crisis Counselors who respond to requests by the patrol officers when help is needed. This unit has ten counselors three of them are the leads. They are on the job twenty four seven. The Family Violence Unit has eight to ten counsellors with one lead counselor. They work in an office and follow up on referrals of the crisis counselors or contact victims if they had not previously been contacted by a crisis counselor. Six to Eight Counselors work in the Central Investigative Bureau. They contact all others who are not victims of family violence. The Director of the Program is William Perry, who has a Doctorate in Clinical Psychology.

The Crisis Counselors drive Ford Escapes. They are large vehicles with "Austin Police Department Crime Victim Assistance" painted on each side. They are equipped with a police radio and a computer with a large screen. They are able to communicate at any time with the Dispatcher and any police units that are working. The vehicles are also equipped with car seats for children, Teddy Bears and a supply of literature with information for crime victims. The Crisis Counselors have a Masters Degree or above in Psychology and experience in crisis counselling before being hired.

I spent a day with Crisis Counsellor, Marchelle Kappeler, who told me about some of her recent calls. Little Travis, two and a half years old, used a broom to unlock the door while his

family was sleeping and wandered about the neighborhood. A responding officer called Marchelle because she had a car seat and was able to drive him around the neighborhood to find his home. An elderly woman needed a ride and some comfort after she crashed her car. Sometimes families need to escape a violent environment and the Crisis Counselor has to locate an available shelter and drive the family to it. When the Austin shelters are full this can mean locating one out of town that has space. Domestic violence calls also mean advising the victims that there are options and that the police department is not interested in deporting victims. When homicides or suicides occur the crisis counselors are frequently called to speak to family members while the house is surrounded by yellow tape. The Crisis Counselor enters the home after the body is removed and assesses the situation. She then discusses clean up needs with the family and whether it is something they are able to do for themselves. She can provide a list of professionals who specialize in this work if that is desired. Sometimes a rape victim will need to be taken to the hospital that specializes in care for rape victims. The Crisis Counselor will be called for transportation and to accompany the victim during the procedure. The list of events to which the Crisis Counselor is called goes on. After every call, a report is entered into the police department computer to be accessed by investigating officers and the other Victim Assistance Counselors who will do the follow up. The Counselors are able to greatly speed the victim compensation process and advise the victims of counselors, funeral homes, and other professionals to assist them.

The Crime Victim Assistance Counselors who work in the office make sure that every single victim of violent crime is contacted. They assist in myriad ways. They speed the process of victim compensation. They refer to psychologists and other counselors who will work for the rate of crime victim compensation and wait for the payments. In the event of a homicide of a foreign national they assist by referring to funeral homes who specialize in transportation of bodies to other countries. They also help by dealing with consulates of other countries. They work closely with investigating detectives to keep victims informed as fully as possible without compromising the investigation. Their work may involve a few contacts or it may take years. If a case results in a prosecution, the victim assistance program in the District Attorneys Office will advise about what is happening in court.

Much of the Counseling work involves Domestic Violence. This is crime prevention in action. The majority of assaults and homicides occur at the hands of family members or people related in some other way. There is usually a pattern of escalating violence. Counseling victims can result in far more effective prevention than severe penalties after the crime.

The program of the Austin Police Department is a model for assistance to crime victims. In California crime victim assistance has taken three paths. We do offer compensation to crime victims. Every District Attorney's office has a victim assistance unit. We have passed laws to assure that victims are informed of court procedures and have the right to participate by being present and making victim impact statements. Victim rights groups have promoted harsher penalties for crime and other protections for crime victims. The immediate needs of people who suffer violent crime, however, are not being met. If no prosecution takes place there is a strong likelihood that no assistance will be offered. The Austin Police department Web site is: www.claustin.tx.us/police.

The Austin program would work for some cities in California but not for others. Flexibility is offered by making grant money available to California police and sheriff departments to design a program that works best for their individual locale. The grants would be intended to help with the start up costs and it is assumed that in time the ordinary budgets to the department would support the programs. The Initiative that makes the grants available could have a "sunset clause" that would end the grants after ten years. We could also get serious about helping crime victims in California.

APPENDIX B: FINDING THE LAW

Every county has a public law library located in the County Seat. They were mandated by the legislature in the days when lawyers needed law libraries and there were many lawyers in the legislature. They are funded by money collected in traffic fines. Lawyers don't go to the library anymore so the libraries have morphed themselves into institutions to help non lawyers. They tend to be located out of the courthouses and have user friendly hours. I have never gone to one that didn't have more staff members than patrons so there is lots of eager help available.

You will find all the law cited in this pamphlet both in print and on Lexis and Westlaw that these law libraries subscribe to.

Jake Widman wrote an article in the January 2009 edition of California Lawyer telling about free online sources for legal research. Public.Resource.Org includes court of appeals decisions dating back to 1950 and all the U.S. Supreme Court decisions. There is no search function so you need to know the case name and citation. Precydent.com has all the documents contained in Public.Resource.Org and other sources as well. A law professor tested its search functions and found that they compare favorably with the commercial services. He also mentioned AltLaw.org, HyperLaw.com, Public Library of Law (PloL.org) and the Legal Information Institute There is also FindLaw which most users probably know about. This is certainly not an exhaustive list of free legal information online but these web sites will get the reader to any law cited in this pamphlet.

APPENDIX C: SOME RECOMMENDED READING

Become acquainted with Amazon.com. if you want to study the death penalty. You can find all the books I am recommending there. Some will be used and will sell for as little as one dollar. Save your coins in a big jar and occasionally take them to the CoinStar Machine in the Grocery store. Get an Amazon.com gift card for your coins. There is no charge for redeeming your coins for the gift card. Amazon.com has about sixty thousand entries on the death penalty and they add them faster than you can read.

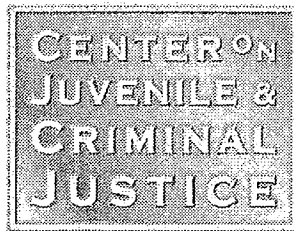
1. California Commission on the Fair Administration of Justice: Final Report. Available on line at www.ccfaj.org. You may be able to get a copy from your legislator or the ACLU of Northern California. The Web Site also contains many documents submitted by witnesses at the various hearings. Michael Radelet, a noted sociologist, for example, testified about a study he did regarding racial discrimination and the California Death Penalty.
2. The penal laws and practices of a society reflect its religious values. It is important to understand this interplay to understand the death penalty in modern American society. The Death Penalty: An Historical and Theological Survey, by James J. Megivern is the best book to give you these insights.

3. The Death Penalty: An American History, by Stuart Banner, traces the death penalty from the beginning of our country to its present day. It helps you understand why the death penalty is largely abandoned in the eastern states and practiced in the South where it had been used to suppress slaves.
4. Three books are recommended to help understand what homicide does to victim survivors. Wounds That Do Not Bind: Victim-Based Perspectives On The Death Penalty, James R. Acker and David R. Karp, has the stories of many victims and shows there is not an uniform response to the death of a loved one. Don't Kill In Our Names: Families of Murder Victims Speak Out Against the Death Penalty, Rachael King. After Homicide: Practical and Political Responses to Bereavement, by Paul Rock is a study of the desperate search that homicide victims pursue to find others who understand their experience and how this translates into political action.
5. Capital Consequences: Families of the Condemned Tell Their Stories, Rachel King helps the reader understand how the Death Penalty creates two sets of victim families.
6. The Death Penalty on Trial: Crisis in American Justice, by Bill Kurtis and The innocent Man: Murder and Injustice In A small Town by John Grisham will help the reader understand the dynamics of cases that convict the innocent and how difficult it is to create procedures that will prevent convicting the innocent.
7. Among The Lowest Of The Dead: The Culture of Death Row by David Von Drehle tells about the beginning years of the death penalty's implementation after 1977 in Florida. It is a good book to understand the living hell we create by creating death rows.
8. Public Justice, Private Mercy: A governor's Education on Death Row, Edmund (Pat) Brown, is Pat Brown's reflections on the Death Penalty in California and his role in it. This book has contemporary significance since his son, Jerry Brown, is now Attorney General and has a good chance to be governor again.

9. Dead Man Walking, Sister Helen Prejean, is probably the best known book on the death penalty. It covers all aspects of the process and is easy reading.
10. Death Work: A Study of the Modern Execution Process, Robert Johnson. This book shows that the modern execution process is unmitigated torture inflicted over years. It has very timely significance because California is now in the process of adopting procedures for executions in accordance with the Administrative Procedures Act.

BIOGRAPHY

Paul W. Comiskey has been a lawyer since 1975. He founded the Prison Law office outside the gate of San Quentin in 1976 and has gained broad experience in the California Criminal Justice System during his career. Paul has represented thousands of clients in criminal cases and more than two hundred jury trials. He was a member of a team of lawyers that sued twenty two counties over conditions in their jails and has gained rights for California prisoners in decisions of the California Courts of Appeal and the California Supreme Court. He has taught courses on the law of Corrections at the University of San Francisco and U.C. Davis Law Schools. He has served his church (Roman Catholic) as a member of the Jesuit Order and Priest from 1962 to 1992. He has a Bachelors Degree in Philosophy and a Masters Degree in Political Science from St. Louis University. (1966-1967). He received his Masters Degree in Theology from the Jesuit School of Theology in Berkeley in 1974 and a Juris Doctor Degree in Law from the University of California at Davis in 1975. Paul was chosen Outstanding Alumnus by his law school class in 2000.



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