University of California, Los Angeles

From the SelectedWorks of Robert M. Sanger

Fall August 26, 2016

Fourteen Years Later: The Capital Punishment System in California

Robert M. Sanger

This work is licensed under a Creative Commons CC_BY-SA International License.

Available at: https://works.bepress.com/robert_sanger/35/
SPECIAL LAW REPORT, SANTA BARBARA AND VENTURA COLLEGES OF LAW, September, 2016

FOURTEEN YEARS LATER: THE CAPITAL PUNISHMENT SYSTEM IN CALIFORNIA

Robert M. Sanger*

ABSTRACT

Fourteen years ago, the Illinois Commission on Capital Punishment issued a Report recommending 85 reforms in the criminal justice system in that state to help minimize the possibility that an innocent person would be executed. The following year, this author conducted an empirical study, later published in the Santa Clara Law Review, to determine if California’s system was in need of the same reforms. The study concluded that over ninety-two percent of the same reforms were needed in California. In addition, the study showed that the California system had additional weaknesses beyond those of Illinois that also could lead to the execution of the innocent.

This article is an effort, fourteen years later, to determine what has transpired in California during the last fourteen years. It will survey of the major scholarly and judicial work that has been published in the last fourteen years on the death penalty nationally and specifically with regard to California as well as on the progress, if any, to meet the unmet recommendations of the Illinois Commission.

This article concludes that there has been much additional criticism of the failures of the criminal justice and death penalty systems in the country and specifically in California. Nevertheless, the empirical study demonstrates that no additional Recommendations of the Illinois Commission have been met in California in the last fourteen years. Illinois, itself, enacted significant reforms to meet at least some of the Illinois recommendations. Nevertheless, Illinois repealed its death penalty. California, despite no reforms, has not, as yet. The voters will have that option on

*Member of the California State Bar. Partner, Sanger Swysen & Dunkle, Santa Barbara, California and Adjunct Professor of Law, Santa Barbara College of Law. B.A., University of California Santa Barbara, J.D. University of California Los Angeles. Certified Criminal Law Specialist, The State Bar of California Board of Legal Specialization. The author has also been a member of the Board of Directors of Death Penalty Focus (DPF) for over 20 years, and is a Past President of California Attorneys for Criminal Justice (CACJ). In addition, the author has been personally involved in some of the events and publications described herein as disclosed in the footnotes. The author is grateful to Mary Kate DeLucco and attorney Mary Broderick of DPF and attorney Nancy Haydt of CACJ for their kind editorial assistance and to Dean Jackie Gardina of the Santa Barbara & Ventura Colleges of Law, and the Officers and Boards of DPF and CACJ for their encouragement in pursuing these studies over the years. All errors are the author’s and opinions are those of the author and not the law school or any organization.

© Robert M. Sanger.

The Special Law Report is an academic publication of the SANTA BARBARA & VENTURA COLLEGES OF LAW, 20 E. Victoria Street, Santa Barbara, CA 93101 and 4475 Market Street, Ventura, CA 93003. The opinions contained in the article are those of the author and do not necessarily reflect the opinions of the Colleges of Law or the Special Law Report editors. Manuscripts submitted for consideration in future issues of the Special Law Report or other publications of the Colleges of Law should be sent to the Colleges of Law at either address above.
November 8, 2016. By voting “Yes” on Proposition 62, the California death penalty would be repealed.

CONTENTS

I. INTRODUCTION ................................................................. 3
II. THE 2002 ILLINOIS COMMISSION REPORT AND THE 2003 SANTA CLARA LAW REVIEW COMPARISON TO CALIFORNIA ........ 10
   A. The Circumstances Leading to the 2003 Santa Clara Law Review Article ......................................................................................................................... 10
   A. The California Commission on the Fair Administration of Justice ........ 18
   C. The Alarcon/Mitchell and Other Scholarship ................................................................. 20
   D. Advances in Forensic Science ...................................................................................... 23
   E. Justice John Paul Stevens Opinions, Book and Interview ........................................... 25
   F. Senate Bill 290 and Proposition 34 to Repeal the Death Penalty ................................ 28
   G. Judge Cormac Carney and the Jones Opinion ............................................................. 30
   H. Justice Breyer’s Opinion in Glossip v. Gross .................................................................. 31
   I. Judge Alex Kozinski’s Article, Criminal Law 2.0 .......................................................... 32
   J. Proposition 62 to Repeal the Death Penalty ................................................................... 34
IV. THE NEW COMPARISON OF THE 85 RECOMMENDATIONS TO CALIFORNIA TODAY ....................................................................................................................... 37
   A. A Summary of the Illinois Commission Recommendations and Whether they are now Met or Still are Not Met ........................................................................... 38
      1) Police and Pretrial Investigations -- Recommendations 1 Through 19 ................................................................................................................................. 38
      2) DNA and Forensic Testing: Recommendations 20 Through 26 ................. 38
      3) Eligibility For Capital Punishment: Recommendations 27 and 28 ................................................................................................................................. 38
      4) Prosecutors’ Selection of Cases for Capital Punishment: Recommendations 29 Through 31 .......................................................................................... 39
      5) Trial Judges: Recommendations 32 Through 39 .............................................. 39
      6) Trial Lawyers: Recommendations 40 Through 45 ........................................... 39
      7) Pretrial Proceedings: Recommendations 46 Through 54 ......................... 39
      8) The Guilt-Innocence Phase: Recommendations 55 Through 59 ................. 39
      9) The Sentencing Phase: Recommendations 60 Through 64 .......................... 40
     10) Imposition of Sentence: Recommendations 65 Through 69 ...................... 40
     11) Proceedings Following Conviction and Sentence:
I. INTRODUCTION

For the last 30 years, the death penalty has undergone significant scrutiny in this country due to the embarrassing and tragic fact that more and more people on death row were found to have not actually committed the crimes for which they were convicted.\(^1\) Although it has been forcefully brought home that the system is outrageously expensive and that it takes a long time,\(^2\) the fact is that all the money and time spent on cases still results in people losing decades of their lives behind bars facing execution, and some actually being executed, who were not guilty.\(^3\)

Fourteen years ago, the specific flaws that led to wrongful convictions and sentences of death in Illinois were comprehensively chronicled in the Report of the

---


\(^3\) Samuel R. Gross, Barbara O’Brien, Chen Hu, and Edward H. Kennedy, Rate of False Conviction of Criminal Defendants Who are Sentenced to Death, 111 Proceedings of the National Academy of Sciences of the United States of America, no. 20, pp. 7230-35 (2014); see summary in Dina Fine Maron, Many Prisoners on Death Row are Wrongfully Convicted, Scientific American, April 28, 2014.
Illinois Commission filed January 2002.4 The fact that the California capital punishment system had the same flaws as the Illinois system was detailed explicitly in an article published in the Santa Clara Law Review in 2003, 13 years ago.5

So, 13 or 14 years ago, it was public knowledge that something was wrong with the California death penalty system.6 Police arrested innocent people, prosecutors indicted or otherwise charged them, and defense lawyers were not able to halt the process. Judges presided over trials, prosecutors argued to juries that these innocent people were guilty beyond a reasonable doubt, and jurors unanimously returned guilty verdicts. Then, without even lingering doubt,7 jurors voted for death and judges pronounced death sentences in 156 known cases in the death states.8 The National Registry of Exonerations catalogues 1,866 innocent defendants exonerated in all cases across the United States.9

---


6 Of course, the California Supreme Court, almost 45 years ago, found that the death penalty was unconstitutional as then practiced, People v. Anderson, 6 Cal. 3d 628 (1972). The Court held, in an opinion that bears re-reading today, that capital punishment degrades and dehumanizes everyone involved and that the death penalty is “unnecessary to any legitimate goal of the state and incompatible with the dignity of man and the judicial process.” Following this decision, the United States Supreme Court the same year in Furman v. Georgia, 408 U.S. 238 (1972), found the death penalty unconstitutional under the federal constitution. However, after the United States Supreme Court approved capital punishment schemes four years later in GREGG v. GEORGIA, 428 U.S. 153 (1976), the California Legislature enacted a new death penalty scheme in 1977 followed by a more expansive initiative, Proposition 7, the Briggs Initiative, in 1978.

7 See, e.g., People v. Streeter, 54 Cal.4th 205, 265 (2012) stating that the “circumstances of the crime” provisions of “factor (a)” of Penal Code § 190.3, allow the defense to argue and the jury to consider “lingering doubt” in the penalty phase of a capital case.

8 See, Death Penalty Information Center, Innocence List, with 156 exonerations of people sentenced to death row from 1973 to the last exoneration recorded October 12, 2015, at: http://www.deathpenaltyinfo.org/innocence-list-those-freed-death-row. This does not take into account people who may have been factually guilty of the crimes but, under a fair administration of the rules, should not have received the death penalty. See Craig Haney, Exoneration and Wrongful Condemnations: Expanding the Zone of Perceived Injustice in Death Penalty Cases, 37 Golden Gate U. L. Rev. (2006).

9 The National Registry of Exonerations maintained by the University of Michigan Law School, currently lists 1,866 innocent criminal defendants of capital and non-capital offenses in the United States convicted from 1956 to the present, at: http://www.law.umich.edu/special/exoneration/Pages/about.aspx.
When so many of these people, thus convicted, were found, in fact, to be innocent, it dawned on many that there must be serious flaws in the criminal justice system. These flaws were perhaps exacerbated by the drama and politics surrounding death cases but they were flaws in the system nonetheless. The flaws were systemic and were found in all stages of the criminal process, from police investigations, false confessions, mistaken eyewitness identifications, failure to preserve exculpatory evidence, unreliable jail-house informants, prosecutorial misconduct, ineffective assistance of defense counsel, perjured testimony, forensic error, tunnel vision, under-trained judges and inadequately informed jurors. This was shocking to people who trusted the protections of the criminal justice system. However, empirically it was incontrovertible that innocent people had been convicted despite all the purported protections.

Famously, Governor George Ryan imposed a moratorium on executions in Illinois in 2000 and empaneled a Blue Ribbon Commission to study how innocent people could have been incarcerated. This was followed by studies in other states. While these states continued their investigations into the problems causing wrongful convictions, California and other states continued to execute people despite these documented systemic failures.

---

10 The explanation as to why wrongful convictions are discovered in death penalty cases in disproportionate numbers to other cases is somewhat complex. Certainly, the serious consequences of a death sentence create an impetus to review cases more carefully. In most states, the statutory schemes provide more time and attention to post-conviction review. But, interestingly, it is also the fact that the kinds of cases in which the death penalty is sought are often high publicity cases, ones that evoke public outcry or are seen as career builders for the police and prosecutors who obtain convictions. Whatever the explanation, it is safe to assume that there are many cases of actual innocence in which a person has been, or still is, wrongfully incarcerated. See, e.g., Brandon Garrett, Judging Innocence, 108 Columbia L. Rev. 55 (2008).


13 There have been 1,437 executions in the United States since 1976. See Death Penalty Information Center (DPIC) execution database at http://www.deathpenaltyinfo.org/number-executions-state-and-region-1976. California executed six of the 13 people executed since 1976 during or after 2000, the latest, Stanley “Tookie” Williams, being executed in 2006. See, DPIC; at http://www.deathpenaltyinfo.org/node/5741#CA. According to the California Department
After two years of work, the Illinois Commission issued its report documenting numerous flaws in the Illinois system. The report made 85 specific recommendations aimed at reducing the frequency of innocent people being convicted and sentenced to death. The California Governor and prosecutors continued to ignore these problems on the grounds that California was not Illinois. In the absence of executive action, the California State Senate began to investigate why California thought that it was immune from the same problems, especially when it had a death row with a population, at the time, of over 600 people.

The author of this article undertook a study in 2002 to determine how many of the 85 recommendations of the Illinois Commission were met in California. The resulting, initially unpublished, paper found generally that the recommendations were not met in California and, furthermore, that there were problems with California’s system that went beyond those addressed by the Illinois Report. That paper came to the attention of state Senator Gloria Romero who commenced hearings on the subject along with Senate President Pro Tem John Burton. The senate invited testimony from Governor Ryan of Illinois, along with experts on the death penalty from all sides, including the head of the capital case section of the

---

14 Illinois Commission Report, supra, n.4


16 California State Senate Select Committee on the California Correctional System, convened, April 2003.
Attorney General’s Office, the Deputy Director of Corrections, the Director of the Habeas Corpus Resource Center and the author of this article.

As a result of the hearings, a Moratorium bill was introduced by the State Senate but it was defeated in the House. The author’s initially unpublished paper was revised and eventually published at the end of 2003 in the Santa Clara Law Review.\textsuperscript{17} The final article compared each of the 85 recommendations of the Illinois Commission with the California system and concluded that the system was “broken.”\textsuperscript{18} The California State Senate created California Commission on the Fair Administration of Justice (hereinafter, “California Commission”),\textsuperscript{19} which was to study the criminal justice system in California and write a report. A proposal for a moratorium on executions was reintroduced for the period of time that the commission would undertake its studies but that was defeated.\textsuperscript{20} When the California Commission issued its report, it found that the California system of criminal justice and the California death penalty system were severely flawed.\textsuperscript{21}

Once again, the conclusions of the California Commission on the Fair Administration of Justice were based on the failure of the system to deliver reliable results. It concluded that California was prone to error in almost all of the same ways that Illinois and the other state commissions studying the problem of wrongful convictions had concluded. The cost of the system and the length of time dedicated to trying to avoid wrongful convictions, while a significant an issue today, was not the focus of the concerns. In fact, the California Commission recommended, as did Illinois, that to avoid the tragic failures, even more money would have to be spent to try to fix the problems.

Since the time of the 2003 Santa Clara Law Review article and the subsequent work of the Commission on the Fair Administration of Justice, flaws in the system have been acknowledged by both the Chief Justice of California sitting at the time of the commission hearings,\textsuperscript{22} and the current Chief Justice.\textsuperscript{23} Subsequent

\textsuperscript{17} Santa Clara article, supra, n. 5.
\textsuperscript{18} Id. at 200.
\textsuperscript{19} Senate Resolution (SR) 44 of the 2003-04 Legislation Session, introduced by Senator Burton.
\textsuperscript{20} 2006 Assembly Bill 2266, introduced by Assemblyperson Lieber, February 22, 2006. This proposed legislation cited the 2003 Santa Clara article.
\texttt{http://digitalcommons.law.scu.edu/ncippubs/1} (hereinafter “California Commission Report”)
\textsuperscript{23} Justice Tani Cantil-Sakayue quoted in Maura Dolan, \textit{California Chief Justice Urges Reevaluating Death Penalty}, Los Angeles Times (December 24, 2011), at:
scholarship\textsuperscript{24} and court decisions\textsuperscript{25} have also assessed the system’s failures. This article will take the publication of the 2002 Illinois Commission Report as the starting point and seek to determine what has been done in the intervening 14 years to remedy the problems that led to the assessment that the system needed significant repair. Since the 2003 Santa Clara article documented that the flaws recognized in the specific 85 recommendations from the Illinois Commission were generally present in California, and since the weight of subsequent authority, including the Commission on the Fair Administration of Justice Report, corroborated the same flaws, it is arguable that the continued use of the death penalty during the last 14 years should have been contingent, minimally, on the implementation of these 85 recommendations.

This article, therefore, will undertake an empirical study of the state of the death penalty system in California now, 14 years after the flaws were exposed. The article will take now, as the Santa Clara article did 14 years ago, the 85 recommendations of the Illinois Commission made in 2002 as the benchmark. The progress, or lack thereof, made in meeting those recommendations in the last 14 years will serve as a gauge as to the progress, or lack thereof, that has been made in trying to avoid wrongful convictions over the last 14 years.\textsuperscript{26} It will be acknowledged that scholarship\textsuperscript{27} and court opinions\textsuperscript{28} have also addressed the cost

\begin{itemize}
\item A note on methodology: This article could go back 30 years, 16, 14, 13, or eight, based on general concerns about wrongful convictions following DNA exonerations (30), Governor Ryan’s 2000 moratorium (16), the 2002 Illinois Commission Report (14), the 2003 Santa Clara article (13), or the 2008 California Commission Report (eight). In order to use the Illinois Report recommendations as a benchmark, the year 2002, 14 years ago, seems a fair starting date. That is the date that the Illinois Commission made its specific recommendations public, followed one year later by a specific correlation of those recommendations to California both through senate hearings and the publication of the 2003 Santa Clara article.
\item Alarcon and Mitchell, \textit{Executing the Will of the Voters?: A Roadmap to Mend or End the California Legislature’s Multi-Billion Dollar Death Penalty Debacle}, 44 Loyola of Los Angeles Law Review S41, Special Issue (2011).
and length of time involved in the capital punishment system. It will also be acknowledged that there is further public recognition that the death penalty is anachronistic and wrong, especially as applied to a growing number of people who are considered too young or too intellectually disabled to execute. And arguments are still made to the United States Supreme Court that the evolving standards of decency require that the death penalty be found violative of the Eighth Amendment to the Constitution. Nevertheless, the focus here will be on whether the underlying flaws – which were identified by the Illinois Commission and the Santa Clara article, and which lead to actual wrongful convictions and to executions – have been remedied.

The second part of this article will review the circumstances leading to the publication of the 2002 Illinois Commission Report. The findings of that report, including its 85 Recommendations, will be summarized. This article will then examine the results of the comparison, fourteen years ago, as published in the 2003 Santa Clara Law Review article, of the California system of capital punishment to those 85 recommendations. This will establish the benchmark for the state of the capital punishment system as it was, and as it needed to be fixed, 14 years ago.

The third part of this article will examine some of the studies and opinions that have been published subsequent to the 2002 Illinois Commission Report and the 2003 Santa Clara article. As indicated, there have been several subsequent assessments that continue to remind legislators, judges and scholars that the conclusions of the 2002 Illinois Commission Report and the 2003 Santa Clara article remain valid. In the opinions offered in these subsequent assessments, the capital punishment system in California remains broken.

The fourth part of this article will take the 85 Recommendations of the Illinois Commission Report and compare them to the death penalty system in California as it is today, 14 years after the Report and 13 years after the 2003 Santa Clara article which made the same comparison at that time. From this new comparison, this article will demonstrate what progress, or lack of progress, has been made to address those concerns. Such an empirical study, using the Illinois Commission Report to establish a benchmark, should be of use in the assessment of the condition of the death penalty in California in 2016. The conclusion is that, in the 14 years between the benchmark 85 Recommendations of the Illinois Commission -despite an intervening California Commission Report, scholarship and continued criticism--the California capital punishment system has remained largely

---


31 Santa Clara article, *supra*, n. 5.
unchanged and no more of those 85 Recommendations have been met than were at the time they were made.

II. THE 2002 ILLINOIS COMMISSION REPORT AND THE 2003 SANTA CLARA LAW REVIEW COMPARISON TO CALIFORNIA

The second part of this article will review the circumstances leading to the publication of the 2003 Santa Clara article which established the applicability of the criticisms contained in the Illinois Commission to California. This will include a brief recounting of the Illinois Commission Report and a summary of the findings of that report, including its 85 Recommendations. The results of the comparison of the California system of capital punishment to those 85 Recommendations, which were published in the 2003 Santa Clara article, will also be summarized. In other words, this part will review the assessment of the state of the failures in the death penalty system in California as it was 14 years ago and establish the 85 Recommendations as a benchmark.

A. The Circumstances Leading to the 2003 Santa Clara Law Review Article

Seventeen years ago, Illinois’ death row was populated by a large number of innocent people. This disturbing fact was unearthed by journalism students at Northwestern University under the supervision of Professor David Protess and Law Professor Larry Marshall. By the time the dust settled, 167 inmates had their sentences commuted to life without the possibility of parole or, in three cases, life, while 17 people were exonerated. While there has been some controversy about one of the 17 exoneration cases, it is believed that more people on death...
row were (and are) innocent, but did not have cases involving DNA or other means of proving their innocence. In addition, the investigations leading to the 17 exonerations were only conducted in cases where the individual had been convicted and sentenced to death. Therefore, it is unknown how many more innocent people are serving time in Illinois who either did not have the DNA or other proof of innocence, or whose cases were not reviewed because the sentence was not death.

It turns out that the disturbing statistics relating to Illinois’ death row were the tip of the iceberg. The “problem” of innocence extends to people on death rows and imprisoned on non-capital convictions throughout the nation. According to the National Registry of Exonerations maintained by the University of Michigan, nationwide there have been 1866 documented exonerations of people convicted from 1956 to present, most occurring after 1980 and, according to the Death Penalty Information Center, 156 of the innocent were sentenced to death. But back in January of 2000, when Illinois exonerations were coming to light, Governor George Ryan realized that there was a serious problem with the death penalty system in that state. He could not justify executing another person, at least until the problems were studied. He established a Blue Ribbon Commission and ordered it to investigate the capital punishment system in Illinois.

On April 15, 2002, after two years of study, the Illinois Governor's Commission issued its report. The report made 85 specific recommendations for corrections to the Illinois death penalty system. The recommendations were backed by 207 pages of analysis with additional materials appended. Although discussion of the abolition of the death penalty was not within the mandate of the commission, after reporting on the various reform recommendations, the commissioners stated:

---


39 http://www.law.umich.edu/special/exoneration/Pages/ExonerationConvictionYearCrimeType.aspx


42 The Blue Ribbon Commission was comprised of senior law enforcement officials and others who supported the death penalty, at least before the study was completed.


44 Id.

45 Id.
“The Commission was unanimous in the belief that no system, given human nature and frailties, could ever be devised or constructed that would work perfectly and guarantee absolutely that no innocent person is ever again sentenced to death.”

The findings were remarkable. At the time the report was released, it seemed that the 85 Recommendations should resonate with all jurisdictions that had a death penalty. While some people in California read them as common sense objections to the way the death penalty was practiced, others simply asserted that California was not Illinois. That challenge led to the research project that finally resulted in the 2003 Santa Clara article.

Meanwhile, around the same time, other states with the death penalty also commissioned investigations and reports about their systems. This period of activity led some states to impose a moratorium or to abolish the death penalty entirely. In the years since the 2000 Illinois moratorium and the 2002 Illinois Commission Report, New Jersey statutorily abolished the death penalty in 2007, New Mexico in 2009, Illinois, itself, in 2011, Connecticut in 2012, Maryland in 2013 and Nebraska in 2015. New York’s courts found the death penalty unconstitutional in 2007 and the legislature has failed to re-enact a remedial statute. Most recently, in August 2016, the Delaware Supreme Court found that the death penalty violated the constitution and, as a result, unless and until there is legislative action, there is no death penalty in that state either.

---

47 Other states, prompted in part by Governor Ryan’s initial moratorium, have undertaken studies of their death penalty systems. None, so far, has produced reports as comprehensive as that of the Illinois Commission. The State of Connecticut issued its report of its Commission on the Death Penalty on January 8, 2003. The commission was unfunded and was limited to 14 questions posed by the legislature. Nevertheless, the Connecticut Commission came to the same conclusions as did the Illinois Commission on several issues. Study Pursuant to Public Act No. 01-151 of the Imposition of the Death Penalty in Connecticut (January 8, 2003). Nevada issued a compilation of recommendations to the legislature prepared by outside agencies also concurring in many of the recommendations of the Illinois Commission Report. Work Session Document, Legislative Commission’s Subcommittee to Study the Death Penalty and Related DNA Testing (Assembly Concurrent Resolution No. 3 [File No. 7, Statutes of Nevada 2001 Special Session], June 14, 2002). Arizona created a Capital Case Commission, which issued a report critical of the death penalty process in that state. Their report was released February, 2003 also raising similar issues. Arizona’s Death Penalty Process Flawed, East Valley Tribune, February 18, 2003.
During this period, California had the largest death row in the country with, at the time, over 600 people condemned to death. However, the California governor declined to commission a study or impose a moratorium. As a result, the State Senate undertook hearings under the leadership of Senators Romero and President Pro Tem John Burton. The hearings involved testimony from Governor Ryan as well as a number of other people representing various points of view and expertise on capital punishment, including the author. An early version of the 2003 Santa Clara article was submitted and published as a part of the proceedings of the hearings.

The senate then created the Commission on the Fair Administration of Justice to study the flaws in the criminal justice system in general as well as the death penalty system in particular. The enabling legislation provided that the study would not be funded by state money and it was finally passed. Although the commission was created, the subsequent request for a moratorium pending the results of the study again failed. Nevertheless, the California Commission became operational and undertook its responsibilities in 2004. The commission was chaired by the former Attorney General of California John Van de Kamp.


The 85 recommendations contained in the original Illinois Commission Report covered the entire criminal justice process as it applied to capital cases, from the police procedures, through prosecutorial discretion, judicial oversight, the defense function, and to sentencing regularity. The proposed 85 Recommendations included proposed legislation as well as protocols for prosecution, defense, and the


52 Senate Resolution (SR) 44 of the 2003-04 Legislation Session, introduced by Senator Burton.

53 2006 Assembly Bill 2266, introduced by Assemblyperson Lieber, February 22, 2006. This proposed legislation cited the 2003 Santa Clara article.

54 California Commission Report, supra, n.21, at 24, 34.
judiciary. In essence, they addressed all the issues found seriously lacking in the Illinois capital punishment system.

The 2003 Santa Clara article as finally published detailed the comparison of the Illinois system of capital punishment with the California system.\textsuperscript{55} The conclusion was that California only complied with less than ten percent of the Illinois Commission recommendations.\textsuperscript{56} Furthermore, some aspects of the California system were significantly worse than Illinois'.\textsuperscript{57} Before looking at the 85 Recommendations, the 2003 Santa Clara article addressed some “Known Deficiencies in California’s Capital System.” These included deficiencies uncovered in the Columbia University study by Professor Liebman that identified California as the largest death row in the United States in which substantial time was taken to appoint counsel and to have cases heard, only to have the State Supreme Court uphold most of the convictions. This led to a much higher reversal rate in federal court while maintaining an overall rate of reversal between state and federal courts combined that was in line with other death states.\textsuperscript{58}

The 2003 Santa Clara article also covered the fact that, despite more money and time being spent on cases in California, cases that were ultimately reversed were reversed for many of the same reasons as states that spent less money. Incompetence of counsel, prosecutorial misconduct, and judicial errors led to reversal just as they did in the Southern states which spent less time and money. In addition, California had more special circumstances than many states, did not have much of a statutory “narrowing” approach to mitigation, and lacked safeguards like written findings by the penalty phase jury, unanimous verdicts on aggravation, proof beyond a reasonable doubt (or, for the most part, any standard of proof) for aggravating circumstance, proportionality review, a procedure to avoid racial disparities, or a meaningful process to review innocence claims.\textsuperscript{59} In many of these regards, Illinois did not have recommendations since the state did not have these problems.

With these additional problems in mind, the 85 Recommendations of the 2002 Illinois Commission Report will help to establish the benchmark to which this article will compare today's California capital punishment system. The 85

\textsuperscript{55} Santa Clara article, \textit{supra}, n. 5, see Appendix for a summary at 201-234.

\textsuperscript{56} Santa Clara article, \textit{supra}, n. 5, at 120. Note that the article concluded that compliance was 6.17% and making a correction it should have been 7.40%. See discussion below at n. 60.

\textsuperscript{57} Santa Clara article, \textit{supra}, n. 5. California had and still has far more special circumstances than Illinois had, meaning that the death penalty was not narrowed statutorily to the “worst of the worst.”

\textsuperscript{58} Liebman et al., \textit{A Broken System, Part II: Why There Is So Much Error in Capital Cases, and What Can Be Done About It}, The Justice Project, Appendix. A (2002); Santa Clara article, \textit{supra}, n. 5, at 107.

\textsuperscript{59} Santa Clara article, \textit{supra}, n. 5 at 106-119.
Recommendations made by the Illinois Commission were organized into twelve sections:

- Police and Pre-trial Investigations – 1 through 19;
- DNA and Forensic Testing – 20 through 26;
- Eligibility For Capital Punishment – 27 and 28;
- Prosecutors’ Selection of Cases For Capital Punishment – 29 through 31;
- Trial Judges – 32 through 39;
- Trial Lawyers – 40 through 45;
- Pretrial Proceedings – 46 through 54;
- The Guilt-Innocence Phase – 55 through 59;
- The Sentencing Phase – 60 through 64;
- Imposition of Sentence – 65 through 69;
- Proceedings Following Conviction and Sentence – 70 through 75;
- Funding – 76 through 82; and
- Miscellaneous – 83 through 85.

The 2003 Santa Clara article compared each one of these recommendations in the text to the California system of capital punishment and summarized them in an appendix. The conclusion was that, in addition to the other problems California’s system had, there was a lack of compliance with the specific recommendations. In hindsight, as noted above, there was one error in the original Santa Clara article and compliance with one more Recommendation that will be acknowledged here. To quote the “Overall Statistical Analysis,” at the time (noting the current correction):

“The recommendations were determined to be "Met" by current California law, "Met with Qualifications," "Not Met," "Constitutionally Required" or,
in one case, "Not Applicable." California does not meet ("Not Met") seventy-six (corrected: seventy five\textsuperscript{61}) of the Recommendations. It meets ("Met") three, with two other recommendations which are "Met with Qualifications." Three recommendations are required by the United States Constitution, as construed by the Supreme Court, meaning that all states are required to be in compliance. There is one recommendation that is arguably peculiar to Illinois and, for the sake of argument, we will not compare it to California for this analysis.\textsuperscript{62}

This meant that there were 81 recommendations that could be met by California but that California did not meet 75 of these 81. This was a compliance rate of 7.40 percent. Furthermore, this gave California the “benefit of the doubt” as to three of the recommendations. Recommendation 77 recommends the reauthorization of the Capital Crimes Litigation Act.\textsuperscript{63} California does not have such an act and, therefore, by one reasonable interpretation, California does not comply. However, since this recommendation is, in another sense, peculiar to Illinois, it was deemed inapplicable for the purpose of the article. In addition, the two recommendations deemed “Met with Qualifications” were combined with the only three that were “Met” outright for compliance with five recommendations out of the 81.

Broken down into the categories of the Illinois Report, the Santa Clara article found that California’s deficiencies were as follows:

- Police and Pre-trial Investigations -- 1 – 19: 19 NOT MET / 0 MET
- DNA and Forensic Testing -- 20 - 26: 6 NOT MET / 1 MET\textsuperscript{64}
- Eligibility For Capital Punishment -- 27, 28: 2 NOT MET / 0 MET
- Pros. Sel. of Cases for Cap. Punishm’t -- 29 - 31: 3 NOT MET / 0 MET
- Trial Judges -- 32 - 39: 8 NOT MET / 0 MET
- Trial Lawyers – 40 - 45: 6 NOT MET / 0 MET
- Pretrial Proceedings -- 46 - 54: 9 NOT MET / 0 MET
- The Guilt-Innocence Phase -- 55 - 59: 4 NOT MET / 2 MET\textsuperscript{65}

\textsuperscript{61} See note 60 above.
\textsuperscript{62} Santa Clara article, supra, n. 5, 119-120.
\textsuperscript{63} Id. at 178-79
\textsuperscript{64} Recommendation 26, was met with qualifications.
\textsuperscript{65} One, Recommendation 55, determinations as to whether evidence of problems with eyewitness identifications may be admitted should be resolved by the trial judge on a case by case basis, was required by constitutional law in that the trial court would have discretion to allow it or not. See United States v. Rincon, 28 F.3d 921, 923 (9th Cir.1994); but, c.f., United States v. Hall, 165 F2d. 1095 (7th Cir. 1999). See note 48 above
The individual recommendations of the Illinois Commission could have been met in California by majority vote on a bill then signed into law by the Governor. The 1978 Briggs Initiative amended the Penal Code but not the state Constitution. See Ballot Initiative text at: http://repository.uchastings.edu/cgi/viewcontent.cgi?article=1843&context=ca_ballot_prop. As with Proposition 34 on the 2012 ballot or Proposition 62 on the 2016 ballot, changes to the death penalty system—in those instances repeal—were placed on the ballot by initiative petition supported by voter signatures. However, such measures also could have been placed on the ballot with a two thirds vote of both chambers.
The second part of this article will examine some of the studies and opinions that have been published between the 2002 Illinois Commission Report and the present in addition to the 2003 Santa Clara article. There have been several subsequent assessments that continue to remind legislators, judges and scholars that the conclusions reached in the 2003 Santa Clara article applying the Illinois Commission Report to California remain valid. In the opinions offered in these assessments, the capital punishment system in California remains broken.

A. The California Commission on the Fair Administration of Justice

During 2003, California was having its Senate hearings and debating what to do. Meanwhile, the State of Illinois had already enacted a package of reforms for their state. The package was first vetoed by Illinois’ ill-fated Governor Rod Blagojevich. The joint legislature then unanimously overrode his veto. The legislation, known as SB 472, made reforms in screening of jailhouse snitch testimony; provided access, pre-trial and post-conviction, to DNA databases; created an eyewitness pilot project using double blind and sequential procedures for photographic and live line-ups; required a statement of level of confidence as well as pre-line-up admonitions; required disclosure of jail-house snitch reliability information and any inducements for testifying; allowed appellate review on fundamental fairness of any particular death sentence; judicial notation of disagreement with juror’s views; corroboration of jailhouse snitch testimony and that of sole witnesses or a single accomplice; and a program for recording of interrogations.70

Finally, in 2004, the California State Senate established the Commission on the Fair Administration of Justice to evaluate the overall justice system in California. Its mandate was “. . . to study and review the administration of criminal justice in California to determine the extent to which that process has failed in the past, resulting in wrongful executions or the wrongful conviction of innocent persons; to examine ways of providing safeguards and making improvements in the way the criminal justice system functions; to make any recommendations and proposals designed to further ensure that the application and administration of criminal justice in California is just, fair, and accurate . . .”.71 However, the main aim of the commission was to study the effectiveness of the death penalty in order to avoid the possibility of wrongful executions.72

After the California Commission was formed in 2004, an Assembly bill was introduced to the California Legislature in the 2005-2006 session to impose a moratorium on executions in California while the commission did its work.73

71 Senate Resolution (SR) 44 of the 2003-04 Legislation Session.
72 Id.
73 2006 Assembly Bill 2266, introduced by Assemblyperson Lieber, February 22,
California State Assembly Member Sally Lieber’s note to the proposed legislation stated that,

"California's experience with the death penalty closely follows that of Illinois. In 2000, Illinois Governor George Ryan instituted a moratorium on executions in that state, after the 13th person walked off Illinois' death row. He instituted a blue-ribbon panel to examine the death penalty, identify its shortcomings and make recommendations for reforms. Legal experts note that many of the shortcomings identified by the commission in Illinois as contributing to the high rate of erroneous convictions in that state also exist in California."\(^{74}\)

The call for a moratorium on executions, even though it was not adopted, was nevertheless based on the fact that California was not that different from Illinois. The Illinois Commission Report documented many of the failures of the criminal justice system in general which also existed in California. These failures were causes of wrongful convictions and wrongful sentences to death row.

Once the California Commission did its work, the 2003 Santa Clara article was cited as a part of the data considered by the California Commission.\(^{75}\) The California Commission essentially examined the same broad issues that concerned the Illinois Commission, and many other commissions around the country. However, it did its own research, had its own hearings and came to its own conclusions.

The California Commission on the Fair Administration of Justice Report\(^{76}\) had seven parts:

- Eyewitness Identification;
- False Confessions;
- Informant Testimony;
- Problems with Scientific Evidence;
- Professional Responsibility and Accountability of Prosecutors and Defense Lawyers;
- Remedies; and
- Death Penalty.

---

\(^{74}\) Id. at 6. Assemblyperson Lieber cited the 2003 Santa Clara Law Review Article in support of these contentions.

\(^{75}\) See, California Commission Report, supra, n. 21.

\(^{76}\) California Commission Report, supra, n.21.
The conclusions of the California Commission Report corroborated the conclusions of the 2003 Santa Clara article which, in turn, had found that the failures found by the Illinois Commission were also failures in California. California’s death penalty system was broken and needed significant reforms. Those reforms were not identical to those of the Illinois Commission Report but covered a lot of the same ground. Nevertheless, while Illinois had acted promptly following its Commission Report, the work of the California Commission was largely ignored by the California Legislature. What was passed was vetoed by the Governor. As a result of the political unattractiveness of death penalty reform and a concurrent budget crisis, the Commission’s work was doomed to failure from the beginning.

C. The Alarcon/Mitchell Articles and Other Scholarship

In 2007, Senior Judge Arthur L. Alarcon of the United States Court of Appeals for the Ninth Circuit wrote a law review article surveying the deadlocked capital punishment system that operated in California. In that article, Judge Alarcon reviewed the length of time that capital cases took to go through the system and to be resolved. He expressed frustration, and suggested some changes to deal with the delays. As with other judges, like Justices Stevens and Breyer of the United States Supreme Court, he believed that delay is the “gateway” to a broader criticism of the capital punishment system and the criminal justice system in general. Nevertheless, Judge Alarcon recognized that, after people served

---

78 California Senate Bills 171, and 1544 (2005-06 Session) and Senate Bills 756, 511 and 609 (2006-07 Session).
83 See also, for instance, Judge Alex Kozinski’s concern about delay, which also concerned substantive issues like narrowing, in Alex Kozinski & Sean Gallagher, Death: The Ultimate Run-on Sentence, 46 Case W. Res. L. Rev. 1, 3 (1995) to his overall concern
sentences on death row of years and decades, many still had their judgments of conviction reversed or sentences of death overturned.\textsuperscript{84}

Thereafter, Judge Alarcon joined with Professor Paula Mitchell in 2011 to write another scathing condemnation of the capital punishment system in California.\textsuperscript{85} This time, Judge Alarcon and Professor Mitchell focused on the cost of the death penalty. However, the costs were also associated with the lack of purpose in the California system. It did not punish the “worst of the worst.” They chronicled the process in which the political system of initiatives in California had increased the number of death eligible special circumstances starting with ten in 1973, adding 12 more in 1977, 16 more in 1978, five more in 1990, three more in 1996, and another three in 2000, bringing the total number of special circumstances eligible to 39.86

The Alarcon-Mitchell article ended with a “Roadmap for Reform,” in which the authors proposed five reforms.\textsuperscript{87} Essentially, the first set of possible reforms were to leave the current scope of the death penalty unchanged, which would require increasing funding and requiring fiscal honesty with the public about the cost, or would require a complete change in the review system. The second set of reforms would entail significantly narrowing the number of special circumstances, or even narrowing the definition of capital cases to avoid the risk of executing the innocent.\textsuperscript{88} The third set would simply be to abolish the death penalty and replace it with life imprisonment without the possibility of parole.\textsuperscript{89}

This provocative article led to State Senator Loni Hancock introducing legislation in 2011 to put a measure on the 2012 ballot to repeal the death penalty.\textsuperscript{90} Her effort failed,\textsuperscript{91} but it gave rise to a voter initiative, Proposition 34, which qualified by signatures for the 2012 ballot.\textsuperscript{92} After Proposition 34 qualified, Judge Alarcon and

\begin{flushleft}


\textsuperscript{86} Id. at S131-S156.

\textsuperscript{87} Id. at S212-223.

\textsuperscript{88} Id. at S219, suggesting, for instance, limiting capital cases to ones “in which there is (1) biological or DNA evidence that conclusively links the defendant to the murder; (2) a videotaped, voluntary interrogation of and confession by the defendant to the murder; or (3) a video recording that conclusively links the defendant to the murder.”

\textsuperscript{89} Id. at S220-221.

\textsuperscript{90} California Senate Bill 490 (2011-12 Session).

\textsuperscript{91} See below, Sect. III(E).

\textsuperscript{92} See the Official Title and Summary by the Attorney General at: \url{http://vig.cdn.sos.ca.gov/2012/general/pdf/34-title-summ-analysis.pdf}.
\end{flushleft}
Professor Mitchell followed with another article. The concerns raised by the collected works of Judge Alarcon and Professor Mitchell were among those addressed in the Illinois Commission Report, such as the excessive special circumstances and lack of narrowing, which, although once again highlighted, have never been remedied.

Other scholarship was published during this 14-year period, bringing more attention to the serious flaws in the California system. Among the significant works was a piece by Professors Glenn Pierce and Michael Radelet, who examined the racial, ethnic and geographical variations in the imposition of the death penalty in California. This involved detailed demographic studies of the actual impact of the capital punishment system. The results showed, among other things, “homicides involving non-Hispanic white victims are 3.7 times as likely to result in a death sentence than those with non-Hispanic African-American victims. The death sentencing rate for those with Hispanic victims is .369, indicating that white victim homicides are 4.73 times as likely to result in death as Hispanic victim cases.” The further subtleties involved in breaking the analysis down are of even more concern such as, when isolated for variables, they found that, “Where there are no aggravating circumstances in existence, those who kill non-Hispanic whites are 7.6 times as likely to be sentenced to death as those who kill non-Hispanic African-Americans.”

Professors Pierce and Radelet also looked at the issue of regional disparity. It was an issue of concern to the Illinois Commission that a person might or might not receive a death sentence based on where they lived in the state. That became the subject of the Illinois Commission Report and recommendations. Professors Pierce and Radelet’s study established that in California, based on geography alone, a person convicted of death-eligible offense may in some counties, have a much greater risk of receiving the death penalty as compared to a person under identical circumstances in other counties. Worse yet, the racial composition of the

---

93 Judge Arthur L. Alarcón and Paula M. Mitchell, Costs of Capital Punishment in California: Will Voters Choose Reform this November?, 46 Loy. L.A. L. Rev. 51 (2012). Note that publication occurred after Proposition 34 failed by a slim margin, although an earlier draft had been published online.

94 This was raised in the Santa Clara article, supra, n.5., at 109-112 as an issue that was far worse in California than Illinois although, it was also specifically the subject of Recommendation 28, which would limit the special circumstances to only five. Illinois Commission Report, supra, n.4, at 67-68.


96 Id. at 19.

97 Id. at 24.


99 Pierce and Radelet, supra, n.88, at 38.
county correlates with the death sentence rate in that, “When the effects of all variables are
considered simultaneously, death sentencing rates are lowest in
counties with the highest non-white population.”

Another interesting piece of scholarship during the interceding fourteen years is by
Professor Steven Shatz. This work meticulously examined the empirical data
regarding the nature of the offenses for which death sentences were imposed. If the
goal of capital punishment is to impose a death sentence on the “worst of the
worst,” this article is further evidence that it is failing in California just as
indicated in the Illinois Commission Report. Professor Shatz concluded that,

“Twelve of the 13 forms of first-degree felony-murder are double-counted to
establish death-eligibility, and virtually all premeditated murderers are made
dead-eligible by the lying-in-wait special circumstance. Overbroad definitions
of death-eligibility can be seen as the root cause of most of the problems with
the death penalty.”

D. Advances in Forensic Science

Forensic science was of concern of the Illinois Commission, and in the
intervening 14 years, much has transpired on the national stage. The National
Academy of Sciences, at the request of the Attorney General of the United States,
embarked on a comprehensive evaluation of forensic science in the U.S. With the
exception of DNA analysis in cases with non-contaminated, non-degraded, single
source donors, forensic science was found significantly wanting. These concerns
continue and are as yet to be resolved.

100 Id. See also, Catherine Lee, Hispanics and the Death Penalty: Discriminatory
Charging Practices in San Joaquin County, California, 35 Journal of Criminal Justice, 17–
27 (2007); and see, Lee Kovarsky, The Local Concentration of Capital Punishment,
University of Maryland Francis King Carey School of Law, Legal Studies Research Paper

101 Steven Shatz, The Eight Amendment, the Death Penalty, and Ordinary Robbery-

102 Id. at 768.

103 Illinois Commission Report, supra, n.4, Recommendations 16(7), 35(7) and 45(7).

104 Committee on Identifying the Needs of the Forensic Sciences Community,
Strengthening Forensic Science in the United States: A Path Forward, National Research
see Jaxon Van Derbeken, DNA Lab Irregularities May Endanger Hundreds of SFPD
Cases, SF GATE (Mar. 28, 2015), at: http://www.sfgate.com/crime/article/DNAlab-
irregularities-may-endanger-hundreds-of-6165643.php.

105 See, e.g., Spencer S. Hsu, FBI Admits Flaws in Hair Analysis Over Decades,
Washington Post (Apr. 18, 2015), http://www.washingtonpost.com/local/crime/fbi-
overstated-forensic-hair-matches-in-nearllyall-criminal-trials-for-
decades/2015/04/18/39c8d8c6-e515-11e4-b510-962fcfabc310_story.html; Paul Bieber,
Studies of the exonerated have been instructive in determining how things could have gone wrong. Brandon L. Garrett and Peter J. Neufeld wrote a study evaluating cases where the convicted person was, in fact, innocent, yet was convicted, where there was forensic evidence. They conducted empirical research into the transcripts of 137 people who had been convicted and then exonerated. They concluded, “In conducting a review of these 137 exonerees’ trial transcripts, this study found invalid forensic science testimony was not just common but prevalent. This study found that 82 cases—60% of the 137 in the study set—involved invalid forensic science testimony.”

There are certainly many other reminders of the forensic problems with the death penalty as administered in California, which would further emphasize the need to do something about reform if death is to remain a sentence on the books. On a particular point, the author wrote an article about an unthinkable practice that has received tacit approval in the California courts involving “ethnic adjustments” of I.Q. scores for people of color so that they qualify for execution despite the purported protections of Atkins. It specifically discusses the practice in California, recorded by the California Supreme Court, where a forensic “expert” was allowed to opine, in favor of altering test results on the basis of race, that “because Blacks ordinarily perform more poorly than Whites on those tests, it is preferable to use ethnically corrected norms when scoring the tests.” This study


107 Id. at 14.


documents the need for caution and education about forensic practices and expert testimony as raised by the Illinois Commission Report.111

E. Justice John Paul Stevens Opinions, Book and Interview

Justice John Paul Stevens of the United States Supreme Court, before the Illinois Commission Report, authored the separate opinion in Lackey,112 which was a denial of a petition for writ of certiorari wherein the petitioner raised the issue that 17 years on death row violates the Eighth Amendment’s prohibition against cruel and unusual punishment. There he filed his separate memorandum to say that, “Petitioner's claim, with its legal complexity and its potential for far-reaching consequences, seems an ideal example of one which would benefit from such further study.”113 Justice Breyer agreed that the issue is an important undecided one.114

Years later, and six years after the Illinois Commission Report, Justice Stevens also wrote an opinion concurring in the judgment in Baze v. Rees,115 where he expanded on his Lackey opinion and wrote that the death penalty serves no modern purpose. Justice Breyer filed a concurrence of his own but did not join in Justice Stevens’ opinion.116 Justice Stevens began his opinion by questioning whether the use of pancuronium bromide should be used as a part of the lethal injection protocol but deferred to the states to make that determination.117 However, he then stated that he was persuaded,

“that current decisions by state legislatures, by the Congress of the United States, and by this Court to retain the death penalty as a part of our law are the product of habit and inattention rather than an acceptable deliberative process that weighs the costs and risks of administering that penalty...”


111 Illinois Commission Report, supra, n.4, Recommendations 16(7), 35(7) and 45(7); See also, Ruthie Stevens, Note, Are Intellectually Disabled Individuals Still at Risk of Capital Punishment After Hall v. Florida? The Need for a Totality-of-the-Evidence Test to Protect Human Rights in Determining Intellectual Disability, 68 Okla. L. Rev. 411 (2016), where the point is made that, even after Hall v. Florida, supra, n. 102., additional caution must be taken in making the forensic determination of whether or not a person who may have intellectual disability should live or die.


113 Id.

114 Id.


116 Id. at 107. Justice Breyer’s concurrence did not join in the criticism of the death penalty itself but, instead, on the question of whether the method of execution before the Court posed “a significant and unnecessary risk of inflicting severe pain.”

117 Id. at 71-78.
against its identifiable benefits, and rest in part on a faulty assumption about the retributive force of the death penalty.”

He then went on to say that life without possibility of parole satisfies the need for incapacitation. He observed that even the method of execution militates against retribution since the majority of the Court is concerned about painful infliction, meaning that death does not seem to be a punishment intended in the traditional retributive sense of inflicting pain. He raised the risk of error — error that cannot be corrected after a person is executed. He also found that discrimination and arbitrariness pervade the system, which sometimes accords fewer rights to a capital defendant than others. On this latter point, he singled out the death qualified jury and the fact that prosecutorial discretion may be misused. Justice Steven’s conclusions, however, did not persuade him to break with precedent, and he concurred in the judgment.

Justice Stevens retired in 2010. He wrote for the New York Review of Books and then published his own book, entitled Six Amendments. That book spoke to his continuing commitment to stare decisis and principled decision making. He felt that the law resulting from certain decisions was wrong. Therefore, he proposed Constitutional Amendments for each of the particular issues. As to the death penalty, Justice Stevens reviewed the profound problems that were associated with capital punishment, and he proposed to repeal it by an amendment to the Eighth Amendment so that it would read, “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment such as the death penalty inflicted.”

The author had an opportunity to interview Justice Stevens in February 2016 in Ft. Lauderdale, Florida, regarding his views on the death penalty. He spoke of finality, saying, "After a defendant has been executed, it is too late to correct any errors in the proceedings, including those which would establish the defendant's innocence.” He noted that more than 140 people were released from death row

118 Id. at 78.
119 Id. at 79.
120 Id. at 85.
121 Id. at 85-86.
122 Id. at 86.
123 Id. at 79-81.
125 Id. at 123.
127 Id.
between 1973 and 2012 as a result of evidence of their wrongful conviction and, as the increasing number of these exonerations demonstrates, "the criminal justice system is not infallible."128 "Given the ever present potential for error in every case, the risk of error in capital cases is simply unacceptable." Referring to an example of an innocent man being executed, he said, "It is time to put an end to mistaken and irrevocable state action of that kind; a goal that can only be accomplished by abolishing the death penalty."129

Justice Stevens then discussed the cost and the diminishing returns in the cost benefit analysis of using such an extreme remedy. He said, "...there remains the unacceptable cost of prosecuting capital cases. The expense of capital trials is particularly outrageous, in light of the lack of evidence supporting capital punishment's justifications, including deterrence. Few other civilized societies engage in such a wasteful use of resources with no demonstrated benefit to society. Taxpayers should terminate this waste as expeditiously as possible."130

In addition, he cited the time and delay he had discussed in Lackey: "...the benefit portion of the balance is reduced substantially ... and by the diminishing need for the death penalty because with the available sentence of incarceration without possibility of parole the deterrence value of penalty has diminished almost to zero. So on a constitutional analysis as well as a policy analysis, if the benefits are trivial compared to the potential harm of such an important issue, as a matter of sound policy you should get rid of it."131

The Justice also acknowledged the need for quality representation. He said, "As long as the death penalty continues, however, it is critical that capital defendants receive the strongest possible defense against that irreversible sentence."132 In each of these regards, he echoes the concerns of the Illinois Commission and the California Commission with regard to the integrity of the system. Justice Stevens' evolving opinions have been open and available to the California Legislature during this 14-year period within which the recommendation of the Illinois Commission could have been met.

Justice Stevens made another observation that may be relevant to the present analysis. In response to the author’s question as to whether it is time for the Supreme Court to take the Eighth Amendment issue head on, he said, "Of course I think that is only one of the things that should be done. I think that the death penalty should be opposed both in the Supreme Court on constitutional grounds, which would be their only basis for considering the issue, but it seems to me that it

---

128 Id.
129 Id.
130 Id.
131 Id.
132 Id.
is also appropriate for state legislatures or state voters to consider the wisdom or lack of wisdom in continuing to maintain such an expensive and unrewarding form of penalty because I really think as time has gone by, it has become more and more obvious that the benefits that are available from imposing the death penalty have reduced in significance dramatically.\textsuperscript{133}

"So, the answer is yes. I feel even more strongly and I have thought about this repeatedly and the more I think about it the more it seems to me that it really doesn't make much sense for society to engage in such a wasteful enterprise when there are so many good arguments against going forward. The issue should be reflected on by voters in states, state by state, it should be considered by judges on the state level . . . . It's a matter that can be addressed at the state level, the federal level, the legislative level and a judicial forum."\textsuperscript{134}

Much like Judge Alarcon and Professor Mitchell,\textsuperscript{135} and Justices Powell\textsuperscript{136} and Blackmun\textsuperscript{137} before them, Justice Stevens now clearly advocates abolition. Specifically, he is looking to the legislature, or in California, where we have enshrined the death penalty in the California Constitution, to an initiative of the voters to repeal it.\textsuperscript{138}

\textbf{F. Senate Bill 290 and Proposition 34 to Repeal the Death Penalty}

In 2011, the debate was brought to the fore, primarily by the publication of the Alarcon, Mitchell articles.\textsuperscript{139} As a result of the public attention to the issue, California State Senator Loni Hancock, Chair of the Senate Public Safety Committee, introduced legislation to place a measure on the ballot to repeal the death penalty.\textsuperscript{140} Senator Hancock’s bill would have abolished the death penalty in California if adopted by the legislature and if voted on affirmatively by the voters.

\begin{flushleft}
\begin{footnotesize}
\textsuperscript{133} Interview, \emph{supra}, n. 126.
\textsuperscript{134} \emph{Id}.
\textsuperscript{135} See III(B) above.
\textsuperscript{136} After he retired from the Court, Justice Powell told his biographer that “Experience taught him that the death penalty cannot be decently administered.” (Jeffries, \textit{Justice Lewis F. Powell, Jr.}, Fordham Univ. Press (1994) p. 451).
\textsuperscript{137} In a case just before he retired, Justice Blackmun famously said, "I no longer shall tinker with the machinery of death." \textit{Callins v. Collins} (1994) 510 U.S. 1141, 1145 (Dis. Opn. of Blackmun, J.)
\textsuperscript{138} Interview, \emph{supra}, n. 126.
\textsuperscript{140} California Senate Bill 490 (2011-12 Session).
\end{footnotesize}
\end{flushleft}
Spec. Law Rept., SANTA BARBARA/VENTURA COLLEGES OF LAW 29

in the 2012 general election. The bill went through several amendments\(^{141}\) and, in August of 2011, went through Senate Public Safety Committee hearings. At those hearings, Senior Judge Arthur Alarcon and Professor Paula Mitchell testified to their work leading to the publication of their law review article in 2011.\(^{142}\) Former Attorney General Van de Kamp also testified to the work of the California Commission on the Fair Administration of Justice.\(^{143}\)

These and other witnesses testified to the fact that the same problems persisted in California that had been identified by the Illinois Commission Report, the Santa Clara article, the California Commission Report, and the Alarcon/Mitchell articles. Nevertheless, Senator Hancock announced on August 25, 2011, that she would withdraw SB 490 because:

"The votes were not there to support reforming California's expensive and dysfunctional death penalty system. I had hoped we would take the opportunity to save hundreds of millions of dollars that could be used to support our schools and universities, keep police on our streets and fund essential public institutions like the courts. Study after study has demonstrated that the cost of maintaining the death penalty when so many basic needs are going unmet has become an expense we can no longer afford."\(^{144}\)

Although the Hancock proposal was withdrawn, it became clear to abolitionists that it was time to go directly to the voters. Therefore, a coalition of organizations qualified what became proposition 34\(^{145}\) for the November 2012 ballot.\(^{146}\) The initiative generated considerable public discussion, but the campaign led with the economic argument that the repeal of the death penalty in California would save millions of dollars.\(^{147}\) Other arguments included the fact that the system has been


\(^{143}\) California Commission Report, supra, n. 21, at 24, 34.


\(^{145}\) See the Official Title and Summary by the Attorney General at: http://vig.cdn.sos.ca.gov/2012/general/pdf/34-title-summ-analysis.pdf.


\(^{147}\) The financial argument was first, see, e.g., Ballotpedia at: https://ballotpedia.org/California_Proposition_34,_the_End_the_Death_Penalty_Initiative_(2012)#cite_note-sacbee-3.
found to be “broken” and susceptible to mistakes, which was listed as third.\textsuperscript{148} There were some problems with the manner in which the proposition was presented, particularly in that it confusingly was marketed as a proposition to spend $100 million to put more police officers on unsolved rape and murder cases.\textsuperscript{149} When the dust settled, the initiative failed to pass by the slim margin of 48 percent to 52 percent, with a total of 5,974,243 in favor and 6,460,264 opposed.\textsuperscript{150}

Nevertheless, Senator Hancock’s bill and the election process surrounding Proposition 34 served to bring attention once again to the failures of the death penalty system in California.\textsuperscript{151} This is a part of the history between the Illinois Commission Report Recommendations 14 years ago and the present during which, once again, the failures of the system were made manifest but nothing was done.

\textbf{G. Judge Cormac Carney and the Jones Opinion}

In 2014, Judge Cormac J. Carney handed down an opinion in the case of Edward Dewayne Jones v. Kevin Chappell, Warden of San Quentin.\textsuperscript{152} Judge Carney, a federal District Court Judge sitting in Los Angeles, found the death penalty, as practiced in California, to be unconstitutional. His decision was overturned by the Ninth Circuit Court of Appeals on November 12, 2015 (\textit{sub nom.}, \textit{Jones v. Davis}, 806 F.3d 538 (9th Cir. 2015). The Ninth Circuit opinion reversed on narrow procedural grounds that, “under \textit{Teague v. Lane}, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), federal courts may not consider novel constitutional theories on habeas review.” The court found that the claim raised by Jones was a novel constitutional rule and thus the claim was barred by \textit{Teague}.

The Jones decision by Judge Carney, although it was overruled, is significant in that it highlighted, one more time, the broken nature of the system of capital punishment in California. Judge Carney rested his decision on the delay in review and execution of sentences, famously referred to in Justice John Paul Stevens’

\begin{flushleft}
\textsuperscript{148} \textit{Id.}

\textsuperscript{149} In addition to confusing and, perhaps, alienating voters, this had the effect of causing the Legislative Analyst to show a one-time $100 million expenditure offsetting the projected first year potential savings with which the campaign sought to lead. \texttt{http://vig.cdn.sos.ca.gov/2012/general/pdf/34-title-summ-analysis.pdf}.  

\textsuperscript{150} California Secretary of State, \textit{Statement of the Vote Summary Pages}, 13 at: \texttt{http://elections.cdn.sos.ca.gov/sov/2012-general/06-sov-summary.pdf}.  


\end{flushleft}
concurrency in *Lackey v. Texas*, 514 U.S. 1045 (1995). However, Judge Carney made reference to the fact that the opinion

“... should not be construed to suggest that the post-conviction review process should be curtailed in favor of speed over accuracy. Indeed, it bears noting that in more than half of all cases in which the federal courts have reviewed a California inmate's death sentence on habeas review, the inmate has been granted relief from the death sentence... The post-conviction review process is, therefore, vitally important. It serves both the inmate's interest in not being improperly executed, as well as the State's interest in ensuring that it does not improperly execute any individual. 153

Even though the decision was primarily based on the same issue raised by Justice Stevens in *Lackey*, Judge Carney cited the California Commission Report and, once again, potentially brought the concept of reform before the legislators and voters.

**H. Justice Breyer’s Opinion in Glossip v. Gross**

In a 2015 dissent in the United States Supreme Court decision of *Glossip v. Gross*, Justice Breyer opined that the death penalty may be subject to constitutional objection. 154 Although he did not take up the cause with Justice Stevens in *Baze v. Rees*, 155 Justice Breyer now approached the question of the constitutionality of the death penalty. The *Glossip* case was another that came before the Court on a petition for certiorari raising the issue of the legality of the means of carrying out the death sentence by a form of lethal injection. Justice Alito delivering the opinion of the Court, holding that the death penalty is constitutional and that the use of the drug in question, midazolam, was not a cruel and unusual means of imposing that punishment. 156

Justice Breyer, joined by Justice Ginsberg, dissented specifically on the grounds that the death penalty itself, “now likely constitutes a legally prohibited ‘cruel and unusual punishment[.]’ under the Eighth Amendment.” 157 Specifically, Justice Breyer addressed issues that had been raised in the Illinois Commission Report and could have been addressed here in California. First, he considered the unreliability of the death penalty. It is not reliable as the DNA exonerations have demonstrated. 158 He gave several examples of executions of the factually innocent as well as convictions that were overturned on innocence grounds before

---

157 Id. at 2756 Dissenting Opinion, Breyer, J.
158 Id. at 2757.
execution.\textsuperscript{159} He cited shortened police investigations, false confessions, mistaken eyewitness testimony, untruthful jailhouse informants, ineffective assistance of counsel and flawed forensics.\textsuperscript{160} He also cited death qualified juries and flawed procedures in the trial and appellate courts.\textsuperscript{161} This is the precise list compiled by the Illinois Commission and the subject of the 85 recommendations in the Illinois Commission Report.\textsuperscript{162}

Continuing on with a theme present in the Illinois Commission Report and emphasized in the Santa Clara article, Justice Breyer reviewed studies that found that the death penalty was arbitrary and was not implemented in a way to narrow the class of cases.\textsuperscript{163} This included geographical arbitrariness and racial disparities.\textsuperscript{164} In addition, he acknowledged the importance of taking the time to thoroughly review a death sentence but he elaborated extensively on the unfairness of the resultant delays.\textsuperscript{165} He concluded that the decline in the use of the death penalty is an indication of changing standards of decency.\textsuperscript{166} And he actually cites the California Commission Report in support of his position and concludes that he believes it is “highly likely” that the death penalty is unconstitutional.\textsuperscript{167}

\textit{I. Judge Alex Kozinski’s Article, Criminal Law 2.0}

There were many other scholarly and judicial reminders during the last 14 years that the California death penalty system is flawed. Chief Judge Alex Kozinski, for instance, wrote a scathing condemnation of the criminal justice system.\textsuperscript{168} It did not pertain exclusively to the death penalty nor exclusively to California, but it raised many of the same issues identified in the Illinois Commission Report, the Santa Clara article and the California Commission Report. Judge Kozinski wrote that,

“The significant number of inmates freed in recent years as the result of various innocence projects and especially as a result of DNA testing in cases where the convictions were obtained in the pre-DNA era, should cause us to question whether the current system is performing as effectively as we’ve been led to believe. It’s no answer to say that the exonerees make up only a minuscule portion of those convicted. For every

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{159} \textit{Id.}
\item \textsuperscript{160} \textit{Id. at 2758.}
\item \textsuperscript{161} \textit{Glossip v. Gross, ___ U.S. ___, 135 S.Ct. 2759 (2015).}
\item \textsuperscript{162} Illinois Commission Report, supra, n. 4, \textit{passim}.
\item \textsuperscript{163} \textit{Glossip v. Gross, ___ U.S. ___, 135 S.Ct. 2760-64 (2015).}
\item \textsuperscript{164} \textit{Id.}
\item \textsuperscript{165} \textit{Id. at 2764-72.}
\item \textsuperscript{166} \textit{Id. at 2772-76.}
\item \textsuperscript{167} \textit{Id. at 2776-77.}
\end{enumerate}
\end{footnotesize}
In other words, just as it was troubling to Governor Ryan, his commission, the California Commission and others, there are too many exonerations and too many people still in prison (and possibly facing the death penalty) to ignore the underlying systemic problems.

Judge Kozinski, finding many of the same systemic problems as did both the Illinois and California Commissions categorized the failures in eleven categories:170

• Eyewitnesses are not reliable;
• Fingerprint evidence is not foolproof;
• Other types of forensic evidence are not scientifically proven and are fallible;
• DNA is fallible;
• Human memory is unreliable;
• Confessions are fallible because innocent people do confess;
• Juries do not always follow instructions;
• Prosecutors do not always play fair;
• Proof beyond a reasonable doubt may not be followed by the jury;
• Police are not always objective in their investigations; and
• Guilty pleas are not conclusive proof of guilt.

Judge Kozinski went on to make his own recommendations for reform of the criminal justice system. Many sound familiar to those who have studied the Illinois Commission Report, the California Commission Report, and many of the intervening opinions offered to reform the California death penalty system. Judge Kozinski recommended, among other things, the following:171

• Require open file discovery;

---

169 Id. at xiv.
170 The categories were headed with ironic and rhetorical questions and are transposed to the headnotes that reflect the content of each section of Part I of the article. Id. iii-ix.
171 Id. xxvi-xxxvi. Note that Judge Kozinski made other recommendations; for instance, including jury reforms, most of which either pertained to non-capital cases or had specific application to federal cases.
• Adopt standardized, rigorous procedures for dealing with the government’s disclosure obligations;
• Adopt standardized, rigorous procedures for eyewitness identification;
• Video record all suspect interrogations;
• Impose strict limits on the use of jailhouse informants;
• Adopt rigorous, uniform procedures for certifying expert witnesses and preserving the integrity of the testing process;
• Keep adding conviction integrity units;
• Establish independent Prosecutorial Integrity Units;
• Enter Brady compliance orders in every criminal case;
• Engage in a Brady colloquy;
• Adopt local rules that require the government to comply with its discovery obligations without the need for motions by the defense;
• Condition the admission of expert evidence in criminal cases on the presentation of a proper *Daubert* showing;
• When prosecutors misbehave, don’t keep it a secret.

These recommendations of Judge Kozinski are included within the same recommendations of the Illinois Commission that are still not met in California.

**J. Proposition 62 to Repeal the Death Penalty**

With all of the criticism of the death penalty system in California over the fourteen years, it is hard to justify allowing it to stand. If the system is broken and is not being fixed, repeal is a logical alternative. Therefore, once again, the voters in California are being given the means to repeal the death penalty. The “Death Penalty Initiative Statute” qualified to be included as Proposition 62 on the November 8, 2016 ballot. This is the culmination of all the review, work, and criticism on the death penalty system over the last 14 years (and more). The text of the initiative was drafted by Professor Paula Mitchell and attorney Mary Broderick.\(^{172}\) Mike Farrell--actor, author, and civil rights activist--submitted a letter requesting a title and summary on September 15, 2015.\(^{173}\)

---

172 The present author was the third member of the drafting committee.

summary were issued by the California Attorney General's office on November 19, 2015 with 365,880 valid signatures required for qualification purposes. More than the required signatures was submitted, and the measure was accepted for the ballot with an official summary issued by the Attorney General’s office as follows:

“Repeals death penalty and replaces it with life imprisonment without possibility of parole. Applies retroactively to existing death sentences. Increases the portion of life inmates’ wages that may be applied to victim restitution. Fiscal Impact: Net ongoing reduction in state and county criminal justice costs of around $150 million annually within a few years, although the impact could vary by tens of millions of dollars depending on various factors.”

Arguments in support of and in opposition to the Death Penalty Repeal Initiative, Proposition 62, can be found in the official voter guide.

Interestingly, the opposition to the repeal proposition decided to mount its own competing proposition, given the number 66. However, even this opposition proposition acknowledges that the system is broken but seeks to increase the immediate costs while trying to speed it up. A careful analysis of this proposition, comparing it to Proposition 62 to repeal the death penalty, has been prepared by attorney Nancy Haydt and Professor Paula Mitchell. Their conclusion is that the opposition proposition is not well thought out. Besides costing tens of millions of dollars a year it creates a convoluted system that contains unworkable provisions some of which create complex constitutional issues that would result in even more litigation. Oddly, this proposition does other things like exempt lethal injection from existing safeguards and public oversight.

In addition to those problems, the opposing proposition, even if it could be implemented, does not help to meet a single recommendation of the Illinois Commission Report. In some senses, the opposition proposition would defeat the recommendations of the Illinois Commission Report. For instance, one of the

---


175 See Ballotpedia, Id.


178 Id.

179 See the provisions of Section 11 at Official Ballot, p. 216, at:
significant concerns of the Illinois Commission is improving the level of representation of those facing the death penalty. Yet the opposition proposition encourages or coerces lawyers who are not prepared to provide competent capital representation to take death penalty cases by forcing non-capital lawyers to take appointments if they accept non-capital appointments and allowing career prosecutors who sought the death penalty to retire and automatically qualify for appointments.\textsuperscript{180}

Professor Mitchell and attorney Haydt make the point that Proposition 62 is a simple and straightforward way to deal with an admittedly dysfunctional system. They conclude: “Regardless of moral views on the death penalty, it is now glaringly obvious California’s system cannot be repaired. The voters of California deserve effective responsible governance. The death penalty does not promote public safety and is a waste of time and money.”\textsuperscript{181} Given the lack of success in addressing any of the core problems over a fourteen year period, that conclusion seems to be supported by the empirical evidence.

\textsuperscript{180} Section 18 of Proposed Proposition 66 would amend the Government Code to direct that the Judicial Council and Supreme Court, “shall consider the qualifications needed to achieve competent representation, the need to avoid unduly restricting the available pool of attorneys so as to provide timely appointment, and the standards needed to qualify for Chapter 154 of Title 28 of the United States Code. Experience requirements shall not be limited to defense experience.” See Official Ballot, 217 at: \url{http://vig.cdn.sos.ca.gov/2016/general/en/pdf/complete-vig.pdf}.

\textsuperscript{181} Mitchell and Haydt, \textit{An Analysis of the Competing Death Penalty Ballot Initiatives, supra}, n.177, at 70.
IV. THE NEW COMPARISON OF THE 85 RECOMMENDATIONS TO CALIFORNIA TODAY

The fourth part of this article will take the 85 Recommendations of the Illinois Commission Report and compare them to the death penalty system in California as it is today, 14 years after the Illinois Commission Report and the Santa Clara Law Review article which made the same comparison as of that time. From this comparison, the article will determine what, if any, progress has been made to address those concerns contained in the 85 recommendations during the last 14 years. Such an empirical study, using the Illinois Commission framework, should
place the assessment of the condition of the death penalty in California in 2016 in the perspective of the progress, or lack thereof, over these last 14 years.

A. A Summary of the Illinois Commission Recommendations and Whether they are now Met or Still are Not Met

1. Police and Pretrial Investigations -- Recommendations 1 Through 19

California still does not meet any of the 19 specific recommendations made by the commission in this category. These recommendations are designed to bring police practices up to minimum requirements in order to avoid false confessions, miscollected and misinterpreted events, false identifications, and contamination of testimony. They also seek to require police practices that include training on issues that have caused wrongful convictions and to encourage police practices which really result in finding the actual perpetrator. There were some efforts to enact legislation that might have had an impact on some of these recommendations but they were vetoed by the governor, and what finally was approved did not address the issues. Therefore, 14 years later, all of these recommendations remain not met.

2. DNA and Forensic Testing: Recommendations 20 Through 26

The Illinois Commission made seven recommendations regarding DNA and forensic testing. California follows only one, with qualifications. In Recommendation 26, the Illinois Commission recommended adequate funding for DNA and forensic testing in capital cases. California follows this one recommendation in the sense that it makes funds available, at the trial court’s discretion and within limitations on appeal, for defense experts and testing. Otherwise, 14 years ago, California did not follow the other recommendations. In the intervening 14 years, arguably one additional recommendation, Recommendation 25 (expanding the scope of permissible defense DNA comparisons) has come closer to being met but is still not met.

3. Eligibility for Capital Punishment: Recommendations 27 and 28

The Illinois Commission made two recommendations addressing the “narrowing” of death eligible cases to a smaller subset. It recommended that there be five, and only five, circumstances which would make a murder case death eligible. In contrast, 14 years ago, California had 25 numbered special circumstances which actually broke down into more than 36 special circumstances. No effort has been made to limit the special circumstances or provide for additional narrowing in California. Therefore, these recommendations are still not met.

---

182 See below, Sec. IV (B).
185 See below, IV(B)(3).
4. Prosecutors’ Selection of Cases for Capital Punishment: Recommendations 29 Through 31

The Illinois Commission made three recommendations regarding the manner in which prosecutors should select cases for death. The recommendations attempt to create a rational system under which prosecutors in capital cases select defendants whose cases meet the theoretically narrowed category of death-eligibility. Prosecutors would be required to follow statewide standards, and to articulate their reasons for choosing particular defendants for death. California did not have any such standards 14 years ago and still does not. These recommendations are still not met.

5. Trial Judges: Recommendations 32 Through 39

The Illinois Commission made eight recommendations regarding the administration of the trial courts. These recommendations are designed to increase the level of knowledge and performance by the judges trying capital cases. They also provide for more centralized management and oversight. Fourteen years ago, none of these recommendations were met. In the last 14 years, there have been no efforts to meet these recommendations and they remain not met.

6. Trial Lawyers: Recommendations 40 Through 45

The Illinois Commission made six specific recommendations pertaining to trial lawyers who handle capital cases. Recommendations 40 through 45 establish levels of training and experience for members of the capital bar and assure that all persons handling capital cases meet them. Recommendation 41 also creates a Capital Litigation Trial Bar. None of these recommendations were met fourteen years ago and they remain not met today.

7. Pretrial Proceedings: Recommendations 46 Through 54

The Illinois Commission made nine recommendations pertaining to pre-trial proceedings in capital cases. The commission identified a number of procedures which will ensure that a defendant and his or her counsel are fully informed, have notice in order to defend, and can prepare to go to trial or fairly enter a non-capital plea if it is available. Once again, none of these recommendations were met 14 years ago and none are met now.

8. The Guilt-Innocence Phase: Recommendations 55 Through 59

The Illinois Commission made five recommendations regarding the guilt-innocence phase of the capital trial. One of the recommendations is constitutionally required under existing precedent from the Supreme Court. That recommendation pertains to the requirement that expert testimony on eyewitness identification be permitted on a case-by-case basis. Of the four remaining
recommendations, the Santa Clara article concluded that California complied with only one. That one is also arguably compelled by the Constitution, prohibiting introduction of polygraph results in the guilt-innocence phase of the trial. California case law was in accord.

The author respectfully makes a correction to the previous Santa Clara article. California did and does comply with Recommendation 57 with regard to having a standard jury instruction with regard to reliability of in-custody informant testimony. California Penal Code Section 1127a was, in fact, enacted in 1989 and did require such an admonition. CALJIC approved jury instruction, 3.20 accomplished that, and it has been replaced by CALCRIM 336. With this adjustment, the number of Recommendations with which California did not comply in 2003, would have been 75 rather than 76. This would have made the compliance rate of 7.40 percent rather than the 6.17 percent reported in the original article.

9. The Sentencing Phase: Recommendations 60 Through 64

The Illinois Commission made five recommendations regarding the sentencing phase of trial. These recommendations require discovery prior to the penalty phase of the trial and seek to expand mitigating factors to include the defendant’s extreme abuse as a child and reduced mental capacity. The recommendations would establish the defendant’s right to allocution, prohibit polygraph results, and require that jurors be fully informed of the life without possibility of parole alternative (LWOPP). Recommendation 60 (expanding discovery rules to capital cases) was met with qualifications and 63 (requiring instructions to the alternative sentences to death) was already constitutionally required. Fourteen years ago, only recommendation 64 (prohibiting polygraph results at sentencing) was met. In the last 14 years, no more of these sentencing recommendations have been met.

10. Imposition of Sentence: Recommendations 65 Through 69

The Illinois Commission made five recommendations relating to the imposition of the sentence of death. These recommendations impose procedural requirements on the manner in which the trial court imposes a death sentence. At the time, one recommendation was met and one was constitutionally required. Three were not met. In the past 14 years, the remaining three are still not met.

11. Proceedings Following Conviction and Sentence: Recommendations 70 Through 75

The Illinois Commission made six recommendations relating to proceedings that follow sentencing and conviction. They require proportionality review, ongoing discovery, time periods for post-conviction relief, mandatory evidentiary hearings, extended procedures for actual innocence claims, and a clear statute on clemency
procedures. Fourteen years ago, none of these recommendations were met. Fourteen years later, they are still not met.

12. Funding: Recommendations 76 Through 82

The Illinois Commission made seven recommendations pertaining to funding by the state, one of which applies only to Illinois. These recommendations attempt to ensure that lawyers handling capital cases have adequate funding and are properly compensated for their time. They also seek to assure that funds for law enforcement equipment, particularly recording devices, are available and properly administered throughout the state. One, that pertained specifically to an Illinois statute, is arguably not applicable to California, although an argument could be made that, since California does not have a similar statute, the recommendation broadly construing a Capital Litigation Trust is not met. Nevertheless, nothing has changed in the intervening 14 years and, still, the remainder of these recommendations is not met.


The Illinois Commission made three general recommendations which pertain to improving the capital system and avoiding errors. The Commission recommends applying the recommendations to non-capital cases, collecting and disseminating comparative information throughout the judicial system, and encouraging the reporting of attorney misconduct to the state bar. None of these recommendations were met by California at the time. Fourteen years later, they are all still not met.

K. Particular California Attempts at Legislation over the Last Fourteen Years

As indicated above, there have been some efforts at legislation in California, some of which may have addressed partial concerns of the Illinois Commission Report. What little made it through the legislature and then past the governor’s veto,\(^\text{186}\) was inadequate to meet the recommendations of the Illinois Commission Report. The Recommendations of the Illinois Commission Report still are not met any more than they were at the time as documented in the 2003 Santa Clara article. The only change is the acknowledgment of one oversight in the 2003 analysis.\(^\text{187}\) In other words, in 14 years nothing has changed and, yet, California still has a death penalty as of this writing.

\(^{186}\) Governor Arnold Schwarzenegger vetoed the legislation initially and Governor Jerry Brown signed the re-introduced and revised bills into law. See Sect. III(B)(1) below.

\(^{187}\) The addition of Recommendation 57 as being met as of the time of the Illinois Commission Report.
Although the California Legislature has not met any of the recommendations of either the Illinois Commission or the California Commission, there have seen some efforts. The failure of the efforts is instructive on how far away California is from compliance. The following analysis will take the possibly affected recommendations of the Illinois Commission Report and indicate what efforts were made even though none had the effect of actually meeting any particular recommendation.

1. Recommendation 4: Videotaping Custodial Interrogations

Recommendation 4 of the Illinois Commission Report called for custodial interrogations of a suspect in a homicide case occurring at a police facility to be videotaped and that the videotaping should not include merely the statement made by the suspect after interrogation, but the entire interrogation process. There was an effort to address this issue in California after the California Commission had made a similar recommendation. In the 2005-06 Legislative Session, legislation was passed that would have required recording and preserving the recording of suspects in homicides and other violent crime investigations. Governor Arnold Schwarzenegger vetoed this bill.

The following session, 2007-08, another bill was introduced and passed by the California Legislature to require recording of suspects’ interrogations. It contained concessions to law enforcement issues raised by the governor in his veto statement the year before. Nevertheless, Governor Schwarzenegger vetoed this bill as well.

It was not until 2013 that a bill was introduced to amend Welfare and Institutions Code §626.8 and Penal Code §859.5 to require recording of interrogations involving juveniles accused of serious or violent felonies as listed in Welfare and Institutions Code §707(b). The Senate Appropriations Committee voted to place the bill in the Senate file on April 29, 2013 and on February 22, 2013, the bill was re-introduced as amended only to require recording of interrogations for juveniles suspected of committing murder. The bill as finally amended was signed by Governor Jerry Brown and chaptered by the Secretary of State on October 13, 2013.

189 California Commission Report, supra, n. 21.
190 California Senate Bill 171 (2005-06 Session).
191 California Senate Bill 511 (2007-08 Session).
193 California Senate Bill 569 (2013-14 Session).
California, 14 years later, is far from complying with Recommendation 4 of the Illinois Commission to video record (“ videotape” in the now anachronistic language of the time) all custodial interviews of in-custody homicide suspects and to record the entire process of such interrogations. The history of the effort to make some modest changes to California law in this regard shows the reluctance of the legislature and the governor to take recommendations of either the Illinois Commission Report or the California Commission Report seriously. Recommendation 4 of the Illinois Commission Report is still not met.

2. Recommendation 16, 45, 51, 52 and 69: In-Custody Informants

Illinois Recommendation 16 provides as one of its eight sub-recommendations that there be training for all police who work homicide cases regarding, among other things, “the risks of false testimony by in-custody informants (‘jailhouse snitches’).” Similarly Recommendation 45 would require training on the same matters, including the use of in-custody informants, for prosecutors and defense lawyers who are members of the Capital Trial Bar. 195 Recommendation 51 requires prompt disclosure of in-custody informant background, and 52 requires the judge to hold a pre-trial evidentiary hearing. These recommendations were not met 14 years ago and still are not met.

In the 2005-2006 legislative session, the California Legislature passed bills through both chambers which did not fully address any Illinois Commission Report recommendation but attempted to address recommendations of the California Commission Report. One provided for recording and preserving the recording of suspects in homicides and other violent investigations. 196 The second required substantial changes in the process of eyewitness identification procedures. 197 Although these were recommended by the Californian Commission and might have partially met the recommendations of the Illinois Commission, they were vetoed by Governor Arnold Schwarzenegger.

In the 2006-2007 Session, lawmakers attempted to enact legislation that accommodated the governor’s veto messages the year before. Of the three new laws, two were revisions of the ones vetoed the year before and a new one of them required the corroboration of testimony by jailhouse informants. 198 This would still not have addressed the education requirements and the mandatory prompt disclosure and pre-trial evidentiary hearing requirements of the Illinois Recommendations. However, this bill would have gone a long way to curb jailhouse informant abuse. Nevertheless, the governor, again, vetoed it along with the other two

195 There is no provision for a Capital Trial Bar in California but, even if one construed that loosely, there is still no required training in the eight designated areas for either prosecution or defense.
196 California Senate Bill 171 (2005-06 Session).
197 California Senate Bill 1544 (2005-06 Session).
198 California Senate Bill 609 (2006-07 Session).
bills. 199

Finally, in 2011, a partial reform, not including anything that would have fully met any of the recommendations of the Illinois or California Commission Reports, was enacted. Governor Jerry Brown approved the bill, adding §1111.5 to the California Penal Code requiring corroboration of the testimony of an in-custody informant. 200 Section 1111.5 creates an exception and establishes a burden for the proponent in cases where one in-custody informant is used to corroborate another in-custody informant. To conform to this statute, the California Jury Instruction governing the use of in-custody informants was amended in 2012 to reflect this change in the law. 201 Nevertheless, since it does not address the issues raised by the Illinois Commission, Recommendations 16, 45, 81 and 82 are still not met.

Furthermore, Recommendation 69 of the Illinois Commission Report required corroboration of a single eyewitness as well as an in-custody informant or an accomplice. Accomplice testimony is covered by existing law. 202 However, the new California Penal Code Section 1111.5 only requires corroboration of the testimony of an in-custody informant but not the testimony of a single eye-witness. Therefore, Recommendation 69 is still not met.

3. Recommendation 25: Forensic Testing Including DNA where Potential to Produce New Evidence

Penal Code Section 1405 was amended effective January 1, 2015 to allow for testing of DNA upon a showing that the testing will be relevant to identity rather than dispositive of identity. This brings California closer to compliance with Recommendation 25 that, in capital cases, forensic testing, including DNA testing, should be permitted where it has the scientific potential to produce new, noncumulative evidence relevant to the defendant’s assertion of actual innocence, even though the results may not completely exonerate the defendant. California Penal Code Section 1405 still does not meet the requirements of Illinois Commission Report Recommendation 25 in that it still limits the showing to relevance to “identity” rather than the broader criteria of actual innocence.

V. OBSERVATIONS AND CONCLUSIONS

The overall result of this empirical study of the law of California is to establish that practically nothing has changed to make the capital punishment system more

200 California Senate Bill 687 (2010-11 Session).
201 California Criminal Jury Instructions (CALCRIM) 336.
reliable in these past 14 years. None of the unmet Recommendations of the Illinois Commission have been met during that period of time. Circumstances have become more extreme in California. As of the writing of the 2003 Santa Clara Law Review article, there were approximately 620 condemned people on California’s death row, and, today, there are approximately 746 condemned people on California’s death row.

Furthermore, documentation of wrongful convictions and wrongful executions around the country have continued to be documented. Scholarship and judicial decisions have continued to be critical of the criminal justice system, particularly as it applies to capital cases. Illinois, itself, made some actual reforms and addressed some of the recommendations of the Illinois Commission Report during the fourteen years. California made no reforms. Illinois abolished its death penalty. California did not.

Therefore, the empirical evidence supports the conclusion that is that there is no interest in California in making the basic reforms to the criminal justice system that would provide some safeguards against the conviction of the innocent. The repeal of the death penalty seems to be the only logical remedy at this time. A repeal measure will be on the November 2016 ballot in California as Proposition 62. The opposition to the repeal has put their own proposition on the ballot, 66, but it does not propose any of the recommended reforms and instead offers to reduce safeguards and expedite executions. If the concerns about wrongful convictions and wrongful executions expressed by the Illinois Commission, the California Commission for the Fair Administration of Justice, and numerous scholars and jurists are to be considered seriously, a “yes” vote on Proposition 62 (and a “no” on 66) seems justified in light of the failure to do anything else over the last fourteen years.

---

203 Santa Clara article, supra, n.5, at 4 and sources cited in fn. 3.
204 California Department of Corrections and Rehabilitation, Condemned Inmate List, dated May 12, 2016, http://www.cdc.ca.gov/Capital_Punishment/docs/CondemnedInmateListSecure.pdf?pdf=Condemned-Inmates. To give a sense of the significance of that number of human beings, the list, giving essentially one line per person facing death, is 29 pages long.
VI. APPENDIX

The Illinois Recommendations Compared to the California Capital Punishment System Fourteen Year Later\textsuperscript{205}

Recommendation 1: NOT MET

After a suspect has been identified, the police should continue to pursue all reasonable lines of inquiry, whether these point towards or away from the suspect.

Recommendation 2: NOT MET

(a) The police must list on schedules all existing items of relevant evidence including exculpatory evidence, and their location.

(b) Recordkeeping obligations must be assigned to specific police officers or employees, who must certify their compliance in writing to the prosecutor.

(c) The police must give copies of the schedules to the prosecution.

(d) The police must give the prosecutor access to all investigatory materials in their possession.

Recommendation 3: NOT MET

In a death eligible case, representation by the public defender during a custodial interrogation should be authorized by the [state] legislature when a suspect requests the advice of counsel, and where there is a reasonable belief that the suspect is indigent. To the extent that there is some doubt about the indigency of the suspect, police should resolve the doubt in favor of allowing the suspect to have access to the public defender.

Recommendation 4: NOT MET

Custodial interrogations of a suspect in a homicide case occurring at a police facility should be videotaped. Videotaping should not include merely the statement made by the suspect after interrogation, but the entire interrogation process.

Recommendation 5: NOT MET

\textsuperscript{205} The Santa Clara Article, \textit{supra}, n.5., sets forth in detail how the Illinois Commission Report Recommendations compare to the California Capital Punishment System. No recommendations have been met in the last fourteen years under study in this article.
Any statements by a homicide suspect which are not recorded should be repeated to the suspect on tape, and his or her comments recorded.

Recommendation 6: NOT MET

There are circumstances in which videotaping may not be practical, and some uniform method of recording such interrogations, such as tape recording, should be established. Police investigators should carry tape recorders for use when interviewing suspects in homicide cases outside the station, and all such interviews should be audio taped.

Recommendation 7: NOT MET

The [state] eavesdropping act should be amended to permit police taping of statements without the suspects' knowledge or consent in order to enable the videotaping and audio taping of statements as recommended by the Commission. The amendment should apply only to homicide cases, where the suspect is aware that the person asking the question is a police officer.

Recommendation 8: NOT MET

The police should electronically record interviews conducted of significant witnesses in homicide cases where it is reasonably foreseeable that their testimony may be challenged at trial.

Recommendation 9: NOT MET

Police should be required to make a reasonable attempt to determine the suspect's mental capacity before interrogation, and if a suspect is determined to be mentally retarded, the police should be limited to asking nonleading questions and prohibited from implying they believe the suspect is guilty.

Recommendation 10: NOT MET

When practicable, police departments should insure that the person who conducts the lineup or photospread should not be aware of which member of the lineup or photo spread is the suspect.

Recommendation 11: NOT MET

(a) Eyewitnesses should be told explicitly that the suspected perpetrator might not be in the lineup or photospread, and there/ore they should not feel they must make an identification;

(b) Eyewitnesses should also be told that they should not assume that the person administering the lineup or photospread knows which person is the suspect in the case.

Recommendation 12: NOT MET
If the administrator of the lineup or photospread does not know who the suspect is, a sequential procedure should be used, so that the eyewitness views only one lineup member or photo at a time and makes a decision (that is the perpetrator or that is not the perpetrator) regarding each person before viewing another lineup member or photo.

Recommendation 13: NOT MET

Suspects should not stand out in the lineup or photo spread as being different from the distractors, based on the eyewitness' previous description of the perpetrator, or based on other factors that would draw attention to the suspect.

Recommendation 14: NOT MET

A clear written statement should be made of any statements made by the eyewitness at the time of the identification procedure as to his or her confidence that the identified person is or is not the actual culprit. This statement should be recorded prior to any feedback by law enforcement personnel.

Recommendation 15: NOT MET

When practicable, the police should videotape lineup procedures, including the witness' confidence statement.

Recommendation 16: NOT MET

All police who work on homicide cases should receive periodic training in the following areas, and experts on these subjects should be retained to conduct training and prepare manuals on these topics: (1) The risks of false testimony by in-custody informants ("Jailhouse snitches"). (2) The risks of false testimony by accomplice witnesses. (3) The dangers of tunnel vision or confirmatory bias. (4) The risks of wrongful convictions in homicide cases. (5) Police investigative and interrogation methods. (6) Police investigating and reporting of exculpatory evidence. (7) Forensic evidence. (8) The risks of false confessions.

Recommendation 17: NOT MET

Police academies, police agencies and the [state] Department of Corrections should include within their training curricula information on consular rights and the notification obligations to be followed during the arrest and detention.

Recommendation 18: NOT MET

The [state] Attorney General should remind all law enforcement agencies of their notification obligations under the Vienna Convention on Consular Relations and under- take regular reviews of the measures taken by state and local police to
ensure full compliance. This could include publication of a guide based on the United States State Department Manual.

Recommendation 19: NOT MET

The statute relating to the [state] Law Enforcement Training Standards Board should be amended to add police per jury (regardless of whether there is a criminal conviction) as a basis upon which the Board may revoke certification of a peace officer.

Recommendation 20: NOT MET

An independent state forensic laboratory should be created, operated by civilian personnel, with its own budget, separate from any police agency or supervision.

Recommendation 21: NOT MET

Adequate funding should be provided by the [state] to hire and train both entry level and supervisory level forensic scientists to support expansion of DNA testing and evaluation. Support should also be provided for additional up-to-date facilities for DNA testing. The state should be prepared to outsource by sending evidence to private companies for analysis when appropriate.

Recommendation 22: NOT MET

The Commission supports the [state supreme court rule] establishing minimum standards for DNA evidence.

Recommendation 23: NOT MET

The federal government and the [state] should provide adequate funding to enable the development of a comprehensive DNA database.

Recommendation 24: NOT MET

[State] Statutes should be amended to provide that in capital cases a defendant may apply to the court for an order to obtain a search of the DNA database to identify others who may be guilty of the crime.

Recommendation 25: NOT MET

In capital cases, forensic testing, including DNA testing pursuant to 725 ILCS 51116(3), should be permitted where it has the scientific potential to produce new, noncumulative evidence relevant to the defendant's assertion of actual innocence, even though the results may not completely exonerate the defendant.

Recommendation 26: MET WITH QUALIFICATIONS
The provisions governing the Capital Litigation Trust Fund should be construed broadly so as to provide a source of funding for forensic testing pursuant to 725 ILCS 5116(3) when the defendant faces the possibility of a capital sentence. For noncapital defendants, provisions should be made for payment of costs of forensic testing for indigents from sources other than the Capital Litigation Trust Fund.

Recommendation 27: NOT MET

The current list of 20 eligibility factors should be reduced to a smaller number.

Recommendation 28: NOT MET

There should be only five eligibility factors:

1. The murder of a police officer or firefighter killed in the performance of his/her official duties, or to prevent the performance of his/her official duties, or in retaliation for the performing of his/her official duties.

2. The murder of any person (inmate, staff, visitor, etc.), occurring at a correctional facility.

3. The murder of two or more persons as set forth in [current Illinois law].

4. The intentional murder of a person involving the infliction of torture. For the purposes of this section, torture means the intentional and depraved infliction of extreme physical pain for a prolonged period of time prior to the victim's death; depraved means the defendant relished the infliction of extreme pain upon the victim evidencing debasement or perversion or that the defendant evidenced a sense of pleasure in the infliction of extreme physical pain.

5. The murder by a person who is under investigation for or who has been charged with or has been convicted of a crime which would be a felony under [the] law, of anyone involved in the investigation, prosecution or defense of that crime, including, but not limited to, witnesses, jurors, judges, prosecutors and investigators.

Recommendation 29: NOT MET

The [state] attorney general and the [state's prosecutor association] should adopt recommendations as to the procedures [prosecutors] should follow in deciding whether or not to seek the death penalty, but these recommendations should not have the force of law, or be imposed by court or legislation.

Recommendation 30: NOT MET

The death penalty sentencing statute should be revised to include a mandatory review of death eligibility undertaken by a state-wide review committee. In the
Spec. Law Rept., SANTA BARBARA/VENTURA COLLEGES OF LAW 51

absence of legislative action to make this a mandatory scheme, the Governor should make a commitment to setting up a voluntary review process, supported by the presumption that the Governor will commute the death sentences of defendants when the prosecutor has not participated in the voluntary review process, unless the prosecutor can offer a compelling explanation, based on exceptional circumstances, for the failure to submit the case for review.

The state-wide review committee would be composed of five members, four of whom would be prosecutors. The committee would develop standards to implement the legislative intent of the General Assembly with respect to death eligible cases. Membership of the committee, its terms and scope of powers are set forth in the commentary below.

Recommendation 31: NOT MET

The Commission supports [Illinois] Supreme Court Rule 416(c) requiring that the state announce its intention to seek the death penalty, and the factors to be relied upon, as soon as practicable but in no event later than 120 days after arraignment.

Recommendation 32: NOT MET

The [state] supreme court should give consideration to encouraging the [state administrative office of the courts] to undertake a concerted effort to educate trial judges throughout the state in the parameters of the Capital Crimes Litigation Act and the funding sources available for defense of capital cases.

Recommendation 33: NOT MET

... The [state] supreme court should be encouraged to undertake more action as outlined in this report to insure the highest quality training and support are provided to any judge trying a capital case.

The Commission also supports the revised Committee Comments to new Supreme Court Rule 43, which contemplate that capital case training will occur prior to the time a judge hears a capital case. The Supreme court should be encouraged to consider going further and requiring that judges be trained before presiding over a capital case.

Recommendation 34: NOT MET

In light of the changes in Illinois Supreme Court rules governing the discovery process in capital cases, the Supreme Court should give consideration to ways the Court can insure that particularized training is provided to trial judges with respect to implementation of the new rules governing capital litigation, especially with respect to the management of the discovery process.

Recommendation 35: NOT MET
All judges who are trying capital cases should receive periodic training in the following areas and experts on these subjects be retained to conduct training and prepare training manuals on these topics: (1) The risks of false testimony by in-custody informants (jailhouse snitches); (2) The risks of false testimony by accomplice witnesses; (3) The dangers of tunnel vision or confirmatory bias; (4) The risks of wrongful convictions in homicide cases; (5) Police investigative and interrogation methods; (6) Police investigating and reporting of exculpatory evidence; (7) Forensic evidence; and (8) The risks of false confessions.

Recommendation 36: NOT MET

The Illinois Supreme Court and the Administrative Office of the Courts should consider development of and provide sufficient funding for state-wide materials to train judges in capital cases, and additional staff to provide research support.

Recommendation 37: NOT MET

The Illinois Supreme Court should consider ways in which information regarding relevant case law and other resources can be widely disseminated to those trying capital cases, through development of a digest of applicable law by the Supreme Court and wider publication of the outline of issues developed by the State Appellate Defender or the State Appellate Prosecutor and/or Attorney General.

Recommendation 38: NOT MET

The Illinois Supreme Court, or the chief judge of the various judicial districts throughout the state, should consider implementation of a process to certify judges who are qualified to hear capital cases either by virtue of experience or training. Trial court judges should be certified as qualified to hear capital cases based upon completion of specialized training and based upon their experience in hearing criminal cases. Only such certified judges should hear capital cases.

Recommendation 39: NOT MET

The [state} supreme court should consider appointment of a standing committee of trial judges and/or appellate justices familiar with capital case management to provide resources to trial judges throughout the state who are responsible for trying capital cases.

Recommendation 40: NOT MET

The Commission supports new Illinois Supreme Court Rule 416(d) regarding qualifications for counsel in capital cases.

Recommendation 41: NOT MET
The Commission supports new Illinois Supreme Court Rule 701(b) which imposes the requirement that those appearing as lead or co-counsel in a capital case be first admitted to the Capital Litigation Bar under Rule 714.

Recommendation 42: NOT MET

The Commission supports new Illinois Supreme Court Rule 714 which imposes requirements on the qualifications of attorneys handling capital cases.

Recommendation 43: NOT MET

The office of the State Appellate Defender should facilitate the dissemination of information with respect to defense counsel qualified under the proposed Supreme Court process.

Recommendation 44: NOT MET

The commission supports efforts to have training for prosecutors and defenders in capital litigation, and to have funding provided to insure that training programs continue to be of the highest quality.

Recommendation 45: NOT MET

All prosecutors and defense lawyers who are members of the Capital Trial Bar who are trying capital cases should receive periodic training in the following areas and experts on these subjects should be retained to conduct training and prepare manuals on these topics: (1) The risks of false testimony by in-custody informants ("jail-house snitches"); (2) The risks of false testimony by accomplice witnesses; (3) The dangers of tunnel vision or confirmatory bias; (4) The risks of wrongful convictions in homicide cases; (5) Police investigative and interrogation methods; (6) Police investigating and reporting of exculpatory evidence; (7) Forensic evidence; and (8) The risks of false confessions.

Recommendation 46: NOT MET

The Commission supports new Illinois Supreme Court rule 416(e) which permits discovery depositions in capital cases on leave of the court for good cause.

Recommendation 47: NOT MET

The Commission supports the provisions of the new Illinois Supreme Court rule 416(1) mandating case management conferences in capital cases.

The Illinois Supreme Court should consider adoption of a rule requiring a final case management conference in capital cases to insure that there has been compliance with the newly mandated rules, that discovery is complete and that the case is fully prepared for trial.

Recommendation 48: NOT MET
The Commission supports Illinois Supreme Court Rule 416(g), which requires that a certificate be filed by the state indicating that a conference has been held with all those persons who participated in the investigation or trial preparation of the case, and that all the information required to be disclosed has been disclosed.

Recommendation 49: NOT MET

The Illinois Supreme Court should adopt a rule defining "exculpatory evidence" in order to provide guidance to counsel in making appropriate disclosures. The commission recommends the following definition:

Exculpatory information includes, but may not be limited to, all information that is material and favorable to the defendant because it tends to: (1) Cast doubt on defendant's guilt as to any essential element in any count in the indictment or information; (2) Cast doubt on the admissibility of evidence that the state anticipates offering in its case-in-chief that might be subject to a motion to suppress or exclude; (3) Cast doubt on the credibility or accuracy of any evidence that the state anticipates offering in its case-in-chief) or (4) Diminish the degree of the defendant's culpability or mitigates the defendant's potential sentence.

Recommendation 50: NOT MET

Illinois law should require that any discussion with a witness or a representative of a witness concerning benefits, potential benefits or detriments conferred on a witness by any prosecutor, police official, corrections official or anyone else, should be reduced to writing, and should be disclosed to the defense in advance of trial.

Recommendation 51: NOT MET

Whenever the state introduces the testimony of an in-custody informant who has agreed to testify for the prosecution in a capital case to a statement allegedly made by the defendant, at either the guilt or sentencing phase, the state should promptly inform the defense as to the identification and background of the witness.

Recommendation 52: NOT MET

(a) Prior to trial, the trial judge shall hold an evidentiary hearing to determine the reliability and admissibility of the in-custody informant's testimony at either the guilt or sentencing phase;

(b) At the pre-trial evidentiary hearing, the trial judge shall use the following standards:

The prosecution bears the burden of proving by a preponderance of evidence that the witness' testimony is reliable. The trial judge may consider the following factors, as well as any other Factors bearing on the witness' credibility:
(1) the specific statements to which the witness will testify; (2) the time and place, and other circumstances of the alleged statements; (3) any deal or inducement made by the informant and the police or prosecutor in exchange for the witness' testimony; (4) the criminal history of the witness; (5) whether the witness has ever recanted his/her testimony; (6) other cases in which the witness testified to alleged confessions by others; (7) any other evidence that may attest to or diminish the credibility of the witness, including the presence or absence of any relationship between the accused and the witness.

(c) The state may file an interlocutory appeal from a ruling suppressing the testimony of an in-custody informant, pursuant to Illinois Supreme Court Rule 604.

Recommendation 53: NOT MET

In capital cases, courts should closely scrutinize any tactic that misleads the suspect as to the strength of the evidence against him/her, or the likelihood of his/her guilt, in order to determine whether this tactic would be likely to induce an involuntary or untrustworthy confession.

Recommendation 54: NOT MET

The commission makes no recommendation about whether or not plea negotiations should be restricted with respect to the death penalty.

Recommendation 55: CONSTITUTIONALLY REQUIRED

Expert testimony with respect to the problem associated with eyewitness testimony may be helpful in appropriate cases. Determinations as to whether such evidence may be admitted should be resolved by the trial judge on a case by case basis.

Recommendation 56: MET

Jury instructions with respect to eyewitness testimony should enumerate factors for the jury to consider, including the difficulty of making a cross-racial identification. The current version of [the instruction] is a step in the right direction, but should be improved.

The [model jury instructions] should also be amended to add a final sentence which states as follows: Eyewitness testimony should be carefully examined in light of other evidence in the case.

Recommendation 57: NOT MET

The [state committee on pattern criminal jury instructions] should consider a jury instruction providing special caution with respect to the reliability of the testimony of in-custody informants.
Recommendation 58: NOT MET

[Special jury instructions relating to an alleged statement of a defendant] should be supplemented . . . , to be given only when the defendant's statement is not recorded: . . . You should pay particular attention to whether or not the statement is recorded, and if it is, what method was used to record it. Generally, an electronic recording that contains the defendant's actual voice or a statement written by the defendant is more reliable than a non-recorded summary.

Recommendation 59: MET

Illinois courts should continue to reject the results of polygraph examination during the innocence/guilt phase of a capital case.

Recommendation 60: CONSTITUTIONALLY REQUIRED

The Commission supports the new amendments to [Illinois] Supreme Court Rule 411, which make the rules of discovery applicable to the sentencing phase of capital cases.

Recommendation 61: NOT MET

The mitigating factors considered by the jury in the death penalty sentencing scheme should be expanded to include the defendant's history of extreme emotional or physical abuse and that the defendant suffers from reduced mental capacity. [Expand the list of statutory factors to include: Defendant's background includes a history of extreme emotional or physical abuse; and (7) Defendant suffers from reduced mental capacity.]

Recommendation 62: NOT MET

The defendant should have the right to make a statement on his own behalf at [sic] during the aggravation/mitigation phase, without being subject to cross-examination.

Recommendation 63: CONSTITUTIONALLY REQUIRED

The jury should be instructed as to the alternative sentences that may be imposed in the event that the death penalty is not imposed.

Recommendation 64: MET

[The state courts} should continue to reject the results of polygraph examinations during the sentencing phase of capital cases.

Recommendation 65: MET

The statute which establishes the method by which the jury should arrive at its sentence should be amended to include language . . . to make it clear that the jury
should weigh factors in the case and reach its own independent conclusion about whether the death penalty should be imposed. The statute should be amended to read as follows: "If the jury determines unanimously, after weighing the factors in aggravation and mitigation, that death is the appropriate sentence . . . ."

Recommendation 66: NOT MET

After the jury renders its judgment with respect to the imposition of the death penalty, the trial judge should be required to indicate on the record whether he or she conurs in the result. In cases where the trial judge does not concur in the imposition of the death penalty, the defendant shall be sentenced to natural life as a mandatory alternative (assuming the adoption of a new death penalty scheme limited to five eligibility factors).

Recommendation 67: NOT MET

In any case approved for capital punishment under the new death penalty scheme with five eligibility factors, if the finder of fact determines that death is not the appropriate sentence then the mandatory alternative sentence would be natural life.

Recommendation 68: CONSTITUTIONALLY REQUIRED

[The state] should adopt a statute which prohibits the imposition of the death penalty for those defendants found to be mentally retarded. The best model to follow in terms of specific language is that found in the Tennessee statute.

Recommendation 69: NOT MET

[The state] should adopt a statute which provides:

A. The uncorroborated testimony of an in-custody informant witness concerning the confession or admission of the defendant may not be the sole basis for the imposition of a death penalty.

B. Convictions for murder based upon the testimony of a single eyewitness or accomplice, without any other corroboration, should not be death eligible under any circumstances.

Recommendation 70: NOT MET

In capital cases the [State] Supreme Court should consider on direct appeal (1) whether the sentence was imposed due to some arbitrary factor, (2) whether an independent weighing of the aggravating and mitigating circumstances indicates death was the proper sentence, and (3) whether the sentence of death was excessive or disproportionate to the penalty imposed in similar cases.

Recommendation 71: NOT MET
Rule 3.8 of the Illinois Supreme Court Rules of Professional Conduct [ABA Model Rule 3.9], Special Responsibilities of a Prosecutor, should be amended in paragraph (c) by the addition of the [un]italicized language: (c) A public prosecutor or other governmental lawyer in criminal litigation shall make timely disclosure to counsel for the defendant, or to the defendant if the defendant is not represented by a lawyer, of the existence of evidence, known to the prosecutor or other government lawyer, that tends to negate the guilt of the accused or mitigate the degree of the offense.

Recommendation 72: NOT MET

The Post-Conviction Hearing Act should be amended to provide that a petition for a post-conviction proceeding in a capital case should be filed within 6 months after the issuance of the mandate by the Supreme Court following affirmances of the direct appeal from the trial.

Recommendation 73: NOT MET

The Illinois Post-Conviction Hearing Act should be amended to provide that in capital cases, the trial court should convene the evidentiary hearing on the petition within one year of the date the petition is filed.

Recommendation 74: NOT MET

The Post-Conviction Hearing Act should be amended to provide that in capital cases, a proceeding may be initiated in cases in which there is newly discovered evidence which offers a substantial basis to believe that the defendant is actually innocent, and such proceedings should be available at any time following the defendant's conviction regardless of other provisions of the Act limiting the time within such proceedings can be initiated. In order to prevent frivolous petitions, the Act should provide that in proceedings asserting a claim of actual innocence, the court may make an initial determination with or without a hearing that the claim is frivolous.

Recommendation 75: NOT MET

[State] law should provide that after all appeals have been exhausted and the Attorney General applies for a final execution date for the defendant, a clemency petition may not be filed later than 30 days after the date that the [court] enters an order setting an execution date.

Recommendation 76: NOT MET
Leaders in both the executive and legislative branches should significantly improve the resources available to the criminal justice system in order to permit the meaningful implementation of reforms in capital cases.

Recommendation 77: NOT APPLICABLE

The Capital Crimes Litigation Act, which is the state statute containing the Capital Litigation Trust Fund and other provisions, should be reauthorized by the General Assembly.

Recommendation 78: NOT MET

The Commission supports the concept articulated in the statute governing the Capital Litigation Trust Fund, that adequate compensation be provided to trial counsel in capital cases for both time and expense, and encourages regular consideration of the hourly rates authorized under the statute to reflect the actual market rates of private attorneys.

Recommendation 79: NOT MET

The provisions of the Capital Litigation Trust Fund should be construed as broadly as possible to insure that public defenders, particularly those in rural parts of the state, can effectively use its provisions to secure additional counsel and reimbursement of all reasonable trial related expenses in capital cases.

Recommendation 80: NOT MET

The work of the State Appellate Defender's office in providing statewide trial support in capital cases should continue, and funds should be appropriated for this purpose.

Recommendation 81: NOT MET

The Commission supports the recommendations in the Report of the Task Force on Professional Practice in the Illinois Justice System to reduce the burden of student loans on those entering criminal justice careers and improve salary levels and pension contributions for those in the system in order to insure retention of qualified counsel.

Recommendation 82: NOT MET

Adequate funding should be provided by the [state] to all [state] police agencies to pay for the electronic recording equipment, personnel and facilities needed to conduct electronic recordings in homicide cases.

Recommendation 83: NOT MET
The Commission strongly urges consideration of ways to broaden the application of many of the recommendations made by the Commission to improve the criminal justice system as a whole.

Recommendation 84: NOT MET

Information should be collected at the trial level with respect to prosecutions of first degree murder cases, by trial judges, which would detail information that could prove valuable in assessing whether the death penalty is, in fact, being fairly applied. Data should be collected on a form which provides details about the trial, the background of the defendant, and the basis for the sentence imposed. The forms should be collected by the [state's administrative office of the courts] and the form from an individual case should not be a public record. Data collected from the forms should be public, and should be maintained in a public access database by the Criminal Justice Information Authority.

Recommendation 85: NOT MET

Judges should be reminded of their obligation under Canon 3 to report violations of the Rules of Professional Conduct by prosecutors and defense lawyers.

TOTALS:

<table>
<thead>
<tr>
<th>Category</th>
<th>Status</th>
</tr>
</thead>
<tbody>
<tr>
<td>NOT MET</td>
<td>75</td>
</tr>
<tr>
<td>MET</td>
<td>4</td>
</tr>
<tr>
<td>MET WITH QUALIFICATIONS</td>
<td>2</td>
</tr>
<tr>
<td>CONSTITUTIONALLY REQUIRED</td>
<td>3</td>
</tr>
<tr>
<td>NOT APPLICABLE</td>
<td>1</td>
</tr>
</tbody>
</table>

COMPLIANCE = 6 OF 81 = 7.4 PERCENT