

## COMPARISON OF THE ILLINOIS COMMISSION REPORT ON CAPITAL PUNISHMENT WITH THE CAPITAL PUNISHMENT SYSTEM IN CALIFORNIA

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### I. INTRODUCTION

On Saturday, January 11, 2003, Governor George H. Ryan took the historic step of commuting all death sentences of all prisoners on Illinois' death row to life imprisonment without the possibility of parole.<sup>1</sup> In his words, he did so because:

I must act.

Our capital system is haunted by the demon of error—error in determining guilt, and error in determining who among the guilty deserves to die.

Because of all of these reasons today I am commuting the sentences of all death row inmates.<sup>2</sup>

California has the largest death row population of any state in this country,<sup>3</sup> more than three and one half times lar-

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1. Governor George H. Ryan, Speech at the Northwestern University School of Law (Jan. 11, 2003) [hereinafter Ryan Speech], <http://www.law.northwestern.edu/depts/clinic/wrongful/RyanSpeech.htm> (last visited Sept. 18, 2003).

2. *Id.*

3. According to the official statistics of the California Department of Corrections, there were 622 condemned inmates as of April 9, 2003. *See* CALIFORNIA DEPARTMENT OF CORRECTIONS, CONDEMNED INMATE LIST SUMMARY, at <http://www.corr.ca.gov/communicationsoffice/capitalpunishment/PDF/2003-04Summary.pdf> (last visited Aug. 11, 2003) [hereinafter CONDEMNED INMATE SUMMARY]. There were 608 condemned males almost all of whom were housed at San Quentin State Prison and 14 condemned females at Chowchilla State

ger than that of Illinois when Governor Ryan acted.<sup>4</sup> California lawyers, judges, legislators, and voters need to ask: “How does the California death penalty system compare to that of Illinois?” Toward that end, this article will compare the system in California to the comprehensive study of the Illinois system conducted by Governor Ryan’s blue-ribbon Commission. The Commission’s report identified the shortcomings of the Illinois death penalty system,<sup>5</sup> and formed the basis for the Governor’s ultimate decision of commutation.<sup>6</sup>

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Prison. *Id.* Texas and Florida follow California with the next largest death row populations of 453 and 380, respectively. *See* NAACP LEGAL DEFENSE AND EDUCATION FUND, DEATH ROW U.S.A. (Winter 2003) [hereinafter NAACP, DEATH ROW U.S.A.].

4. Governor Ryan commuted the sentences of 167 condemned people, 164 to life without the possibility of parole, and 3 others to conform to the sentences of their co-defendants. *See* Jeff Flock, “Blanket Commutation” Empties Illinois Death Row, *at* <http://www.cnn.com/2003/LAW/01/11/illinois.death.row/index.html> (last visited Oct. 5, 2003).

5. *See* REPORT OF THE COMMISSION ON CAPITAL PUNISHMENT, GOVERNOR’S COMMISSION ON CAPITAL PUNISHMENT (Apr. 15, 2002), [http://www.idoc.state.il.us/ccp/ccp/reports/commission\\_report/index.html](http://www.idoc.state.il.us/ccp/ccp/reports/commission_report/index.html) (last visited Aug. 12, 2003) [hereinafter ILLINOIS COMMISSION REPORT].

6. Other states, prompted in part by Governor Ryan’s initial moratorium, have undertaken studies of their death penalty systems. None, so far, has produced a report 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. *See* THE CONNECTICUT COMMISSION ON THE DEATH PENALTY, STUDY PURSUANT TO PUBLIC ACT NO. 01-151 OF THE IMPOSITION OF THE DEATH PENALTY IN CONNECTICUT (Jan. 8, 2003), [http://www.opm.state.ct.us/pd1/CDP/DCP\\_Final\\_Report-Jan2003.doc](http://www.opm.state.ct.us/pd1/CDP/DCP_Final_Report-Jan2003.doc). The Commission was unfunded and was limited to fourteen questions posed by the legislature. *See id.* at 4-5, Appendix A. Nevertheless, the Connecticut Commission came to the same conclusions as the Illinois Commission on several issues. *See, e.g., id.* at 35 (recommending that preliminary decisions to seek the death penalty be reviewed by a statewide committee comprised of State’s Attorneys, similar to Illinois recommendation 30), 56-62 (recommending changes to police procedures to ensure “best practices” in criminal investigations, similar to Illinois recommendations 1 through 19).

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), <http://www.leg.state.nv.us/lcb/research/03InterimReports/Bulletin03-05.pdf>. (eliminating “great risk of death to more than one person” as an aggravating circumstance).

Arizona created a Capital Case Commission, which issued a report critical of the death penalty process in that state. OFFICE OF THE ATTORNEY GENERAL OF

## II. THE ILLINOIS COMMISSION REPORT ON CAPITAL PUNISHMENT

Illinois Governor George H. Ryan declared a moratorium on executions in his state on January 31, 2000.<sup>7</sup> On March 4, 2000, he appointed a special Governor's Commission to study how the death penalty system in Illinois could be reformed.<sup>8</sup> The Governor took this dramatic action because thirteen people who had been condemned to Illinois' Death Row were subsequently determined to be innocent.<sup>9</sup>

Nevertheless, the Governor made clear in his instructions to the Commission that it was to study how to reform the death penalty system, not to debate whether or not the death penalty should be abolished.<sup>10</sup> The Governor's Executive Order forming the Commission and setting forth its mission stated:

The Commission, upon concluding its examination and analysis of the capital punishment process, shall submit to the Governor a written report detailing its findings and providing comprehensive advice and recommendations to the Governor that will further ensure the administration of capital punishment in the State of Illinois will be fair and accurate.<sup>11</sup>

Governor Ryan, a Republican, selected members from across the political spectrum, all of whom were familiar with

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THE STATE OF ARIZONA, CAPITAL CASE COMMISSION FINAL REPORT, 14 (Dec. 31, 2002), <http://www.attorneygeneral.state.az.us/CCC/Capital%20Case%20Commission%20-%20Final%20Report.pdf>. Their report, released December 21, 2002, included a number of recommendations that were in-line with those made by the Illinois Commission. *See, e.g., id.* at 15 (recommending audio or video recording of suspect interrogations, similar to Illinois recommendation 4), 17-18 (recommending minimum competency standards for capital defense counsel, similar to Illinois recommendations 40 and 42).

7. *See* Press Release, Governor Ryan Declares Moratorium on Execution, Will Appoint Commission to Review Capital Punishment System (Jan. 31, 2000) <http://www.state.il.us/gov/press/00/Jan/morat.htm> (last visited Feb. 13, 2003) [hereinafter Ryan Press Release].

8. *See* Exec. Order No. 424 Ill. Reg. 7439 (Mar. 4, 2000), *available at* 2000 WL 635067.

9. *See* Ryan Press Release, *supra* note 7. However, by the time Governor Ryan' commuted the sentences of the remaining condemned inmates, seventeen people had been exonerated. *See* Ryan Speech, *supra* note 1.

10. *See* Ryan Press Release, *supra* note 7.

11. Exec. Order No. 424, *supra* note 8.

Illinois' death penalty system.<sup>12</sup>

On April 15, 2002, after two years of study, the Illinois Governor's Commission issued its Report.<sup>13</sup> The Report made eighty-five specific recommendations for corrections to the Illinois death penalty system,<sup>14</sup> backed by 207 pages of analysis and appended materials.<sup>15</sup> Although discussion of the death penalty's abolition was not within the mandate of the Commission, after reporting on the various reform recommendations, the Commissioners stated: "The Commission was unanimous in the belief that no system, given human nature and frailties, could ever be devised or constructed that would work perfectly and guarantee absolutely that no innocent person is ever again sentenced to death."<sup>16</sup>

### III. KNOWN DEFICIENCIES IN CALIFORNIA'S CAPITAL SYSTEM

The author maintains that at one time California was perceived to be at the forefront of modern jurisprudence. It

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12. Former federal prosecutor and First Assistant Illinois Attorney General, Judge Frank McGarr served as the Commission's Chairman. ILLINOIS COMMISSION REPORT, *supra* note 5, at 1. Judge McGarr spent eighteen years on the federal bench and served as Chief Judge of the Federal District Court for the Northern District of Illinois between 1981 and 1986. *Id.* A former member of the Illinois General Assembly and the United States Congress, Senator Paul Simon served as Co-Chair. *Id.* Since he retired from the United States Senate in 1997, Senator Simon has been a professor at Southern Illinois University and Director of its Public Policy Institute. *Id.* Thomas P. Sullivan also served as Co-Chair. Formerly a United States Attorney for the Northern District of Illinois from 1977 to 1981, Mr. Sullivan is now in private practice at Jenner & Block. *Id.* The Commission included six former prosecutors: Judge Frank McGarr (Chairman), Thomas P. Sullivan (Co-Chair), Former Deputy Governor Mathew R. Bettenhausen (Member and Executive Director), William J. Martin, Thomas Needham, and Scott Turow. *Id.* The Commission also included four current or former criminal defense attorneys: Kathryn Dobrinic, Rita Fry, Theodore Gottfried, and Andrea Zopp. *Id.* The Commission also included two current or former judges: Judge Frank McGarr (Chairman) and Judge William H. Webster. *Id.* The remainder of the committee included Senator Paul Simon (Co-Chair and former member of the Illinois General Assembly and the United States Congress), Mike Waller (the elected State's Attorney of Lake County, Illinois), Donald Hubert (former President of the Chicago Bar Association), and Roberto Ramirez (founder of the Jesús Guadalupe Foundation to financially assist Latino students in pursuit of higher education). *Id.* Refer to the "Commission Members" section of the Illinois Commission Report for more information. *Commission Members*, ILLINOIS COMMISSION ON CAPITAL PUNISHMENT, at [http://www.idoc.state.il.us/ccp/ccp/member\\_info.html](http://www.idoc.state.il.us/ccp/ccp/member_info.html) (last visited Aug. 1, 2003).

13. ILLINOIS COMMISSION REPORT, *supra* note 5, at 1.

14. *See id.*

15. *Id.*

16. *Id.* at 207.

has fallen far from that status, particularly with regard to criminal justice issues and specifically with regard to the death penalty. The Columbia University Liebman study revealed that California has the largest death row population of any state in the nation.<sup>17</sup> People sentenced to death in California have to wait four to six years before counsel is appointed to represent them.<sup>18</sup> In all, condemned people in California have to wait almost ten years before their direct appeals and post conviction petitions are heard by the California Supreme Court.<sup>19</sup> Even after that long wait, the court affirms almost all convictions, no matter what issues are raised.<sup>20</sup>

*A. Problems Identified by San Jose Mercury News Investigative Reports*

Extensive investigative reporting by the *San Jose Mercury News* has also unearthed disturbing evidence that the California death penalty system is not functioning.<sup>21</sup> Lead re-

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17. Liebman et al., *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), at <http://justice.policy.net/cjreform/dpstudy/liebman2.pdf> (last visited Aug. 11, 2003).

18. Michael Millman, Director of the California Appellate Project, estimated the delay at four to five years. Interview with Michael Millman, Director, California Appellate Project, in Monterey, Cal. (Mar. 1, 2003)[hereinafter Millman Interview]. The California District Attorneys Association (CDA) and the Criminal Justice Legal Foundation issued a report stating that the delay in appointment of counsel for condemned inmates in California is currently five to six years. CALIFORNIA DISTRICT ATTORNEYS ASSOCIATION AND CRIMINAL JUSTICE LEGAL FOUNDATION, PROSECUTORS PERSPECTIVE ON CALIFORNIA DEATH PENALTY, at 18 (2003), <http://www.cdada.org/whitepapers/DPPaper.pdf> (last visited Aug. 11, 2003) [hereinafter CDA PROSECUTOR'S WHITE PAPER].

19. See Liebman et al., *supra* note 17, at Appendix A-7.

20. See *id.* Since the voters removed Chief Justice Rose Bird and two other Justices in 1986, the California Supreme Court has been even more reluctant to reverse death sentences. See Sam Kamin, *Harmless Error and the Rights/Remedies Split*, 88 Va. L.Rev. 1, 62-64 (2002). More recent figures show a greater disparity in recent years between the low reversal rate in California state court and the high reversal rate of California cases in federal court. See Howard Mintz, *State, U.S. Courts at Odds on Sentences: Different Standards Lead to Reversals*, SAN JOSE MERCURY NEWS, Apr. 15, 2002, [http://www.bayarea.com/mld/mercurynews/news/special\\_packages/3067231.htm](http://www.bayarea.com/mld/mercurynews/news/special_packages/3067231.htm) (last visited Aug. 11, 2003) [hereinafter Mintz, *Different Standards*].

21. See Howard Mintz, *Death Sentence Reversals Cast Doubt on System: Courtroom Mistakes Put Executions on Hold*, SAN JOSE MERCURY NEWS, Apr. 14, 2002, [http://www.bayarea.com/mld/mercurynews/news/special\\_packages/3062323.htm](http://www.bayarea.com/mld/mercurynews/news/special_packages/3062323.htm) (last visited Aug. 11, 2003) [hereinafter Mintz, *Courtroom Mistakes*]; see also

porter Howard Mintz incorporated some of the research of the Liebman Study and further corroborated it with case studies from California. "The *Mercury News* study examined seventy-two California cases reversed by state and federal courts since 1987 and 150 appeals pending in the federal courts."<sup>22</sup> It found that even though California spends more money on capital cases than other states, its convictions are reversed because of problems similar to those in other states that spend less money, such as Alabama or Texas. These problems include incompetent lawyers, prosecutorial misconduct, and judicial errors.<sup>23</sup>

The *Mercury News* study found no minimum statewide standards for the qualifications of defense lawyers appointed to death penalty trials.<sup>24</sup> According to the study, the main issue on appeal is the penalty, as opposed to guilt or innocence. Two-thirds of reversals are reversals of the penalty phase; and fewer than one-third of those whose sentences were reversed on appeal have received the death penalty on remand.<sup>25</sup> The study also found that California conflicts with the federal courts more than any other state. The California Supreme Court's reversal rate is 10%, the lowest in the country, while the federal courts have reversed 62% of the death sentences affirmed by the California Supreme Court, the highest rate nationally.<sup>26</sup> The combined reversal rate for California cases, however, is roughly in line with the national av-

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Mintz, *Different Standards*, *supra* note 20; Howard Mintz, *Under Fire, Court Eases Limits on Presenting New Evidence*, SAN JOSE MERCURY NEWS, May 2, 2002,

[http://www.bayarea.com/mld/mercurynews/news/special\\_packages/3184491.htm](http://www.bayarea.com/mld/mercurynews/news/special_packages/3184491.htm) (last visited Aug. 11, 2003) [hereinafter Mintz, *Under Fire*].

22. Mintz, *Courtroom Mistakes*, *supra* note 21.

23. *Id.*

24. California has enacted minimum standards for the appointment of counsel in capital cases on appeal under California Rule of Court 76.6 (effective Feb. 27, 1998). Condemned people in California must wait nearly ten years before their direct appeals and post conviction petitions are heard by the California Supreme Court, however. *See* note 18, *supra*. Therefore, few if any condemned people on California's death row are represented by counsel appointed under this rule. Similarly, California's minimum standards for the appointment of trial counsel in capital cases under California Rule of Court 4.117 became effective on January 1, 2003. Because capital trials typically take between one and two years to complete, it is unlikely that any of the death row residents were represented at trial by counsel appointed under this new rule.

25. *See* Howard Mintz, *Courtroom Mistakes*, *supra* note 21.

26. *See id.*

erage found in a Columbia University study performed by James S. Liebman and colleagues.<sup>27</sup>

*B. California's Procedures Compare Unfavorably with Those of Other States*

In addition, California's death penalty procedures compare unfavorably with the procedures of other states. In part, this is because the system introduced in 1977<sup>28</sup> and re-introduced in 1978<sup>29</sup> was not well thought out. Since its enactment it has been amended repeatedly, creating a patchwork of provisions rather than a coherent system.<sup>30</sup> Whatever the reasons, most other states that impose the death penalty have checks and balances and procedural safeguards not present in California.<sup>31</sup> Some of these deficiencies may also violate the Federal Constitution, and they should give Californians pause to think.<sup>32</sup>

*1. California Law Fails to Narrow the Pool of Death Eligible Defendants*

California's death penalty statute does not meaningfully narrow the pool of people convicted of murder to a smaller group eligible for the death penalty.<sup>33</sup> As in all states that have the death penalty, the death penalty is actually imposed on a small fraction of those who are death eligible.<sup>34</sup> As a matter of constitutional law, the selection of those who are to

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27. See Liebman et al., *supra* note 17, at Appendix A-15.

28. See CAL. PENAL CODE §§ 190-190.4 (West 1977), *repealed by* PROPOSITION 7 (Nov. 7, 1978).

29. Known as the Briggs Initiative on the November 7, 1978 general election ballot, Proposition 7 repealed and replaced California Penal Code Sections 190, 190.1, 190.2, 190.3, and 190.4, and repealed Penal Code Section 190.26.

30. See Steven F. Shatz & Nina Rivkind, *The California Death Penalty Scheme: Requiem for Furman?*, 72 N.Y.U. L. REV. 1283, 1314-17 (1997).

31. *Id.* at 1316-18.

32. Examples include (1) the failure to narrow the categories of death eligible murder cases as set forth below, *see infra* text accompanying notes 33-40; (2) the failure to have meaningful narrowing factors in aggravation and mitigation, *see* text accompanying notes 41-48, *infra*; (3) the failure to require proof beyond a reasonable doubt to establish aggravating factors, *see infra* text accompanying notes 50-57; and (4) the failure to permit inter-case proportionality review, *see infra* text accompanying notes 59-60.

33. See Shatz & Rivkind, *supra* note 30, at 1283.

34. A meticulous study of California murder cases showed that less than one in eight (11.4%) of people convicted of death eligible murders receives a death judgment. See *id.* at 1332.

receive the death penalty cannot be capricious; instead, a rational narrowing process is required.<sup>35</sup> Purportedly, California narrows the field of death eligible convicts by requiring a finding of “special circumstances” in addition to simple guilt.<sup>36</sup> Those special circumstances are so numerous and so broad, however, that they encompass nearly every first degree murder.<sup>37</sup> There are twenty-five special circumstances under the

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35. The Supreme Court of the United States, in *Furman v. Georgia*, 408 U.S. 238 (1972), declared the then existing death penalty schemes unconstitutional under the Federal Constitution on the grounds that death was being imposed arbitrarily. *See id.* at 240. The Court has described this process as narrowing. *See, e.g.*, *Sawyer v. Whitley*, 505 U.S. 333, 341-42 (1992). Before the United States Supreme Court acted in *Furman*, the California Supreme Court had already found the California death penalty system constitutionally flawed. *See People v. Anderson*, 493 P.2d 880, 899 (Cal. 1972). Chief Justice Wright concluded that

[C]apital punishment is impermissibly cruel. It degrades and dehumanizes all who participate in its processes. It is unnecessary to any legitimate goal of the state and is incompatible with the dignity of man and the judicial process. Our conclusion that the death penalty may no longer be exacted in California consistently with article I, section 6, of our Constitution is not grounded in sympathy for those who would commit crimes of violence, but in concern for the society that diminishes itself whenever it takes the life of one of its members.

*Id.* The Chief Justice then went on to quote Lord Chancellor Gardiner of the House of Lords, debating abolition of capital punishment in England:

[W]hen we abolished the punishment for treason that you should be hanged, and then cut down while still alive, and then disembowelled while still alive, and then quartered, we did not abolish that punishment because we sympathized with traitors, but because we took the view that it was a punishment no longer consistent with our self respect.”

*Id.* (quoting 268 Hansard, Parliamentary Debates (5th Series) (Lords, 43d Parl., First Sess., 1964-1965) (1965) p. 703).

36. *See* CAL. PENAL CODE §190.2-190.3 (West 2003).

37. California’s broad construction of the “felony murder,” “lying in wait,” and other enumerated special circumstances means that more than 84% of convicted first degree murderers are statutorily death eligible under the California statutory scheme. *See* Shatz & Rivkind, 72 NYU L. REV. 1283, 1332 (1997) (“When juvenile first degree murderers are excluded from the calculation, the result is that more than 84% of convicted first degree murderers are statutorily death-eligible under the present California Scheme.”). Further in 2000, Proposition 18 changed the elements of the “lying in wait” special circumstance from one committed “while lying-in-wait” to one committed “by means of lying-in-wait,” the same standard required for non-capital first degree murder. Cal. Penal Code §190.2(15) (West 2003); California Secretary of State, *Murder: Special Circumstances. Legislative Initiative Amendment. Analysis by Legislative Analyst*, available at <http://primary2000.ss.ca.gov/VoterGuide/Propositions/18analysis.htm> (last accessed Oct. 5, 2003) (describing the changes made by the Proposition to California Penal Code Section 190.2). This change should render the statute unconstitutional, because there is no longer any meaningful way to distinguish



current California statutes, many with subsections, rendering over thirty-six actual circumstances in which capital punishment may be sought.<sup>38</sup>

One scholarly article has identified seven restricted, theoretically possible categories of first degree murder that would not be capital crimes under the California statute.<sup>39</sup> These seven restricted categories of non-capital murder stand in contrast to the twenty-five special circumstances making cases death eligible. Given that some of the narrowing special circumstances are so broad, it can hardly be claimed that they fulfill their constitutionally mandated job of narrowing at all. The seven exceptions are so restricted that the process is turned on its head: rather than having almost all murders ineligible with limited exceptions, almost all murders are death eligible with limited exceptions.<sup>40</sup>

In the second phase of the narrowing process, the jury considers whether the aggravating factors outweigh the mitigating factors.<sup>41</sup> One aggravating factor, the circumstances of the crime,<sup>42</sup> has been interpreted so broadly that prosecutors

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tutional, because there is no longer any meaningful way to distinguish between capital and non-capital murder committed by means of lying-in-wait. Furthermore, since "lying-in-wait" requires virtually no "lying" or "waiting," nearly any intentional homicide can become "death-eligible" first degree murder.

38. California Penal Code section 190.2 has twenty-two subdivisions setting forth special circumstances. CAL. PENAL CODE § 190.2 (West 2003). In addition, special circumstances are found in Military and Veterans Code section 1627(a) and in Penal Code sections 37, 128, 219, and 4500, pursuant to Penal Code section 190.3. CAL. MIL. & VET. CODE § 1627(a) (West 2003); CAL. PENAL CODE §§ 37, 128, 219, 4500 (West 2003). This figure does not include the "heinous, atrocious, or cruel" special circumstance declared invalid in *People v. Superior Court*, 647 P.2d. 76 (1982); accord *Maynard v. Cartwright* 486 U.S. 356 (1988). California Penal Code section 219 is also listed in section 190.2(17)(I) as a felony special circumstance in conjunction with a conviction for first degree murder. CAL. PENAL CODE § 190.2(17)(I) (West 2003). Therefore, twenty-one special circumstances remain under section 190.2, and four additional circumstances remaining under section 190.3, totaling twenty-five. See *id.* However, if the separate subdivisions of section 190.2(17) are counted, there are thirty-six special circumstances. If all of the qualifying felonies are counted, there would be thirty-nine total. Conservatively, California has twenty-five special circumstances, and over thirty-six if subsections are counted.

39. See Shatz & Rivkind, *supra* note 30, at 1324-26.

40. See *Tuilaepa v. California*, 512 U.S. 967, 972 (1994); *Zant v. Stephens*, 462 U.S. 862, 875 (1983); *Furman v. Georgia*, 408 U.S. 238 (1972).

41. See CAL. PENAL CODE § 190.3 (West 2003).

42. See *id.* § 190.3(a). For portions of the analysis in the text associated with notes 43-48, and the notes themselves, the author is indebted to the work of the California Appellate Project and draft briefing collected and prepared by

can argue practically any case warrants the death penalty. The California Supreme Court has never interpreted this factor in a way that would make it a narrowing circumstance. To the contrary, the court has approved the use of this factor to allow the prosecution to argue that the defendant should get the death penalty on the grounds that the defendant had a "hatred of religion,"<sup>43</sup> or because three weeks after the crime the defendant sought to conceal evidence,<sup>44</sup> threatened witnesses after his arrest,<sup>45</sup> or disposed of the victim's body in a manner that precluded its recovery.<sup>46</sup>

In actual practice, prosecutors throughout California have argued that the jury could weigh in aggravation almost every conceivable circumstance of the crime, even those that, from case to case, are absolutely opposite to each other.<sup>47</sup> For instance, prosecutors have argued that cases were aggravated and death verdicts should be returned because the victim was killed (1) in the middle of the night, (2) late at night, (3) early in the morning, or (4) in the middle of the day.<sup>48</sup> These and countless other examples demonstrate that no rational narrowing process exists. Therefore, courts impose death sentences based on the unfettered discretion of prosecutors and jurors.

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that office. These arguments have been included in various briefs filed in the California Supreme Court including briefs filed by the author. *See, e.g.*, Appellant's Opening Brief in *People v. Turner* (S009038) (brief on file with the California Supreme Court); Appellant's Opening Brief in *People v. Lewis* (S020670) (brief on file with the California Supreme Court). As adapted and expanded here, the author accepts responsibility for any deficiencies.

43. *See* *People v. Nicolaus*, 817 P.2d 893, 908 (Cal. 1991).

44. *See* *People v. Walker*, 765 P.2d 70, 90 n.10 (Cal. 1988).

45. *See* *People v. Hardy*, 82 P.2d 781, 899 (Cal. 1992).

46. *See* *People v. Bittaker*, 774 P.2d 659, 697 n.35 (Cal. 1989).

47. The California Appellate Project assembled a collection of these arguments for inclusion in their amicus brief filed in *Tuilaepa v. California*, 512 U.S. 967, 972 (1994). The anomalous results are summarized in Appellant's Opening Brief in *People v. Turner* (S009038) (brief on file with the California Supreme Court).

48. *See, e.g.*, *People v. Fauber* (No. S005868, RT 5777) (early morning killings); *People v. Bean* (No. S004387 RT 4715) (middle of the night killings); *People v. Avena* (No. S004422 RT 2603-04) (late-night killings); *People v. Lucero* (No. S012568RT 4125-26) (middle of the day killing). All briefs are on file with the California Supreme Court.

2. *California Lacks Important Procedural Safeguards*

Furthermore, California does not have many of the safeguards common to death penalty sentencing schemes in other states that guard against the arbitrary imposition of death. In California, juries do not have to make written findings on the basis for their death verdict.<sup>49</sup> Nor do they have to decide unanimously upon which aggravating circumstances they are relying.<sup>50</sup> The standard of proof beyond a reasonable doubt is not required for the proof of aggravating circumstances, nor is it required for the jury to find that the aggravating circumstances outweigh the mitigating circumstances. The jury is not even required to find beyond a reasonable doubt that death is the appropriate penalty.<sup>51</sup> In fact, except as to the existence of other criminal activity and prior convictions, juries are not instructed on any burden of proof at all.<sup>52</sup>

Twenty-seven states require that factors relied on to impose death in a penalty phase must be proven beyond a reasonable doubt by the prosecution, and three additional states have related provisions.<sup>53</sup> Only California and Florida fail to

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49. See CAL. PENAL CODE §§ 190-191 (West 2003); see also THE COMMITTEE ON STANDARD JURY INSTRUCTIONS, CRIMINAL, OF THE SUPERIOR COURT OF LOS ANGELES COUNTY, CAL., CAL. JURY INSTRUCTIONS, CRIMINAL, 8.88 (West 2003) [hereinafter CALJIC].

50. See CAL. PENAL CODE § 190.3 (West 2003); CALJIC, *supra* note 49, at 8.88.

51. CALJIC, *supra* note 49, at 8.88, in relevant part, instructs the jury:

In weighing of various [aggravating and mitigating] circumstances you determine under the relevant evidence which penalty is justified and appropriate considering the totality of the aggravating circumstances with the totality of the mitigating circumstances. To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without the possibility of parole.

*Id.*

52. See *id.* at 8.86; see also *People v. Robertson*, 655 P.2d 279, 298-300 (Cal. 1982).

53. See ALASKA STAT. § 12.55-165 (Michie 1975); ARK. CODE ANN. § 5-4-603 (Michie 1987); COLO. REV. STAT. ANN. § 16-11-103(d) (repealed 2002); DEL. CODE ANN. tit. 11, § 4209(d)(1)(a) (1992); GA. CODE ANN. § 17-10-30(c) (Harrison 1990); IDAHO CODE § 19-2515(h) (Michie 1993); 720 ILL. COMP. STAT. ANN. 5/9-1(f) (West 1992); IND. CODE ANN. § 35-50-2-9(a),(e) (West 1992); KY. REV. STAT. ANN. § 532.025(3) (Michie 1992); LA. CODE CRIM. PROC. ANN. art. 905.3 (West 1984); MD. ANN. CODE art. 27, § 413(d), (f), (g) (1957); MISS. CODE ANN. § 99-19-103 (1993); MO. ANN. STAT. § 565.032 (West 2002); MONT. LAWS 154 (2003); NEV. REV. STAT. ANN. § 175.554(3) (Michie 1992); N.H. REV. STAT. ANN. § 630:5

address the matter statutorily.<sup>54</sup>

Three states require that the jury must base any death sentence on a finding beyond a reasonable doubt that death is the appropriate punishment.<sup>55</sup> The supreme court of a fourth state, Utah, reversed a death judgment because that judgment was based on a standard of proof that was less than proof beyond a reasonable doubt.<sup>56</sup> In contrast, California does not require that a reasonable doubt standard be used during any part of the penalty phase, except as to proof of prior criminality relied upon as an aggravating circumstance.<sup>57</sup> Even in that context, the required finding need not be unanimous.<sup>58</sup>

Unlike other states, California has no requirement of proportionality review whereby the trial and appellate courts can compare the nature of the offense and offender to unrelated cases or to the cases of co-defendants.<sup>59</sup> In fact, proportionality review is actually prohibited in California.<sup>60</sup> Therefore, the courts have no means to review individual cases on the basis that individual defendants are being treated in a disparate fashion, though non-capital defendants have that right of review.

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(2002); N.M. STAT. ANN. § 31-20A-3 (Michie 1990); OHIO REV. CODE ANN. § 2929.04 (Anderson 1993); OKLA. STAT. ANN. tit. 21, § 701.11 (West 1993); 42 PA. CONS. STAT. ANN. § 9711(c)(1)(iii) (West 1982); S.C. CODE ANN. § 16-3-20(A), (C) (Law. Co-op 1992); S.D. CODIFIED LAWS § 23A-27A-5 (Michie 1988); TENN. CODE ANN. § 39-13-204(f) (1991); TEX. CRIM. PROC. CODE ANN. § 37.071(c) (Vernon 1993); VA. CODE ANN. § 19.2-264.4(C) (Michie 1990); WYO. STAT. ANN. § 6-2-102(d)(i)(A), (e)(i) (Michie 1992); *see also* State v. Stewart, 250 N.W.2d 849, 863 (Neb. 1977); State v. Simants, 250 N.W.2d 881, 888-90 (Neb. 1977); State v. Pierre, 572 P.2d 1338-48 (Ut. 1977).

54. *See* FLA. STAT. ANN. §§ 921.141-921.142 (West 2003).

55. *See* ARK. CODE ANN. § 5-4-603(a)(3) (Michie 1991); WASH. REV. CODE ANN. § 10.95.060 (West 1990); *see also* State v. Goodman, 257 S.E.2d 569, 577 (N.C. 1979).

56. *See* State v. Wood, 648 P.2d 71, 83-84 (Utah 1982).

57. *See* CAL. PENAL CODE § 190.3 (West 2003); CALJIC, *supra* note 49, at 8.86.

58. *See* CAL. PENAL CODE § 190-191 (West 2003); CALJIC, *supra* note 49, at 8.84-8.88.

59. According to the Illinois Commission study, nineteen states provide for proportionality review: Alabama, Delaware, Georgia, Idaho, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, North Carolina, Pennsylvania, South Carolina, South Dakota, Tennessee, and Washington. ILLINOIS COMMISSION REPORT, *supra* note 5, at 166.

60. *See* Pulley v. Harris, 465 U.S. 37 (1984).

*C. Racial Disparities Cast Doubt upon California's Death Penalty System*

Serious racial disparities permeate California's death penalty system.<sup>61</sup> Recent studies in Pennsylvania and Maryland confirm significant racial bias in the death penalty sentencing systems of those states.<sup>62</sup> The Pennsylvania Supreme Court Committee found that, "[e]mpirical studies conducted in Pennsylvania to date demonstrate that, at least in some counties, race plays a major, if not overwhelming, role in the imposition of the death penalty."<sup>63</sup> The Maryland study concluded that, "[o]ffenders who kill white victims, especially if the offender is black, are significantly and substantially more likely to be charged with a capital crime."<sup>64</sup> Although Californians may think their system is not subject to the same criticism, the preliminary studies show that it is racially biased in exactly the same way.<sup>65</sup> More significantly, since California has no proportionality review either in the trial courts<sup>66</sup> or the state supreme court,<sup>67</sup> no mechanism exists to bring the issue of racial bias before the courts of this state.

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61. *See id.* Since the death penalty was re-instituted in California in 1977, only twelve white defendants were executed for killing blacks while 180 blacks were executed for killing whites. *See* NAACP LEGAL DEFENSE AND EDUCATION FUND, DEATH ROW U.S.A. (Winter 2003); *see also* Glenn L. Pierce & Michael L. Radelet, *Race, Region and Death Sentencing in Illinois*, 81 OR. L. REV. 39 (2002).

62. *See* FINAL REPORT OF THE PENNSYLVANIA SUPREME COURT COMMITTEE ON RACIAL AND GENDER BIAS IN THE JUSTICE SYSTEM 218 (2003), <http://www.courts.state.pa.us/Index/Supreme/BiasCmte/FinalReport.pdf> [hereinafter Pennsylvania Report]; PATERNOSTER ET AL., AN EMPIRICAL ANALYSIS OF MARYLAND'S DEATH SENTENCING SYSTEM WITH RESPECT TO THE INFLUENCE OF RACE AND LEGAL JURISDICTION, FINAL REPORT 36 (2003), <http://justice.policy.net/relatives/21200.pdf>. [hereinafter Maryland Report].

63. Pennsylvania Report, *supra* note 62, at 218.

64. Maryland Report, *supra* note 62, at 36.

65. A noted sociologist and author of studies on race and the death penalty in other states, Michael Radelet states that preliminary studies show a significant disparity between the race of victim and the race of defendant regarding those who get sentenced to death in California. Interview with Michael Radelet, Sociology Professor, University of Colorado, in Gaviota, Cal. (Mar. 2, 2003). Racial minorities convicted of murdering a white person are at least twice as likely to receive the death penalty as those who murder blacks. *See id.*

66. The trial judge has no authority to do an inter-case proportionality review. *See* *People v. Marshall*, 790 P.2d 676, 692 (Cal. 1990). However the judge can do an intra-case review to determine if the punishment is proportionate to the individual defendant's culpability. *Id.* at 691-92. *See also* *People v. Dillion*, 668 P.2d 697 (Cal. 1983).

67. *See* *People v. Lang*, 782 P.2d 627, 662 (Cal. 1989).

*D. DNA Evidence Has Exonerated Many Death-row Inmates*

There is also good reason to suspect that some of the people on California's death row are actually innocent. Approximately 111 condemned people in this country have been released from death row since the death penalty was reinstated in the 1970s.<sup>68</sup> Though DNA testing has exonerated many of these people, DNA trace evidence is available in only a small percentage of the cases.<sup>69</sup> Therefore, many innocent people will never have the opportunity to bring forth scientific evidence of their innocence.<sup>70</sup>

To determine how such injustice occurs, the Institute for Law and Justice has analyzed twenty-eight cases in which the defendant was shown conclusively to be innocent.<sup>71</sup> The studies show that most of those cases involved positive identifications or police misconduct.<sup>72</sup> California has not established procedures to minimize these wrongful convictions.

Significantly, many California death-row cases have not been reviewed. Of the approximately 620 people condemned in California, roughly 140 have no lawyer to represent them at all.<sup>73</sup> Another 110 have an appellate lawyer but no lawyer to do the habeas corpus investigation and petition.<sup>74</sup> A death

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68. According to data compiled by the DEATH PENALTY INFORMATION CENTER, at <http://www.deathpenaltyinfo.org/innoc.html> (last visited Aug. 12, 2003), there have been 111 exonerations since 1973. The California District Attorney's Association and the conservative Criminal Justice Legal Foundation concluded that, as of the time of their writing, only thirty-four of these people were actually innocent. See CDAA PROSECUTOR'S WHITE PAPER, *supra* note 18, at vi. Using suspect methodology, they contend—contrary to the Constitution—that even if acquitted, a person can be deemed “not innocent.” For instance, they disagree that Patrick Croy was innocent, even though the jury acquitted him based on self-defense, because he killed a police officer. *Id.* at vii. However, it is not necessary to quibble over numbers. Whatever the number of exonerated people condemned to death, it is a significant number and it reflects a larger number of condemned people who have not yet been—and some who will never be—discovered.

69. See Gary L. Wells & Elizabeth A. Olson, *Eyewitness Testimony*, 54 ANN. REV. PSYCHOL. 277, 278 (2002).

70. See Connors et al., *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial*, NIJ RES. REP. 15 (1996), <http://www.ilj.org/infotech/dnaevid.pdf>.

71. *Id.* at 1.

72. *Id.* at 15.

73. Millman Interview *supra*, note 18.

74. See *id.* Since the habeas corpus defense team examines innocence claims, forty percent (140 without an attorney plus 110 without habeas corpus

row inmate must wait approximately four to six years before the California Supreme Court appoints a lawyer.<sup>75</sup> Furthermore, the California Supreme Court takes approximately ten years before it considers the direct appeal and state habeas petition.<sup>76</sup> Meaningful review often does not occur until the case reaches the federal court.<sup>77</sup> As a result, most of the condemned people on California's death row have not had a chance to have their innocence claims advanced or tested.

Given the experience of other states, including Illinois, it is likely that innocent people have also been condemned to death in California. Illinois courts have discovered that almost ten percent of their death row population were factually innocent.<sup>78</sup> Since no one knows how many other innocent people simply had their sentences commuted or, more tragically, have been executed, ten percent is probably a conservative figure.<sup>79</sup> California's death row population is approximately 620.<sup>80</sup> If California's rate of wrongful conviction were the same as Illinois', that would mean that over sixty innocent people have been condemned to death in California.

#### *E. California's Death Penalty System Conflicts with International Law*

Finally, California's death penalty system does not comply with international law.<sup>81</sup> Almost all industrialized nations

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representation) of the 620 people presently condemned in California have not yet had anyone begin examining their innocence claims. Once that examination begins, it can take years before any significant information about those claims comes to light.

75. *See id.*; *see also* CDAA PROSECUTOR'S WHITE PAPER, *supra* note 18, at 18.

76. *See* Liebman et al., *supra* note 17, at Appendix A-7.

77. *Id.*

78. Since the death penalty was re-instituted in Illinois in the 1970's, there were seventeen people exonerated. *See* Ryan Speech, *supra* note 1. Governor Ryan commuted the sentences of 165 people, almost all to life in prison without the possibility of parole. *Id.* In addition, thirty-three other people condemned in Illinois have been exonerated since the death penalty was initially established in that state. *Id.*

79. *See id.* Certainly many of the people who were condemned to death in Illinois are probably guilty. However, Governor Ryan was not able to ascertain whether or not all of the remaining condemned 167 people were in fact guilty. *Id.*

80. *See* Millman Interview, *supra* note 18.

81. *See generally* ROGER HOOD, THE DEATH PENALTY: A WORLDWIDE PERSPECTIVE (3d ed. 2002). Turkey eliminated the death penalty in August 2002, meaning that there are no European nations which have retained the

have abandoned the death penalty. For instance, the European Union denies admission to a country with the death penalty.<sup>82</sup> Ninety percent of the world's known executions are conducted by four nations: China, Iran, Saudi Arabia, and the United States.<sup>83</sup> Beyond that, the death penalty and the manner in which California imposes it conflict with numerous provisions of international treaties and conventions to which the United States claims to be a party.<sup>84</sup>

#### F. Summary

Therefore, as the Columbia University and the *San Jose Mercury News* studies show, the system in California is not working. Compared with constitutional law and procedures in other jurisdictions, California's system does not contain even the basic safeguards to avoid capricious, erroneous, and discriminatory application of the death penalty. A strong probability exists that dozens of innocent people are awaiting death on California's death row. Finally, California's system conflicts with international law. In light of these concerns, California could benefit from adopting the recommendations

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death penalty. *Id.* at 8. The four nations that now account for the most executions in the world are China, Iran, Saudi Arabia, and the United States. *Id.* at 90-91.

82. *Id.* at 17; see also DEATH PENALTY INFORMATION CENTER, THE DEATH PENALTY: AN INTERNATIONAL PERSPECTIVE (summarizing the number of abolitionist countries as of August, 2002), at <http://www.deathpenaltyinfo.org/article.php?did=127&scid=30> (last visited Aug. 11, 2003).

83. See HOOD, *supra* note 81. In 2001, there were 3,048 known executions in 31 countries, 90% of which took place in China, Iran, Saudi Arabia, and the United States. *Id.* at 89.

84. The International Court of Justice, known as the World Court, has issued orders seeking to halt executions pending in the state of Texas. See Case Concerning Avena and Other Mexican Nationals (Mexico v. United States), 2003 WL 256903 (I.C.J.) (Jan. 21, 2003). Case information is available at the International Court of Justice's website at <http://www.icj-cij.org/icjwww/idocket/imus/imusframe.htm>. The ICJ's provisional order of 02/05/03 is available at [http://www.icj-cij.org/icjwww/idocket/imus/imusorder/imus\\_iorder\\_20030205.PDF](http://www.icj-cij.org/icjwww/idocket/imus/imusorder/imus_iorder_20030205.PDF). Treaties which raise issues with this country's use of capital punishment include the International Covenant on Civil and Political Rights (ICCPR), Dec. 9, 1966, 999 U.N.T.S. 171, the Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (Convention Against Torture), Dec. 10, 1984, 39 U.N. GAOR, Supp. No. 51, at 197, the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), 1966, 660 U.N.T.S. 195, and the Vienna Convention on Consular Relations (VCCR), 1963, 596 U.N.T.S. 261.



of the Illinois Commission.

#### IV. COMPARISON OF CALIFORNIA WITH THE ILLINOIS COMMISSION REPORT

Given the deficiencies described in Part III, an inquiry into whether California follows the Illinois Commission's recommendations will aid in evaluating California's system. California adopts the Illinois recommendations at a dismal rate of 6.17%. Far from being a leader in jurisprudence in the country, California fails miserably when measured against the standards set by the Illinois Commission.

The Illinois Commission Report tracks the system of criminal justice in capital cases systematically from the inception of a case to its conclusion.<sup>85</sup> The Report acknowledges numerous flaws, many of which either have resulted in the conviction of the innocent or are likely to contribute to those results.<sup>86</sup> The recommendations, for the most part, neither hamper the conviction of the truly guilty nor place an undue burden on law enforcement, the courts, or the defense function.<sup>87</sup> Some are simple, common sense measures.<sup>88</sup> Others ultimately save resources by giving a greater assurance that things will be done right the first time.<sup>89</sup>

##### A. Overall Comparison

Appendix A of this article summarizes the comparison of the Illinois Commission Report to current California law.<sup>90</sup>

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85. See generally ILLINOIS COMMISSION REPORT, *supra* note 5.

86. *Id.* at 7-11.

87. See, e.g., *id.* at 34 (recommending that eyewitnesses should be told that the suspect may not be present in a lineup, that the witness need not select anyone from the lineup, and that the witness should not assume that the person conducting the lineup knows which person in the lineup is the suspect). *Id.* at 93-101 (recommending initial and particular education, ongoing education, and minimum educational standards for judges hearing capital cases).

88. See, e.g., *id.* at 20-21 (recommending that police continue to pursue alternate leads even after acquiring a suspect); *id.* at 28 (recommending that a homicide suspect's unrecorded statements to police be repeated back to him or her on tape and his or her comments recorded).

89. See, e.g., *id.* at 55-56 (recommending the establishment of minimum standards for DNA evidence); *id.* at 56-57 (recommending that the state establish a comprehensive DNA database); *id.* at 57-58 (recommending that capital defendants have an opportunity to conduct a court-ordered search of the DNA database to identify others who may be guilty of the crime).

90. The Illinois Commission Report is quite specific in its recommendations. ILLINOIS COMMISSION REPORT, *supra* note 5, at 207. Many of the recommenda-

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 seventy-six of the Recommendations. It meets three; two other recommendations have been “Met with Qualifications.” Three recommendations are required by the United States Constitution, as construed by the Supreme Court. One recommendation is arguably peculiar to Illinois and will not be compared in this analysis.<sup>91</sup>

Therefore, out of eighty-one recommendations that a state could choose to meet; California does not follow seventy-six. This renders an adoption rate of 6.17% including the three recommendations that are “Met” and the two that are “Met with Qualifications.”<sup>92</sup> In short, California fails to adopt the recommendations of the Illinois Governor’s Commission.<sup>93</sup>

### B. Substantive Comparison

The Illinois Commission studied twelve areas of the

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tions are improvements on existing law enforcement procedures or portions of the existing judicial system. As such, the recommendations should be taken both in letter and spirit to require real and specific reform, not mere rhetorical compliance.

91. Recommendation 77 “recommend[s] the reauthorization of the Capital Crimes Litigation Act.” *Id.* at 178-79. California does not have such an act and, therefore, by definition, California does not adopt the recommendation. This recommendation is peculiar to Illinois, so it will be deemed inapplicable for the purpose of this study.

92. A critic of this analysis might argue that California should get “credit” for complying with the three recommendations which are compelled by the United States Supreme Court in all states. However, compliance with constitutional requirements rarely requires that the California legislature or courts act to change its capital punishment system. Therefore, crediting California with meeting these three recommendations would suggest, erroneously, that the legislature had been more active than they have been in responding to issues underlying the Illinois Commission’s findings. Even including these three recommendations, however, California’s adoption rate would only be eight of eighty-four or 9.52%.

93. *See Castaneda v. Partida*, 430 U.S. 482, 496, n.17 (1977) (discussing statistical significance); *see also* FEDERAL JUDICIAL CENTER, REFERENCE MANUAL ON SCIENTIFIC EVIDENCE, 80-177 (2d ed. 2000). This article presents a correlation study of the actual system in California, compared to the recommendations for the Illinois system. It is not a regression analysis employing a comprehensive statistical database. Nevertheless, the adoption of only 6.17% of the recommendations in California leads to the conclusion that no meaningful correlation exists between the Illinois recommendations and actual practice in California.

criminal process relating to the conduct of capital cases.<sup>94</sup> Starting with an analysis of police procedures, the Commission studied investigation, pre-trial matters, trials, and sentencing.<sup>95</sup> From those areas of study came eighty-two specific recommendations.<sup>96</sup> The Commission concluded with a general section in which it made three more recommendations.<sup>97</sup> Overall, the Commission found that every stage of the criminal process in Illinois needed serious repair to avoid injustice, including the ultimate injustice of convicting and executing innocent people.<sup>98</sup> It concluded that even meeting all of the recommendations would not eliminate the possibility of executing an innocent person.<sup>99</sup>

This paper compares the California criminal process with the Illinois recommendations. California has virtually none of the police practices recommended to promote the integrity of investigations. These recommended practices are designed to solve the crime and advance the probability that the real killer is arrested, prosecuted, and convicted.<sup>100</sup> As Illinois discovered, unchecked police practices not only condemn innocent people but also leave the real killers free to continue killing.<sup>101</sup>

As described in Part III, California lists twenty-five spe-

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94. ILLINOIS COMMISSION REPORT, *supra* note 5. The twelve areas in the Report are (1) Police and Pre-trial Investigations: Recommendations 1 through 19; (2) DNA and Forensic Testing: Recommendations 20 through 26; (3) Eligibility for Capital Punishment: Recommendations 27 and 28; (4) Prosecutors Selection of Cases for Capital Punishment: Recommendations 29 through 31; (5) Trial Judges: Recommendations 32 through 39; (6) Trial Lawyers: Recommendations 40 through 45; (7) Pretrial Proceedings: Recommendations 46 through 54; (8) The Guilt-Innocence Phase: Recommendations 55 through 59; (9) The Sentencing Phase: Recommendations 60 through 64; (10) Imposition of Sentence: Recommendations 65 through 69; (11) Proceedings Following Conviction and Sentence: Recommendations 70 through 75; and (12) Funding: Recommendations 76 through 82. *Id.*

95. *Id.* at 19.

96. *Id.*

97. *Id.* at 187-200 (describing general Recommendations 83 through 85).

98. *Id.* at 207.

99. *Id.*

100. *See* ILLINOIS COMMISSION REPORT, *supra* note 5, at 19.

101. *See generally* THOMAS FRISBIE & RANDY GARRETT, VICTIMS OF JUSTICE (1998). This book chronicles the police practices, some well intentioned, some simply incompetent, and some corrupt, that led to the death sentences of two innocent men. *See generally id.* While the police and prosecutors were forcing the case through the courts and resisting reviews and retrials, the real killer continued to rape and kill others, including an eight-year-old girl. *Id.* at 18, 287.

cial circumstances that make a murder death eligible in California.<sup>102</sup> Many of them have subparts, resulting in over thirty-six factors.<sup>103</sup> The Illinois Commission recommends that there be five and only five.<sup>104</sup> In contrast, the California system makes virtually any murder death eligible. Arguably, California does not even comply with the Federal Constitution on this point.<sup>105</sup> California is so far out of line with the Illinois Commission recommendations on narrowing that the adoption of other recommendations in the Report would still render California's system fundamentally flawed.<sup>106</sup>

Having noted the major differences between California's system and the Illinois Commission's recommendations, this paper will take the Illinois Commission Report segment by segment and compare California's requirements with each recommendation.

1. *Police and Pre-trial Investigations:  
Recommendations 1 Through 19*

California does not meet any of the nineteen recommendations made by the Commission in this category.<sup>107</sup> In essence, these recommendations are designed to bring police practices up to minimum requirements in order to avoid false confessions, misrecollections and misinterpreted events, false identifications, and contaminated testimony.<sup>108</sup> They also require police to receive training on issues that have caused wrongful convictions and to encourage police practices which really result in finding the actual perpetrator.<sup>109</sup>

California adopts none of these recommendations. If the

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102. See CAL. PENAL CODE § 190.2 (West 2003); CAL. MIL. & VET. CODE § 1627(a) (West 2003); CAL. PENAL CODE §§ 37, 128, 219, 4500 (West 2003) (pursuant to CAL. PENAL CODE § 190.3).

103. See Cal. Penal Code § 190.2 (West 2003).

104. ILLINOIS COMMISSION REPORT, *supra* note 5, at 65-80.

105. See Shatz & Rivkind, *supra* note 30, at 1283.

106. *Id.* at 1283, 1288; see *McCleskey v. Kemp*, 481 U.S. 279, 305 (1987) (the death penalty cannot be imposed without "rational criteria that narrow the decision maker's judgment."); *Pulley v. Harris*, 465 U.S. 37, 50 (1984) (emphasizing the importance of the "constitutionally necessary narrowing function of statutory aggravating circumstances."). See *generally*, *Furman v. Georgia*, 480 U.S. 238 (1972) (striking down the death penalty based on the infrequency in which it was applied).

107. ILLINOIS COMMISSION REPORT, *supra* note 5, at 19-50.

108. See *id.* at 19.

109. See *id.*

police investigation is a search for the truth, as it should be, California should implement these recommendations.

*Recommendation 1:*

*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.*<sup>110</sup>

The Illinois Commission recognized that established research has identified “tunnel vision”<sup>111</sup> as an impediment to law enforcement arresting and prosecuting the real criminal.<sup>112</sup> At the time of the Commission’s study, Illinois released thirteen wrongfully convicted people from death row.<sup>113</sup> For many of them, the Commission found that “tunnel vision” or “confirmatory bias” led to the wrongful condemnation.<sup>114</sup>

California law does not require that police pursue inquiries that point away from the defendant.<sup>115</sup> The law does not penalize the prosecution for law enforcement’s failure to pursue leads, interview witnesses and collect evidence.<sup>116</sup>

*Recommendation 2:*

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

*(b) Record-keeping obligations must be assigned to specific police officers or employees, who must certify their com-*

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110. *See id.* at 20.

111. The Illinois Commission suggests that tunnel vision occurs “where the belief that a particular suspect has committed a crime often obviates an objective evaluation of whether there might be others who are actually guilty.” *Id.* at 20. Officers become so convinced that they have arrested the correct person that they often ignore information pointing in another direction. *Id.* at 20-21.

112. ILLINOIS COMMISSION REPORT, *supra* note 5, at 20-21; *see also*, Stanley Fisher, *The Prosecutor’s Ethical Duty to Seek Exculpatory Evidence in Police Hands: Lessons from England*, 68 FORDHAM L. REV. 1379 (2000).

113. *Id.* at 20.

114. *See id.*

115. Part IV of the California Penal Code contains those sections controlling the detection and apprehension of criminals. *See* CAL. PENAL CODE §§ 11006-11010 (West 2003). Nowhere within is there a requirement or direction to look beyond the first suspect identified. *Id.*

116. The California Supreme Court has followed the United States Supreme Court in holding that “unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law.” *People v. Catlin*, 26 P.3d 357, 408 (Cal. 2001) (quoting *Arizona v. Youngblood*, 488 U.S. 51, 57 (1988)).

*pliance 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.*<sup>117</sup>

The Illinois Commission recognized problems with giving the prosecutors and the courts the responsibility to document evidence and ensure that it will be disclosed to the defense.<sup>118</sup> Although prosecutors ultimately have that burden, the study showed that evidence was not being disclosed by law enforcement to the prosecutors and, if it was, sometimes not until long after the prosecution was completed.<sup>119</sup>

California law does not require that police perform the kind of record keeping recommended. Various police agencies throughout the state may have their own record keeping requirements, but no statewide standard or standards from agency to agency within particular counties exist.<sup>120</sup> Since county-wide prosecutors and the state-wide Attorney General's Office deal with multiple agencies, no expectation exists that records will be maintained in a uniform fashion.<sup>121</sup>

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117. ILLINOIS COMMISSION REPORT, *supra* note 5, at 22.

118. *Id.*

119. *Id.*

120. See CAL. PENAL CODE §§ 11006-11010 (West 2003).

121. There are fifty-eight counties and over a thousand cities in the State of California. California Association of Counties at [http://www.csac.counties.org/counties\\_close\\_up/ca\\_county\\_map.html](http://www.csac.counties.org/counties_close_up/ca_county_map.html). There are well over a thousand independent law enforcement agencies in this state. Law Enforcement Agencies at [http://www.post.ca.gov/library/other/agency\\_page.asp](http://www.post.ca.gov/library/other/agency_page.asp). For instance, in Santa Barbara County, local law enforcement agencies include: the Santa Barbara County Sheriff; the Santa Barbara Police Department; the Santa Maria Police Department; the Guadalupe Police Department; the Santa Barbara Airport Patrol; the Lompoc Police Department; the Santa Barbara Harbor Patrol; the University of California at Santa Barbara Police; the District Attorney's Investigator staff; the Santa Barbara County Fire Inspectors; the Fire Inspectors of the city Fire Departments of Carpinteria, Santa Maria, Lompoc, Santa Barbara, and Vandenberg; Elder Abuse Investigators; the Santa Barbara County Probation Department; and, by contract with the Santa Barbara Sheriff, the Goleta Police, the Solvang Police, and the Buellton Police. See *id.* Santa Barbara prosecutors may have investigations involving evidence collected by state agencies, such as the Department of Justice Criminalistics Laboratory, the California Highway Patrol, the Department of Fish and Game, the State Bureau of Narcotics Enforcement, the State Park Rangers, the Alcohol Beverage Control, the State Franchise Tax Board, the California Department of Forestry, the Department of Corrections, the State Fire Marshal, Department of Motor Vehicles Investigators, State Parole, and several others. Additional evi-

*Recommendation 3:*

*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.*<sup>122</sup>

The Illinois Commission noted “the inherent coerciveness of station house interrogations.”<sup>123</sup> False confessions have been documented as a serious factor in the conviction of the innocent.<sup>124</sup> The Commission believed that Recommendation 3 would reduce false confessions while imposing relatively little financial burden on the system.<sup>125</sup>

California law does not require a court to provide the public defender or any counsel for an adult at the time of an interrogation.<sup>126</sup> If the suspect invokes his or her rights pursuant to *Miranda*,<sup>127</sup> the police are supposed to stop.<sup>128</sup> The public defender is only appointed for adults at the arraignment.<sup>129</sup> Therefore, invocation of right to counsel by an ar-

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dence may be collected by other quasi-law enforcement agencies, such as Child Protective Services, Welfare Fraud Investigators, Child Support Investigators, the Air Pollution Control District, and various city and county administrative agencies. Finally, of course, Santa Barbara prosecutors, like prosecutors from other counties, depend on evidence collected from agencies in other counties, special agents, police officers, and inspectors general from the multitude of federal agencies, as well as agents from other countries and organizations like Interpol.

122. *Id.* at 23.

123. ILLINOIS COMMISSION REPORT, *supra* note 5, at 24.

124. *See generally* Richard Ofshe & Richard Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 DENV. UNIV. L. REV. 979 (1997).

125. ILLINOIS COMMISSION REPORT, *supra* note 5, at 24.

126. A public defender or other counsel is appointed when criminal proceedings begin at arraignment. *See* CAL. GOV'T. CODE § 27706(a) (West 2003); *but see* CAL. WELF. & INST. CODE § 625 (West 2003) (right to counsel for a juvenile at interrogation during temporary detention).

127. *Miranda v. Arizona*, 384 U.S. 436 (1964).

128. *See id.* at 437; *see also* *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981). In California, police officers have been trained to continue with the interrogation, because it may provide other leads or be admissible for the purpose of impeachment under *Harris v. New York*, 401 U.S. 222 (1971). *People v. Neal*, 72 P.3d 280, 297 (Cal. 2003) (Baxter J., concurring).

129. *See* CAL. GOV'T. CODE § 27706(a) (West 2003).

restee results in returning the arrestee to custody until arraignment.<sup>130</sup> Arrestees often “voluntarily” waive their right to counsel while awaiting arraignment.<sup>131</sup>

California law does not even require law enforcement to interrupt an interrogation when a lawyer comes to the jail or station house to see the client.<sup>132</sup> Some prosecutors argue that officers may deliberately violate *Miranda* in order to obtain confessions that can be used for further investigation and impeachment if the defendant testifies.<sup>133</sup> Conflicting case law exists on this issue.<sup>134</sup>

*Recommendation 4:*

*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.*<sup>135</sup>

The Illinois Commission observed that prosecutors sometimes used false confessions to convict people later found to be innocent.<sup>136</sup> These purported confessions came at the end of lengthy interrogations.<sup>137</sup> The Commission also concluded that videotaping would help to establish that valid confessions were obtained without physical coercion or undue influence.<sup>138</sup>

California law does not require law enforcement to tape

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130. Invocation of *Miranda* rights simply require the police to stop their interrogations, not to provide the suspect with an attorney. *Neal*, 72 P.3d at 281.

131. *See* *People v. Williams*, 941 P.2d 752, 774 (Cal. 1997).

132. Incredibly, where a lawyer is waiting in the lobby of the police station, the police may exclude him or her and not even tell the subject that the lawyer is there. *See* *People v. Ledesma*, 204 Cal. App. 3d 682 (1988); *People v. Gott*, 117 Cal. App. 3d 125, 128-30 (1981).

133. *See Neal*, 72 P.3d at 297.

134. *See* *People v. Peevy*, 953 P.2d 1212 (Cal. 1998) (holding statements made by a suspect to police officers in deliberate violation of *Miranda* may be admitted at trial to challenge the suspect's credibility); *but see* Cal. Attorneys for Criminal Justice v. Butts, 195 F.3d 1039 (Cal. 1999) (holding that officers who deliberately violated suspects' *Miranda* rights were potentially civilly liable under 42 U.S.C. § 1983 for those constitutional violations).

135. *Id.* at 24.

136. ILLINOIS COMMISSION REPORT, *supra* note 5, at 24-25.

137. *Id.* at 25, n.16; *see also* Gail Johnson, *False Confessions and Fundamental Fairness: The Need for Electronic Recording of Custodial Interrogations*, 6 B.U. PUB. INT. L.J. 719 (1997).

138. *Id.* at 24-25.



record interrogations at all.<sup>139</sup> Videotaping does sometimes occur in practice but is not required. Furthermore, law enforcement commonly videotapes only after preliminary discussions with the defendant have taken place.<sup>140</sup>

*Recommendation 5:*

*Any statements by a homicide suspect which are not recorded should be repeated to the suspect on tape, and his or her comments recorded.*<sup>141</sup>

The Illinois Commission recognized practical limitations on videotaping all statements of all suspects, notwithstanding its recommendation that videotaping be done whenever possible.<sup>142</sup> The Commission noted that suspects often make statements on the way to the police station or when videotaping is not a realistic option.<sup>143</sup> In such instances, the Commission recommends that the suspect repeat statements on video as soon practical.<sup>144</sup> Adoption of this recommendation would not only help avoid false confessions, but also would help law enforcement document valid confessions.<sup>145</sup>

California law does not require that law enforcement record a suspect's statements or specify the manner with which recording should be conducted. Thus, California does not adopt this recommendation.

*Recommendation 6:*

*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.*<sup>146</sup>

The Illinois Commission recommended this as a corollary to the preceding recommendations. Videotaping aids police in

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139. See *People v. Neal*, 72 P.3d 280, 297 (Cal. 2003) (Baxter J., concurring).

140. See, e.g., *Neal*, 72 P.3d 280.

141. ILLINOIS COMMISSION REPORT, *supra* note 5, at 28.

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.* at 29.

preserving statements they believe to be reliable.<sup>147</sup> However, videotaping may be impractical for many interrogations in the field, especially after a hot pursuit.<sup>148</sup> In these situations, it is important to have a backup method of recording important statements that may be used later in court.<sup>149</sup>

California law does not require officers to record interrogations or carry tape recorders. Many agencies provide their officers with tape equipment in the field, but there is no state standard.

*Recommendation 7:*

*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.*<sup>150</sup>

The Illinois Commission recommends that the Illinois eavesdropping statute be amended to allow surreptitious recording of a suspect's statements of a suspect, but only in homicide cases where the suspect knows that he or she is talking to a police officer.<sup>151</sup>

California follows this recommendation with qualifications. California Penal Code section 633 allows a blanket exception to the California "eavesdropping statutes" for law enforcement personnel or anyone acting at their direction.<sup>152</sup> California law meets the goal of allowing greater latitude in the recording of homicide suspects' statements, but does not limit surreptitious recording to homicide suspects.<sup>153</sup> Furthermore, California law allows the recording to take place even if the officer does not identify him or herself as an officer or even if a non-officer is acting at law enforcement direction.<sup>154</sup>

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147. ILLINOIS COMMISSION REPORT, *supra* note 5, at 29.

148. *Id.*

149. *Id.*

150. *See id.* (citation omitted).

151. *Id.* at 29-30.

152. CAL. PENAL CODE § 633 (West 2003).

153. *See* CAL. PENAL CODE § 633 (2003); ILLINOIS COMMISSION REPORT, *supra* note 5, at 29-30.

154. CAL. PENAL CODE § 633 (2003).

Not only do exceptions to California's eavesdropping statutes permit greater invasion of privacy than the Illinois Commission recommends, they may also lead to unreliable statements. Unaware that he is speaking to an officer, a suspect does not expect that his statements may be used against him later. For instance, law enforcement often instigates "cool calls." A civilian witness during a "cool call" may be asked by the police to call the subject and engage in a conversation for the purpose of eliciting admissions or adoptive admissions. The civilian may draw on his or her relationship with the subject. The subject, not knowing that the call is insincere, may try to avoid talking about issues relating to criminal allegations and instead try to maintain the personal relationship with the civilian. The prosecution at trial may claim that the failure to deny the allegations is an adoptive admission.<sup>155</sup>

*Recommendation 8:*

*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.*<sup>156</sup>

The Illinois Commission found that recording witness statements was important in order to ensure accurate testimony at trial.<sup>157</sup> If the witness's account changes at trial, the judge and the jury will be able to view the original account on tape.<sup>158</sup> The Commission found a number of questionable witness statements in the cases of the thirteen condemned people released from death row.<sup>159</sup> However, California law does not require that witness statements be recorded.<sup>160</sup>

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155. See CAL. EVID. CODE § 1221 (2003).

156. ILLINOIS COMMISSION REPORT, *supra* note 5, at 30.

157. *Id.*

158. *Id.*

159. *Id.*

160. See *People v. Fauber*, 831 P.2d 249, 269 (Cal. 1992) (holding that failure to record the entire interview did not violate the defendant's Fourteenth Amendment rights to disclosure of exculpatory evidence, nor did it suppress evidence favorable to the defendant). Because the defendant established only the possibility that the co-defendant's unrecorded remarks would help him attack the co-defendant's credibility, the *Fauber* court concluded that the failure to record did not amount to a loss of material substantial evidence. *Id.* at 270.

*Recommendation 9:*

*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.*<sup>161</sup>

The Illinois Commission found that police need to take special care when interrogating mentally retarded people "because they may be inclined to agree with the police version of events in an effort to seek approval, or may be easily led."<sup>162</sup>

Nevertheless, California law does not require that the police either attempt to determine a suspect's mental capacity or use appropriate procedures to avoid false confessions. Recent research demonstrates the substantial danger of obtaining false confessions from the mentally retarded, who may confess falsely even without coercion.<sup>163</sup> California does mandate police officer training regarding the interrogation of mentally retarded people;<sup>164</sup> however, there are no limitations as set forth by this recommendation.

Under the Supreme Court's decision in *Atkins v. Virginia*,<sup>165</sup> states may not execute mentally retarded people. Nevertheless, the evaluation of the suspect's mental capacity and the determination of mental retardation are critical at the earliest stages of the investigation. Individuals with reduced mental capacity are likely to give false confessions and cannot meaningfully assist their counsel, making their defense more difficult.<sup>166</sup> Early determination will help ensure that defendants' rights are protected, reducing the likelihood that they will harm their defense or distract police from pursuing the real killer.

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161. ILLINOIS COMMISSION REPORT, *supra* note 5, at 30.

162. *Id.*

163. See Welsh S. White, *False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions*, 32 HARV. C.R.-C.L. L. Rev. 105, 123 (1997).

164. See CAL. PENAL CODE § 1315.25(4) (West 2003) (describing training on appropriate language to use when interacting with mentally ill or developmentally disabled people).

165. See *Atkins v. Virginia*, 536 U.S. 304 (2002).

166. *Id.* at 320-21.

*Recommendation 10:*

*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.*<sup>167</sup>

California law does not require that a lineup or photospread be conducted “blind.”<sup>168</sup> To the contrary, the investigating officers conducting the identification usually know the suspect’s identity. The Illinois Commission recommends a “double-blind” procedure, which requires that neither the administrator nor the witness know in advance who in the lineup or the photospread is the subject.<sup>169</sup>

Studies have shown that the investigator conducting a lineup or photospread can have an effect on the choice made by the witness.<sup>170</sup> The Illinois Commission concluded that, “if the person who administers the lineup or photospread knows the identity of the suspect, the administrator can consciously or unconsciously – for example, by eye contact, facial expression, tone of voice, pauses, verbal exchanges – signal his or her knowledge of the witness.”<sup>171</sup> This proposal is critical to accurate identifications, because it reduces the possibility that the identifications will be compromised.

*Recommendation 11:*

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

*(b) Eyewitnesses should also be told that they should not*

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167. ILLINOIS COMMISSION REPORT, *supra* note 5, at 32.

168. Tom Perrotta, *Hynes Endorses Double-Blind Police Lineups*, New York Law Journal, Dec. 13, 2002, at page 1, col. 3 [hereinafter Perrotta Article]. New Jersey is the only state that conducts double blind and sequential lineups. *Id.* Although not required statewide, Santa Clara County, California has adopted procedures for both double blind and sequential lineups. *Id.*

169. ILLINOIS COMMISSION REPORT, *supra* note 5, at 32-33.

170. *See generally* Wells & Olsen, *supra* note 69 (reviewing the literature over the last thirty years). Studies continue to be published regarding this issue. *See, e.g.*, Gary L. Wells & Elizabeth A. Olson, *Eyewitness Testimony*, 54 ANNU. REV. PSYCHOL. 277 (2003); Amy L. Bradfield et al., *The Damaging Effect of Confirming Feedback on the Relation Between Eyewitness Certainty and Identification Accuracy*, 87 J. APPL. PSYCHOL. 112 (2002).

171. ILLINOIS COMMISSION REPORT, *supra* note 5, at 32.

*assume that the person administering the lineup or photospread knows which person is the suspect in the case.*<sup>172</sup>

The Illinois Commission based this recommendation on Gary Wells' study of eyewitness identification procedures.<sup>173</sup> Gary Wells found a substantial amount of evidence showing that false eyewitness identifications are the primary cause of the conviction of innocent people.<sup>174</sup> In such instances, the eyewitnesses were almost certain that they identified the correct person.<sup>175</sup> Their misidentification was often influenced by outside circumstances.<sup>176</sup> The United States Department of Justice commissioned a study which came to the same conclusions.<sup>177</sup> The DOJ study found that "[e]ven honest well-meaning witnesses can make errors, such as identifying the wrong person or failing to identify the perpetrator of the crime."<sup>178</sup> Based on that evidence, the study outlines procedures similar to the Illinois Commission's to obtain the most reliable and accurate information from eyewitnesses.<sup>179</sup>

Since California law does not require a "double-blind" identification procedure,<sup>180</sup> officers do not give this admonition. Based on the author's experience, officers in California may give a version of the admonition, stating that the perpetrator may not be in the lineup. California should adopt a double-blind requirement because it increases the likelihood that the actual perpetrator will be identified and protects against any intentional or unintentional outside influence.

*Recommendation 12:*

*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 mem-*

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172. *Id.* at 34.

173. See generally Gary L. Wells et al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 LAW & HUM. BEHAV. 603 (1998).

174. *Id.* at 603, 606-08.

175. *Id.* at 624.

176. *Id.*

177. See U.S. DEPARTMENT OF JUSTICE, NATIONAL INSTITUTE OF JUSTICE, TECHNICAL WORKING GROUP FOR EYEWITNESS EVIDENCE, EYEWITNESS EVIDENCE: A GUIDE OF LAW ENFORCEMENT, (Oct. 1999) at 2-3, available at <http://www.ncjrs.org/pdffiles1/nij/178240.pdf>.

178. *Id.* at 1.

179. *Id.* at 2-3.

180. See Perrotta, *supra* note 168.

*ber 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.*<sup>181</sup>

California law does not require that officers conduct lineup or photospread procedures sequentially.<sup>182</sup> The Illinois Commission referred to scientific studies demonstrating that a sequential process was more reliable than a process that places all subjects in front of the witness at once.<sup>183</sup> The Commission recognized, however, that sequential photospreads and lineups, without a double-blind procedure produce a higher rate of mistaken identifications.<sup>184</sup>

California should institute a sequential procedure only if the procedure is “double-blind,” since the risk of false identification increases if the administrator knows the suspect’s identity and shows subjects to the witness one at a time.<sup>185</sup>

*Recommendation 13:*

*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.*<sup>186</sup>

The Illinois Commission specifically recognized that the distractors, or “fillers,” in a lineup or photospread procedure should resemble the *description of the perpetrator*, not the suspect.<sup>187</sup> In other words, studies show that when the fillers are chosen to resemble the suspect, the suspect is more likely to be chosen.<sup>188</sup>

California law does not dictate the manner in which the lineup should be constructed. Case law may require suppression at trial of an unduly suggestive line-up or photospread.<sup>189</sup>

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181. ILLINOIS COMMISSION REPORT, *supra* note 5, at 34.

182. *See* Perrotta, *supra* note 168, at page 1, col.3

183. ILLINOIS COMMISSION REPORT, *supra* note 5, at 39.

184. *Id.* at 35.

185. *Id.*

186. *Id.* at 37.

187. *Id.*

188. *See* Wells et al., *supra* note 173, at 630-35.

189. *See* Wade v. United States, 388 U.S. 218, 235 (1967) (referring to earlier studies conducted); *see also* Bradfield et al., *The Damaging Effect of Confirming Feedback on the Relation Between Eyewitness Certainty and Identification Accuracy*, 87 J. APPLIED PSYCHOL. 112 (2002) (referring to more recent studies conducted).

However, California does not comply with the recommendation to the extent that it requires the distractors be similar to the description of the person observed rather than to the suspect in custody. In actual practice, officers conducting a photospread or live line-up procedure usually look for distractors who resemble the suspect. They either go through "mug" books for photographs or through the jail for live subjects. Typically, they take the photo of the actual suspect and try to find similar people as distractors. Studies show that the suspect then bears a familial resemblance to all of the distractors even if they do not bear a resemblance to each other.<sup>190</sup> This makes it more likely that the suspect will be falsely identified.<sup>191</sup> Also, research shows that a false identification at an improper line-up or photospread can contaminate the identifying witnesses' testimony.<sup>192</sup>

*Recommendation 14:*

*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.*<sup>193</sup>

The Illinois Commission found that law enforcement feedback has a significant effect on the confidence level of witnesses who then testify before juries.<sup>194</sup> Scientific studies show that witnesses who receive positive feedback from the police will testify that they have more confidence in their identification.<sup>195</sup> In addition, these witnesses are more likely to make stronger claims about their ability to observe the subject at the scene.<sup>196</sup> This dramatic increase in confidence occurs even where the eyewitnesses have made totally incorrect identifications.<sup>197</sup>

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190. Wells et al., *supra* note 173, at 630-35.

191. *See id.*; TECHNICAL WORKING GROUP FOR EYEWITNESS EVIDENCE, EYEWITNESS EVIDENCE: A GUIDE FOR LAW ENFORCEMENT, 29-30 (Oct. 1999), at <http://www.ncjrs.org/pdffiles1/nij/178240.pdf>.

192. *See generally* Wells et al., *supra* note 173.

193. ILLINOIS COMMISSION REPORT, *supra* note 5, at 37.

194. *Id.* at 38.

195. *See* Wells et al., *supra* note 173, at 635.

196. *See id.*

197. *See id.* at 645-36.



California law does not require officers to make a clear written record of the statements of eyewitnesses at the time of the identification procedure, let alone before law enforcement gives any feedback. Since false eyewitness identifications often account for the conviction of the innocent, the trier of fact should have accurate information about the confidence of the eyewitness at the time of an identification procedure.<sup>198</sup>

*Recommendation 15:*

*When practicable, the police should videotape lineup procedures, including the witness' confidence statement.*<sup>199</sup>

Although the leading study did not recommend videotaping, the Commission unanimously recommended it. Videotaping requires three synchronized cameras, which would be expensive. Nevertheless, the Commission concluded that videotaping would aid in resolving disputes between the defense and prosecution.<sup>200</sup>

California law does not require that lineup procedures be videotaped. Videotaping does not necessarily enhance the reliability of the lineup results, but it creates a record to review later, and ensures that participants are more likely to abide by the rules.

*Recommendation 16:*

*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.*<sup>201</sup>

California law does not require that police officers be trained on these particular issues. Supplemented by the

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198. See ILLINOIS COMMISSION REPORT, *supra* note 5, at 38.

199. ILLINOIS COMMISSION REPORT, *supra* note 5, at 39.

200. *Id.* at 39-40; see *People v. Pierce*, 290 N.E. 2d 256, 262 (Ill. 1972).

201. ILLINOIS COMMISSION REPORT, *supra* note 5, at 40.

Commission on Peace Officer Standards and Training (P.O.S.T.), state law sets forth the training standards.<sup>202</sup> Training includes courses on such issues as civil disobedience,<sup>203</sup> elder abuse,<sup>204</sup> interaction with developmentally disabled and mentally ill,<sup>205</sup> high technology crime,<sup>206</sup> sexual assault,<sup>207</sup> first aid and CPR,<sup>208</sup> domestic violence,<sup>209</sup> stalking,<sup>210</sup> sudden infant death,<sup>211</sup> racial profiling,<sup>212</sup> gang and drug enforcement,<sup>213</sup> hate crimes,<sup>214</sup> high speed vehicle pursuit,<sup>215</sup> carcinogenic materials,<sup>216</sup> chemical agents,<sup>217</sup> shotguns and rifles,<sup>218</sup> wiretapping,<sup>219</sup> and disaster response.<sup>220</sup>

However, the state does not require training on the risks of false testimony by “jailhouse snitches,” the risks of false testimony by accomplice witnesses, the dangers of tunnel vision or confirmatory bias, the risks of wrongful convictions in homicide cases, police investigative and interrogation methods, police investigation and reporting of exculpatory evidence, forensic evidence, or the risks of false confessions. Since all of these problems have been demonstrated to contribute to the possibility of a wrongful conviction, police officers ought to be trained on how to minimize this risk.

*Recommendation 17:*

*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 de-*

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202. See CAL. PENAL CODE §§ 832-832.3 (West 2003).

203. See *id.* § 13514.5.

204. See *id.* § 13515.

205. See *id.* § 13515.25.

206. See *id.* § 13515.55.

207. See *id.* § 13516.

208. See CAL. PENAL CODE § 13518.

209. See *id.* § 13519.

210. See *id.* § 13519.05.

211. See *id.* § 13519.3.

212. See *id.* § 13519.4.

213. See *id.* § 13519.5.

214. See CAL. PENAL CODE § 13519.6.

215. See *id.* § 13519.8.

216. See CAL. HEALTH & SAFETY CODE § 1797.187 (West 2003).

217. See CAL. PENAL CODE § 12403 (West 2003).

218. See *id.* § 12020(b)(1).

219. See *id.* § 629.24, *repealed by* Cal. Stat. 1997.

220. See CAL. GOV'T CODE § 8607 (West 2003).

*tention of foreign nationals.*<sup>221</sup>

The Illinois Commission recognized Illinois' efforts within certain agencies to train their officers regarding the requirements of the Vienna Convention on Consular Relations ("VCCR").<sup>222</sup> Nevertheless, the Commission found that "more consistent efforts . . . would serve to protect the rights of foreign nationals."<sup>223</sup>

California law does not require specific training on consular rights and notifications. In light of the recent attention to the VCCR,<sup>224</sup> police academies and agencies have undoubtedly discussed consular rights and notifications. A larger, more diverse state with more law enforcement agencies than Illinois, California would also benefit from more consistent treatment of foreign nationals.

*Recommendation 18:*

*The [state] Attorney General should remind all law enforcement agencies of their notification obligations under the Vienna Convention on Consular Relations and undertake 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.*<sup>225</sup>

California law now requires advisement of rights under the VCCR.<sup>226</sup> The extent to which the VCCR's requirements have reached the officers and detectives working throughout all of the law enforcement agencies in California is unknown. The publication list of the California Attorney General does not list the VCCR,<sup>227</sup> and California does not require regular

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221. ILLINOIS COMMISSION REPORT, *supra* note 5, at 41.

222. *Id.*

223. *Id.*

224. Lisa Adams, *Review Sought for Mexicans on Death Row*, Sun-Sentinel (Ft. Lauderdale Fla.), Jan. 10, 2001, at 17A. Amnesty International reported in August 2001 that there is a disregard for the consular rights of foreign nationals charged with capital crimes in the United States. *United States of America: A time for Action-Protecting the Consular Rights of Foreign Nationals Facing the Death Penalty*, Amnesty International (Aug. 2001), <http://web.amnesty.org/library/index/ENGAMR511062001> (last accessed Oct. 11, 2003).

225. ILLINOIS COMMISSION REPORT, *supra* note 5, at 42

226. See CAL. PENAL CODE § 834(c) (West 2003).

227. See <http://caag.state.ca.us/publications/index.htm> (last visited Oct. 11, 2003).

reviews to ensure compliance with the VCCR.

*Recommendation 19:*

*The statute relating to the [state] Law Enforcement Training Standards Board should be amended to add police perjury (regardless of whether there is a criminal conviction) as a basis upon which the Board may revoke certification of a peace officer.*<sup>228</sup>

Noting the existence of agency rules against officer perjury,<sup>229</sup> the Commission recommended an amendment to the state statute to make police perjury a basis for revoking certification, whether or not a conviction resulted.<sup>230</sup>

A police officer who files a false police report commits perjury under California law.<sup>231</sup> Perjury in a capital case is itself a capital offense.<sup>232</sup> However, police officers are seldom, if ever, prosecuted for these offenses.<sup>233</sup> California law does not revoke a peace officer's P.O.S.T. certificate if the officer commits perjury. Thus, California does not follow this recommendation.

2. *DNA and Forensic Testing: Recommendations 20 Through 26*

The Illinois Commission made seven recommendations regarding DNA and forensic testing.<sup>234</sup> California follows only one, with qualifications. The Commission recommends adequate funding and supervision of DNA and forensic testing and mandatory minimum state standards.<sup>235</sup> California follows these recommendations in the sense that it makes funds available, at the trial court's discretion and within limitations on appeal, for defense experts and testing.<sup>236</sup> Otherwise, California does not follow the recommendations.

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228. ILLINOIS COMMISSION REPORT, *supra* note 5, at 42.

229. *Id.*

230. *Id.* at 42-43.

231. *See* CAL. PENAL CODE § 118.1 (West 2003).

232. *See id.* § 128.

233. ILLINOIS COMMISSION REPORT, *supra* note 5, at 42.

234. *Id.* at 51-63.

235. *See id.*

236. *See* CAL. PENAL CODE § 987.9(a) (West 2003).

*Recommendation 20:*

*An independent state forensic laboratory should be created, operated by civilian personnel, with its own budget, separate from any police agency or supervision.*<sup>237</sup>

The Illinois Commission found that a laboratory truly independent of law enforcement is critical to promoting confidence, both in the prosecution and the defense, that “results have been fairly and completely analyzed, and honestly reported.”<sup>238</sup> The Commission states, “Crime labs should function as an independent third force in the criminal justice system.”<sup>239</sup>

California’s state-wide forensic services are provided by the Bureau of Forensic Services.<sup>240</sup> The bureau is not an independent agency as the Illinois Commission contemplated, but is located within the California Department of Justice.<sup>241</sup> Its services are available to “state and local law enforcement agencies, district attorneys, and the courts,” but not to defendants.<sup>242</sup>

*Recommendation 21:*

*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.*<sup>243</sup>

The Illinois Commission appreciated the importance of DNA testing.<sup>244</sup> It also recognized the backlog of requests for DNA testing throughout the nation.<sup>245</sup> Even though DNA evidence is relevant to only a small percentage of homicide cases, testing should be mandated where it may establish innocence.

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237. ILLINOIS COMMISSION REPORT, *supra* note 5, at 52.

238. *Id.* at 53.

239. *Id.*

240. See CAL. DEP’T OF JUSTICE, *The Bureau of Forensic Services*, at <http://caag.state.ca.us/bfs/index.htm> (last visited Oct. 10, 2003).

241. See *id.*

242. See *id.*

243. ILLINOIS COMMISSION REPORT, *supra* note 5, at 54-55

244. See *id.*

245. See *id.*

Some funding and outsourcing is available in California, but not to the extent that this recommendation contemplates. Various local agencies, many of which are underfunded and overburdened, perform DNA testing throughout the state.<sup>246</sup> Neither state nor local facilities have the capacity to analyze evidence for the purpose of evaluating innocence claims.

*Recommendation 22:*

*The Commission supports the [state supreme court rule] establishing minimum standards for DNA evidence.*<sup>247</sup>

California law does not set minimum standards for DNA evidence. The California courts, including the California Supreme Court, have dealt with DNA standards on a case-by-case basis.<sup>248</sup>

*Recommendation 23:*

*The federal government and the [state] should provide adequate funding to enable the development of a comprehensive DNA database.*<sup>249</sup>

California law provides for a database system<sup>250</sup> and has authorized a DNA database program for missing persons.<sup>251</sup> There is also a data collection and data bank program set up under the direction of the California Attorney General.<sup>252</sup> As the Illinois Commission reported, all fifty states have enacted similar legislation.<sup>253</sup>

At the federal level, the United States Congress had not enacted the proposed Innocence Protection Act; however, the federal program (CODIS)<sup>254</sup> is in place and subject to expan-

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246. See, e.g., Alison Soltau, *Lab Short on DNA Dough*, EXAMINER, July 24, 2002, at <http://www.examiner.com/news/default.jsp?story=n.dna.0724w> (last visited Aug. 2, 2003).

247. ILLINOIS COMMISSION REPORT, *supra* note 5, at 55 (referring to Illinois State Supreme Court Rule 417).

248. See, e.g., *People v. Venegas*, 954 P.2d 525 (Cal. 1998).

249. ILLINOIS COMMISSION REPORT, *supra* note 5, at 56.

250. See CAL. PENAL CODE §§ 295-295.1 (West 2003).

251. See *id.* §§ 14250-14251 (providing funding through Jan. 1, 2006).

252. See *id.* §§ 296-296.2.

253. ILLINOIS COMMISSION REPORT, *supra* note 5, at 56.

254. CODIS is the FBI's (CO)mbined D(NA) (I)dentification (S)ystem, a database superstructure intended to enable federal, state, and local crime labs to exchange and compare DNA profiles electronically. See FEDERAL BUREAU OF INVESTIGATION, THE FBI'S COMBINED DNA INDEX SYSTEM: CODIS, 2 (2000), at <http://www.fbi.gov/hq/lab/codis/brochure.pdf>. The federal government currently

sion.

The Commission recommends adequate funding for these programs.<sup>255</sup> If California does not obtain federal funding in the near future, adequate funding may not be secure. California is facing a severe budget crisis and programs are being cut statewide.<sup>256</sup> Meanwhile a backlog of samples still waits to be tested.

*Recommendation 24:*

*[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.*<sup>257</sup>

California law does not allow a defendant to apply for a court to order a search of the DNA database.<sup>258</sup> California law allows a defendant, after he or she has been convicted, to apply for an order to have DNA testing done.<sup>259</sup> This statute does not apply to defendants in the trial courts and does not modify the discovery statutes for pre-conviction cases.<sup>260</sup>

Furthermore, the California statute provides that the DNA data bank information can only be disclosed to and used by law enforcement. A specific exception allows DNA information “of the defendant” to be released to the defendant’s attorney in compliance with discovery.<sup>261</sup> California does not follow the Illinois Commission recommendation, which seeks to ensure that an accused has the ability to potentially exon-

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requires that CODIS be supplied with DNA samples from certain classes of federal offenders. 10 U.S.C. § 1565 (2003) (military personnel convicted of qualifying felony or sexual offenses); 42 U.S.C. § 14135(a) (2003) (anyone convicted of a qualifying offense who is in the Bureau of Prisons’ custody); 42 U.S.C. § 14135(b) (2003) (District of Columbia offenders convicted of a qualifying offense). For more information, see the FBI’s DNA & Databasing Initiatives brochure (2000), available at <http://www.fbi.gov/hq/lab/codis/fbidna.pdf>.

255. ILLINOIS COMMISSION REPORT, *supra* note 5, at 56.

256. Gregg Jones, *The Nation*, *State Needs Fast Billions to Deal with Budget Crisis*, L.A. TIMES, Nov. 2, 2002, at A1.

257. ILLINOIS COMMISSION REPORT, *supra* note 5, at 57.

258. There is an argument that there is a constitutional right to post-conviction DNA testing. See Seth F. Kreimer & David Rudovsky, *Double Helix, Double Bind: Factual Innocence and Postconviction DNA Testing*, 151 U. PA. L. REV. 547 (2002).

259. See CAL. PENAL CODE § 1405 (West 2003).

260. See *id.* §§ 1054-1054.9; see also *id.* § 1054.9(e) (regarding the applicability of section 1405 to post-conviction cases).

261. See *id.* § 299.5(f).

erate him or herself at any stage of the proceedings.<sup>262</sup>

*Recommendation 25:*

*In capital cases, forensic testing, including DNA testing pursuant to 725 ILCS 5/116(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.*<sup>263</sup>

California law does not provide the broad access to DNA testing recommended by the Illinois Commission. The California statute allows DNA testing of evidence at the defendant's request, but only in post-conviction cases and does not modify the provisions of discovery for trial cases.<sup>264</sup>

*Recommendation 26:*

*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 5/116(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.*<sup>265</sup>

California follows this recommendation, with qualifications. California law provides that the state will provide funds for capital defense at the trial level in cases where the defendant can show indigence.<sup>266</sup> Individual trial court judges have wide discretion to grant or deny particular requests.<sup>267</sup>

Furthermore, the California Supreme Court limits funds available to the defense on direct appeal and habeas corpus proceedings.<sup>268</sup> The funds available are not sufficient for ex-

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262. ILLINOIS COMMISSION REPORT, *supra* note 5, at 58.

263. *Id.* at 58-59.

264. California Penal Code section 1405 permits a post-conviction court order based on a motion and on a showing. CAL PENAL CODE § 1405 (West 2003). Section 1054.9(e), effective January 1, 2003, makes it clear that section 1405 is the post-conviction exception to the general discovery rules. *Id.* § 1054.9.

265. ILLINOIS COMMISSION REPORT, *supra* note 5, at 60.

266. *See* CAL. PENAL CODE § 987.9 (West 2003).

267. *See, e.g.,* *People v. Alvarez*, 926 P.2d 365, 423 (Cal. 1996).

268. *See* CAL. SUPREME CT. STATEMENT OF POLICIES REGARDING CASES ARISING FROM JUDGMENT OF DEATH § 3:2-2.1 (1989).



pensive procedures or complex cases.<sup>269</sup> While prosecutors use the resources of police investigators, the FBI, and other agencies, defense attorneys must pay for similar services out of the money provided for defense services.<sup>270</sup> Private attorneys sometimes try to subsidize the costs at serious personal risks to themselves, but the majority cannot afford to make that choice.<sup>271</sup> For example, one Alabama lawyer reported that the cost of defending a capital case exceeded \$340,000 and pushed him into bankruptcy.<sup>272</sup>

### 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.<sup>273</sup> It recommended that there be five and only five circumstances which would make a murder case death eligible. In contrast, California has twenty-five special circumstances which actually break down into more than thirty-six.<sup>274</sup>

As mentioned above, California’s system is so far askew from the recommendations that this area alone makes our system a failure. California can hardly claim that it complies with the Federal Constitutional requirement of a narrow class of death eligible murder defendants when nearly all murder cases in California are death eligible.

The point of narrowing is not simply to limit the total number of death sentences handed down. In fact, only a small percentage of death eligible cases result in a death sentence. The issue here is whether California has a rational basis to narrow the class of cases, so that actual death judgments are based on principles and not capriciousness or

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269. Douglas W. Vick, *Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences*, 43 BUFF. L. REV. 329, 375 (1993). “In California, lawyers were paid an average \$110,000 for appellate work at the state level in death cases, at an hourly rate (\$75) that was not adequate to attract enough attorneys to represent all defendants appealing their death sentences.” *Id.* at 375.

270. *Id.* at 395.

271. *Id.* at 397.

272. *Id.*

273. ILLINOIS COMMISSION REPORT, *supra* note 5, at 65-79.

274. See CAL. PENAL CODE § 190.2 (West 2003); CAL. MIL. & VET. CODE § 1627(a) (West 2003); CAL. PENAL CODE §§ 37, 128, 4500 (West 2003) (pursuant to section 190.3).

prejudice.<sup>275</sup>

*Recommendation 27:*

*The current list of 20 eligibility factors should be reduced to a smaller number.*<sup>276</sup>

The Illinois Commission concluded that, “[r]educing the number of eligibility factors should lead to more uniformity in the way in which the death penalty is applied in Illinois, and provide greater clarity in the statute, while retaining capital punishment for the most heinous of homicides.”<sup>277</sup>

The Illinois statutory death penalty scheme is quite similar to California’s. The first step in Illinois is to determine if a homicide case fits into one of the statutory definitions that would make the defendant death eligible.<sup>278</sup> This is equivalent to a finding of “special circumstances” under California law. However, like California, Illinois law contains twenty such eligibility factors some of which are so broad that, “nearly every first degree murder in Illinois could be eligible for the death penalty under one theory or another.”<sup>279</sup> Therefore, as in California, there is little rational narrowing.

California currently lists twenty-five separate eligibility factors called “special circumstances” under California Penal Code section 190.2 and the additional sections referred to in section 190.3, many of which have subparts.<sup>280</sup> Because these special circumstances encompass such a broad area, California’s statutory scheme does not meaningfully narrow the class of cases as discussed above.<sup>281</sup> Hence, as observed by the author, death row in California prisons is disproportionately

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275. See *Tuilaepa v. California*, 512 U.S. 967, 972 (1994); *Zant v. Stephens*, 462 U.S. 862, 875 (1983); *Furman v. Georgia*, 408 U.S. 238 (1972).

276. ILLINOIS COMMISSION REPORT, *supra* note 5, at 66.

277. *Id.* at 67.

278. *Id.* at 65.

279. *Id.* at 66. The Illinois Commission Report does not discuss an even greater problem associated with California’s law: In California, almost all murders can be construed to be first degree murder, thereby making the available pool even larger and the restraints on abuse of discretion, prejudice and caprice even less meaningful. See *Shatz & Rivkin*, *supra* note 30, at 1318.

280. The issue of the breadth of the California statute has been briefed in a case now pending before the California Supreme Court; the briefs drew heavily on the fine work of the California Appellate Project. Appellant’s Opening Brief, *People v. Turner*, No. S009038 (San Bernardino County Super. Ct., filed May 2003).

281. See *supra* text accompanying note 33-40.

populated by the poor, the uneducated, those who had poor representation, the mentally ill, the developmentally disabled, those whose victims were white or prominent, those who suffered child abuse themselves, those from certain geographic locations, and sometimes the innocent. To reduce this disparity, California should adopt Recommendation 27.

*Recommendation 28:*

*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.<sup>282</sup>*

The Illinois Commission identified four policy reasons in favor of capital punishment: (1) certain crimes, when compared to other first degree murders, are especially heinous and shocking; (2) certain people have clearly demonstrated a propensity to murder again; (3) some situations seem to suggest that capital punishment is the only meaningful form of punishment; and (4) some victims deserve special consideration, because they risk their lives for the sake of public

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282. ILLINOIS COMMISSION REPORT, *supra* note 5, at 67-68.

safety.<sup>283</sup> Arriving at the five categories of death eligible homicides, the Commission reported, “[i]f the death penalty continues to be applied in Illinois, a majority of Commission members believed that it should be tailored to further these objectives, while minimizing the opportunities for arbitrary application of this most severe form of punishment.”<sup>284</sup>

California has virtually no limitation on death eligible homicides.<sup>285</sup> The very act of trying to limit the selection of death eligible cases begs the question of whether such a list can be rationally devised at all. If death sentences are imposed on irrational criteria, then capital punishment should be abolished. For instance, if the race of the victim significantly influences the ultimate decision to kill a prisoner, few people would publicly argue that the decision making process is valid.<sup>286</sup> If we seek to reject race as a significant influence, we have to agree on rational criteria or agree that capital punishment cannot remain a part of our society’s laws.<sup>287</sup>

If the selection is to be made, it is noteworthy that four of the Illinois Commission’s five eligibility factors are similar to existing “special circumstances” in California: murder of a police officer or firefighter;<sup>288</sup> murder of two or more persons;<sup>289</sup> murder involving torture;<sup>290</sup> and murder of a person involved in the investigation, prosecution, or defense of a crime by a

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283. *Id.* at 69.

284. *Id.*

285. *See supra* text accompanying note 33-40.

286. Nationwide, the death penalty is imposed on an extremely skewed racial basis. Since the death penalty was re-instituted in 1973, only twelve white defendants were executed for killing blacks while 180 blacks were executed for killing whites. *See NAACP, DEATH ROW U.S.A., supra* note 3. Preliminary studies show significant disparity between race of victim and race of defendant regarding who gets sentenced to death in California. *See* Interview with Michael Radelet, Sociology Professor, University of Colorado, in Gaviota, Cal. (Mar. 2, 2003). Racial minorities convicted of murdering a white person are at least twice as likely to receive the death penalty as those who murder blacks. *See id.*

287. Justice Virginia Long of the New Jersey Supreme Court, in dissent, stated this fact succinctly: “It is time for the members of this Court to accept that there is simply no meaningful way to distinguish between one grotesque murder and another for the purpose of determining why one defendant has been granted a life sentence and another is awaiting execution.” *See State v. Timmendequas*, 773 A.2d 18, 52 (N.J. 2001) (Long, J., dissenting).

288. CAL. PENAL CODE § 190.2(a)(7)-(9) (West 2003).

289. *See id.* § 190.2(a)(2)-(3).

290. *See id.* § 190.2(a)(18).

person under investigation or a defendant.<sup>291</sup> Although not identical, these four eligibility factors are approximately the same as ten of the California special circumstances. Therefore, the Illinois Commission recommendation that its list be limited to five eligibility factors does not include the other fifteen to twenty-six special circumstances listed in California. More importantly, they do not include the most abused and overbroad categories, “felony murder”<sup>292</sup> and “by means of lying in wait.”<sup>293</sup>

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.<sup>294</sup> 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.<sup>295</sup> Prosecutors would be required to follow statewide standards, and to articulate their reasons for choosing particular defendants for death.

California does not have any such standards. Prosecutors are permitted, from county to county, to choose death cases based on their own criteria or none at all.<sup>296</sup> This results in a wild and unprincipled disparity from county to county, such that the location of the case can determine the outcome. Some of California’s fifty-eight counties have few or no death cases at all, while others account for the vast majority of death row inmates.<sup>297</sup>

*Recommendation 29:*

*The [state] attorney general and the [state’s prosecutor association] should adopt recommendations as to the procedures [prosecutors] should follow in deciding whether or*

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291. *See id.* § 190.2(a)(10)-(13).

292. *See id.* § 190.2(a)(17).

293. *See id.* § 190.2(a)(15).

294. ILLINOIS COMMISSION REPORT, *supra* note 5, at 81-92.

295. *Id.* at 81.

296. CAL. GOV’T CODE § 26500 (West 2003) (granting prosecutors power over prosecutions within their jurisdiction). *See also* People v. Keenan, 758 P.2d 1081, 1097-98 (Cal. 1988) (confirming that prosecutors have discretionary power to seek the death penalty).

297. *See* CONDEMNED INMATE SUMMARY, *supra* note 3.

*not to seek the death penalty, but these recommendations should not have the force of law, or be imposed by court rule or legislation.*<sup>298</sup>

The great disparity in filing decisions from county to county in California gives rise to a serious geographical denial of equal protection.<sup>299</sup> Since California re-instituted the death penalty in 1977, thirty percent of the condemned inmates were sentenced out of Los Angeles County, and significant numbers of inmates came from counties with smaller populations like Riverside, Kern, San Bernardino, Sacramento, San Diego, and Santa Clara.<sup>300</sup> On the other hand, sixteen counties have never imposed the death penalty and eleven have only done so once.<sup>301</sup> The District Attorney of San Francisco, Terrence Hallinan, has refused to seek the death penalty at all, although three condemned people were convicted in San Francisco before his term in office began.<sup>302</sup>

The Illinois Commission found similar geographic disparities within Illinois.<sup>303</sup> Even without a sophisticated study, it is apparent that there is a significant geographical disparity in California. One way to address this issue, the Commission found, is to require a statewide protocol, including statewide recommendations to guide the local prosecutors.

California leaves local prosecutors the discretion to decide whether or not to allege special circumstances and, if so, whether to seek the death penalty.<sup>304</sup> The defense can only

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298. ILLINOIS COMMISSION REPORT, *supra* note 5, at 82.

299. The California Supreme Court held that "prosecutorial discretion to select those eligible cases in which the death penalty will actually be sought does not in and of itself evidence an arbitrary and capricious capital punishment system or offend principles of equal protection, due process, or cruel and/or unusual punishment." *Keenan*, 758 P.2d at 1097-98. The fact that a small group of counties prosecute the majority of capital cases in California indicates unequal treatment. See CONDEMNED INMATE SUMMARY, *supra* note 3. The county in which an individual commits his crime ultimately determines whether he gets life or death.

300. CONDEMNED INMATE SUMMARY, *supra* note 3. The California Department of Corrections website contains the statistics as of April 9, 2002.

301. *See id.*

302. *See The Death Penalty Upheld in San Francisco Robbery, Killing*, MET. NEWS-ENTERPRISE, Dec. 6, 2002. San Francisco District Attorney Hallinan not only refused to seek the death penalty in his county but also refused to file a motion to set an execution date in a case predating his taking office. *Id.* at 3. The Attorney General of California stepped in and signed the motion. *Id.*

303. ILLINOIS COMMISSION REPORT, *supra* note 5, at 82.

304. *See People v. Keenan*, 758 P.2d 1081, 1109 (Cal. 1988); *see also Shatz & Rivkind*, *supra* note 30, at 1292. Neither the California Code nor the state At-

challenge that decision on the basis that the prosecutor engaged in intentional and invidious discrimination.<sup>305</sup> Absent evidence of such discrimination, the court lacks the pre-trial jurisdiction to preclude the death penalty in the furtherance of justice.<sup>306</sup>

*Recommendation 30:*

*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 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.*<sup>307</sup>

As a matter of fundamental Eighth Amendment juris-

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torney General's office sets forth standards. Prosecutors exercise their discretion to varying degrees, as evidenced by the differing number of convicts that each county has sent to death row. *See generally* CONDEMNED INMATE SUMMARY, *supra* note 3. A full study of the geographical disparity in the imposition of the death penalty in California should be conducted. However, it is clear from the raw data derived from the Department of Corrections that a glaring disparity exists. *See id.* (indicating that nineteen counties have not imposed any death sentences and thirteen more have imposed less than three, while four have imposed more than forty each. San Francisco, a large metropolitan county, has imposed only three.). Some of the largest counties have contributed fewer inmates than much smaller counties (e.g. San Francisco County contributed three while Kings County contributed four). *Id.* The denial of equal protection based on geographical location may raise constitutional issues per the Supreme Court's decision in *Bush v. Gore*, 531 U.S. 98 (2000).

305. *See Keenan*, 758 P.2d at 1109.

306. The court cannot use Penal Code section 1385, allowing dismissals in the furtherance of justice, to preclude the prosecution from seeking the death penalty by pre-trial order. *See People v. Superior Court (Bridgette)*, 189 Cal. App. 3d 1649, 1652 (1987).

307. ILLINOIS COMMISSION REPORT, *supra* note 5, at 84.

prudence, the death penalty may only be imposed if it is imposed on a rational basis.<sup>308</sup> The Supreme Court in *Furman v. Georgia*, and subsequent cases, held that it cannot be imposed based on random factors, on the basis of race, or on unfettered prosecutorial discretion.<sup>309</sup>

The Illinois Commission recognized that one means to help control prosecutorial discretion would be to create a statewide committee to review death penalty charging decisions.<sup>310</sup> Absent such a legislative enactment, the governor could set up a voluntary review process and commute death sentences which were not so reviewed.<sup>311</sup> This would promote uniformity and adherence to a set of rational guidelines in selecting death cases.

California law does not require either a statewide committee to review death eligibility or any presumption flowing from a failure to participate in a voluntary review process.<sup>312</sup> Since the death penalty was re-instituted in 1977, no California governor has commuted a single death sentence.<sup>313</sup> The imposition of the death penalty in California varies depending on the court's geographical location.<sup>314</sup> Indisputably, prosecutorial discretion is a major factor.<sup>315</sup> Yet, there is no statewide committee to review the decisions. Furthermore, California's governors have done nothing to remedy the disparity.

*Recommendation 31:*

*The Commission supports [Illinois] Supreme Court Rule 416(c) requiring that the state announce its intention to*

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308. *Furman v. Georgia*, 408 U.S. 238, 313 (1972).

309. *See id.*

310. ILLINOIS COMMISSION REPORT, *supra* note 5, at 84.

311. *Id.*

312. CAL. CONST. art 5, § 13. The California Attorney General is the only person in the state with the power to review decisions of the prosecutor. *Id.*

313. For the period from 1977 (when the death penalty was re-instituted in California) until 2002, the Department of Corrections received 717 condemned inmates. *See* California Department of Corrections, *Death Sentence Status, 1978 to Present*, (2002), [http://www.cdc.state.ca.us/CommunicationsOffice/CapitalPunishment/death\\_sentence\\_status.asp](http://www.cdc.state.ca.us/CommunicationsOffice/CapitalPunishment/death_sentence_status.asp) (last visited Aug. 12, 2003). The death sentence was overturned in 60 cases, 13 committed suicide, 22 died from other causes, and 10 were executed. *Id.* The governor did not commute any of the sentences. *Id.*

314. *See supra* note 304.

315. ILLINOIS COMMISSION REPORT, *supra* note 5,



*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.*<sup>316</sup>

At the time of the Commission's study, the Illinois Supreme Court had already issued a rule instituting this recommendation. As discussed below, defense counsel in California may not know until almost the day of trial whether the prosecution intends to seek the death penalty. California law does not require that the prosecutor announce his or her intention to seek the death penalty in a timely fashion. The only certain deadline by which the prosecutor must alert the defense that she or he will seek the death penalty is just before jury selection begins.<sup>317</sup> This requirement exists only because the defendant has the right to "death-qualify" a jury where the death penalty is sought.<sup>318</sup>

The death penalty cannot be imposed in California unless the prosecution charges and proves one or more special circumstances.<sup>319</sup> If the district attorney files a felony complaint and information, she or he may allege one or more special circumstances therein.<sup>320</sup> If the prosecutor indicts the defendant, she or he may ask the grand jury to return one or more special circumstances.<sup>321</sup>

Whether a defendant is arraigned on an information or an indictment,<sup>322</sup> the prosecutor may thereafter amend the ac-

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316. *Id.* at 89.

317. *See* CAL. CIV. PROC. CODE § 223 (West 2003).

318. *See id.* § 223 (West 2003); *see also* *People v. Pike*, 372 P.2d 656 (Cal. 1962).

319. *See* CAL. PENAL CODE § 190.3-.4 (West 2003).

320. *See id.* § 806.

321. *See id.* § 952. The cases in which district attorneys commonly seek grand jury indictments are murder and sex crimes. *Some Aspects of the California Grand Jury System*, 8 STAN. L. REV. 631, 644 (1956).

322. For an information, a complaint is filed and a preliminary hearing is held before a magistrate. The magistrate determines if there is sufficient evidence to hold the defendant to answer. The evidence at the preliminary hearing may be hearsay and the standard of proof is "probable cause" meaning that there is a strong suspicion that a crime was committed and that the defendant committed it. If the defendant is held to answer, the prosecutor then files a charging document called an "information" in the superior court. The defendant is then arraigned on the information and proceeds to trial. With an indictment, the prosecutor goes before a secret grand jury. Neither the suspect nor his or her counsel are allowed in the grand jury room and usually are not given any notice that the grand jury has been convened. After hearing the evidence presented by the prosecutor, the grand jury decides whether to return an indictment. The indictment is then the charging document filed in the superior court

cusatory pleading to allege one or more special circumstances if evidence was adduced at the preliminary hearing or grand jury to support them.<sup>323</sup>

Even where special circumstances are alleged, the defendant still may not be certain that he or she faces the death penalty. If the prosecutor intends to introduce evidence in aggravation during the penalty phase, she or he must give the defendant reasonable notice prior to trial.<sup>324</sup> A lack of notice does not mean that the prosecutor will not seek the death penalty, however, since the notice requirement does not apply to evidence that will also be used as proof of the offense or special circumstances.<sup>325</sup> This is likely where, for example, the prosecutor intends to rely only on the "circumstances of the crime" aggravating factor.<sup>326</sup>

Finally, even the district attorney's statement that she or he will not seek the death penalty is not conclusive. The California Court of Appeal has held that the Constitution does not necessarily bar the prosecutor from changing her or his mind later.<sup>327</sup> In *Leo v. Superior Court*, the California Court of Appeals found that the district attorney's decision did not violate either the United States or the California Constitution, because the decision was not random, arbitrary, or capricious.<sup>328</sup>

The absence of any timely notification requirement under California law is a serious procedural gap. It is easily remedied by compliance with this recommendation.

##### 5. *Trial Judges: Recommendations 32 Through 39*

The Illinois Commission made eight recommendations regarding the administration of the trial courts.<sup>329</sup> These recommendations are designed to increase the level of knowledge and performance by the judges trying capital cases. They also

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upon which the defendant is arraigned and proceeds to trial.

323. See CAL. PENAL CODE § 1009; *but see* Talamantez v. Superior Court, 122 Cal. App.3d 629, 633-36 (1981) (suggesting in dicta that amending an indictment to add a special circumstance would change the offense charged in violation of California Penal Code section 1009).

324. See CAL. PENAL CODE § 190.3 (West 2003).

325. See *id.*

326. See *id.* § 190.3(a); see also Shatz & Rivkind, *supra* note 30, at 1293.

327. See *Leo v. Superior Court*, 179 Cal.App.3d 274, 285 (1986).

328. *Id.* at 284 (stating that since the trial had not begun, the defendant had adequate time to prepare a defense as one for a capital offense and, thus, there was no violation of due process of law).

329. ILLINOIS COMMISSION REPORT, *supra* note 5, at 93-101.

provide for more centralized management and oversight.

*Recommendation 32:*

*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.*<sup>330</sup>

The Illinois Commission recognized that the State of Illinois also had a funding act and that the Illinois Supreme Court had instituted a training program on capital cases.<sup>331</sup> In fact, the recommendation goes beyond what was in place both to train on the specific issues of funding and to ensure that the actual trial judges responsible for funding decision receive the training.<sup>332</sup>

California law does not require that judges be educated specifically on capital case funding issues. Funding for services related to defense of capital cases in the trial courts is established primarily by statute.<sup>333</sup> The individual judges determine how much money, if any, will be allowed for any particular request.<sup>334</sup> These judges must determine what kinds of experts, investigators, and other defense services are appropriate in a death penalty case, and how much money should be allocated to each request.<sup>335</sup> Furthermore, no mechanism exists to ensure that the judges responsible for administering the funds have access to the information they need to make educated decisions on funding.<sup>336</sup> Judicial education on funding issues, as well as other issues related to capital litigation recommended in Recommendations 36 through 38, is critical to developing statewide judicial competence in death penalty cases. It is unrealistic to think that all of the judges from all the various jurisdictions within the state, rural and urban,

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330. *Id.* at 93-94.

331. *Id.* at 93-94.

332. *Id.* at 94.

333. *See* CAL. PENAL CODE § 987.9 (West 2003).

334. *See id.*

335. *See id.*

336. California judges are obligated to obtain ongoing judicial education. *See* CAL. CT. R. APPENDIX § 970. There are, however, no oversight procedures in place to ensure that judges meet this obligation or that judges have training in capital case issues prior to accepting assignment of a capital case.

will have the experience and knowledge necessary to rule on the funding issues related to these complex cases. Certainly, judges have to exercise judgment in refusing or reducing some defense requests, but they must also have the training and experience in capital litigation necessary to understand what requests should be granted.

*Recommendation 33:*

*. . . 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.*<sup>337</sup>

At the time of the Commission's report, the Illinois Supreme Court provided training through the Illinois Judicial Conference and had specifically established "Capital Litigation Regional Seminars" for judges who may preside over death penalty cases.<sup>338</sup> Nevertheless, the Commission unanimously recommended that, "the Supreme Court go one step further and specifically *require* that judges who are going to hear capital cases undertake this training prior to hearing capital cases."<sup>339</sup> The Commission determined that this training is necessary to ensure that judges "understand the parameters of the Capital Crimes Litigation Act and the funding sources available for the defense of capital cases" and that judges hearing capital cases be the most qualified and best trained.<sup>340</sup>

California does not require a judge to have any particular training prior to assignment to a capital case beyond the requirements to pass the bar examination.<sup>341</sup> The sole qualification to become a superior court judge in California is that the candidate has been a member of the California State Bar for a

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337. ILLINOIS COMMISSION REPORT, *supra* note 5, at 94.

338. *Id.* at 94-95.

339. *Id.* at 95.

340. *Id.*

341. *See* CAL. CONST. art. VI, § 15.

period of ten years.<sup>342</sup> Even inactive membership can qualify a candidate.<sup>343</sup>

After judges take the bench, they receive general training through the auspices of the California Judicial Council.<sup>344</sup> Presiding judges of each county are responsible for scheduling the judges' attendance at schools.<sup>345</sup> The California Standards of Judicial Administration specify some general requirements for initial and continuing judicial education.<sup>346</sup> They do not require education regarding capital litigation.<sup>347</sup> However, they do expound specific educational standards regarding assignment to jury trials, family court and juvenile dependency court.<sup>348</sup> Because the issues involved in capital cases are at least as weighty as those in family or juvenile dependency court, the Standards of Judicial Administration should also include specific educational standards for death penalty cases.

If the judges were all trained on the issues involved in homicide and death penalty cases, conviction of the innocent would be less likely, and the results in those cases would be more reliable. To comply with the letter and the spirit of the recommendations, judges should be trained, at a minimum, regarding capital case funding<sup>349</sup> and on the law of capital litigation.<sup>350</sup> Judges should also be trained in advance of the management of the discovery process related to capital litigation,<sup>351</sup> and the legal and evidentiary problems which have led to conviction of the innocent.<sup>352</sup> The latter would include training regarding the risks of false testimony by in-custody informants, the risks of false testimony by accomplice witnesses, the dangers of tunnel vision or confirmatory bias, the

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342. *See id.*

343. *See* CAL. BUS. & PROF. CODE § 6006 (West 2003).

344. *See* CAL. GOV'T. CODE § 68551 (West 2003).

345. *See* CAL. CT. R. APPENDIX § 6.603(c)(2).

346. *See id.* § 25.1.

347. *Id.* § 25.2(a). The Center for Judicial Education and Research issues two chapters in a general workbook on criminal law which relate to death penalty trials. CJER California Judges Benchguides 98 and 99 (2001). These chapters are 88 and 86 pages long, respectively.

348. *See id.* § 25.2.

349. *See* ILLINOIS COMMISSION REPORT, *supra* note 5, at 94 (Recommendation 32).

350. *See id.* at 97 (Recommendation 36).

351. *See id.* at 96 (Recommendation 34).

352. *See id.* (Recommendation 35).

risks of wrongful convictions in homicide cases, police investigative and interrogation methods, police investigating and reporting of exculpatory evidence, forensic evidence, and the risks of false confessions.<sup>353</sup>

To adopt this recommendation for judicial education would require that California first implement other substantive changes. For instance, California first would have to enact the recommendations pertaining to management of the discovery process and then institute judicial training regarding it. However, other aspects of the proposed mandatory training could be instituted immediately such as education on funding and legal and evidentiary issues which have led to conviction of the innocent.

*Recommendation 34:*

*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.*<sup>354</sup>

California law does not require individual judges to have any training on new or existing rules regarding capital litigation, or any new or existing discovery process.<sup>355</sup> The Illinois Commission recommended new discovery and pre-trial procedures<sup>356</sup> which, if adopted in California, would require additional training.<sup>357</sup> However, a judge without substantial death penalty case experience would also benefit from training, and such training would raise the standards of justice and fairness in the individual cases.

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353. *Id.*

354. *Id.* at 96. (Recommendation 34)

355. *See* CAL. CT. R. APPENDIX § 25.1-.3.

356. ILLINOIS COMMISSION REPORT, *supra* note 5, at 115-21 (Recommendations 46, 49, 50, and 51).

357. By their terms, many of the Commission's recommendations will implement procedures not currently required or available in California. *See id.* (Recommendations 46 (permitting discovery depositions); 52 (requiring a pre-trial evidentiary hearing to evaluate the reliability of an in-custody informant); 53 (requiring the court to closely scrutinize any prosecution tactic that might induce an involuntary or untrustworthy confession)). Judges will certainly require additional training to ensure correct and uniform implementation of these new procedures.

*Recommendation 35:*

*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.*<sup>358</sup>

The Illinois Commission studied the thirteen cases in Illinois where people had been released from death row, as well as a number of scholarly writings and government-sponsored reports.<sup>359</sup> Based on its two-year review, the Illinois Commission concluded that “many of these recommended training subjects cover areas where capital cases can go painfully wrong.”<sup>360</sup>

California law does not require judges to receive training on the risks of false testimony by “jailhouse snitches,” the risks of false testimony by accomplice witnesses, the dangers of tunnel vision or confirmatory bias, the risks of wrongful convictions in homicide cases, police investigative and interrogation methods, police investigating and reporting of exculpatory evidence, forensic evidence, or the risks of false confessions.<sup>361</sup>

*Recommendation 36:*

*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.*<sup>362</sup>

The Illinois Commission found that despite Illinois’ ex-

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358. *See id.* at 96.

359. *Id.* at 5-6.

360. *Id.* at 96.

361. CAL. CT. R. APPENDIX § 25.1-.3. Note that the Center for Judicial Education and Research Benchguides 98 and 99, *supra* note 347, do not cover any of these topics.

362. ILLINOIS COMMISSION REPORT, *supra* note 5, at 97.

tensive effort to improve judicial training, judges handling death penalty cases needed access to additional resources to do the job well.<sup>363</sup> The Illinois Commission looked to New Jersey and New York to find examples of effective ways to provide such access.<sup>364</sup> Likewise, California could also increase judges' access to resources, but needs to take the next step.

Recommendation 36 is actually two recommendations in one. First, it mandates statewide funding for materials to train judges in capital litigation. Second, it requires the funding of additional staff to provide research support.

California trial judges do not have a statewide manual covering the topics recommended by the Illinois Commission, and have not been provided with additional staffing for capital cases.<sup>365</sup> Regarding statewide materials, the CJER training materials include only two brief chapters on capital litigation.<sup>366</sup> Those chapters cover, in outline form, the basics of death penalty cases, but they barely scratch the surface of current California law.<sup>367</sup> Furthermore, to comply with this part of the recommendation, the materials should contain information on other issues under the recommendations which have not been implemented, such as management of the discovery process and police practices which have yet to be reformed.

Regarding provision of research support, there is no provision in California law for additional court staffing. In order to comply with this recommendation, the courts would have to budget resources to provide law clerks or research attorneys for judges handling capital cases. This would be of particular importance to smaller courts or to courts which have a high volume of capital cases.

*Recommendation 37:*

*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*

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363. *Id.*

364. *Id.* at 97-98.

365. Although continuing judicial education is provided for in general, there are no statutory provisions requiring a capital litigation manual or an increased support staff for capital cases. *See supra* text accompanying notes 341-48.

366. *See* CJER California Judges Benchguides 98 and 99, *supra* note 347.

367. *See id.*



*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.*<sup>368</sup>

The Illinois Commission recommendation contemplates more than just a summary of the advance sheets.<sup>369</sup> Although it also recommended increased proficiency for death penalty lawyers, the Commission emphasized that the courts play an important role in raising the quality of capital trials.<sup>370</sup>

California does not require that this information be provided to the judges or lawyers handling capital cases. However, defense attorneys can get information through the California Appellate Project.<sup>371</sup> Prosecutors have access to similar material from the California District Attorney's Association.<sup>372</sup> This recommendation suggests that these materials be assimilated into one form, for distribution by the courts.<sup>373</sup>

*Recommendation 38:*

*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.*<sup>374</sup>

Judges need not be certified in order to hear capital cases in California. Nothing in California law prevents a judge with no criminal experience, either as a lawyer or a judge, from hearing a capital case. The Illinois Commission under-

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368. ILLINOIS COMMISSION REPORT, *supra* note 5, at 98.

369. *See id.*

370. *Id.* at 93.

371. Attorneys actively defending a death row inmate can get assistance from the California Appellate Project's San Francisco office. *See generally* CALIFORNIA APPELLATE PROJECT - SAN FRANCISCO, ABOUT CAP, at <http://www.cdaa.org/assoc.html> (last visited Aug. 5, 2003) [hereinafter CALIFORNIA APPELLATE PROJECT].

372. *See* CALIFORNIA DISTRICT ATTORNEY'S ASSOCIATION, CDAA ASSOCIATION AND STAFF, at <http://www.cdaa.org/assoc.html> (last visited Aug. 12, 2003).

373. ILLINOIS COMMISSION REPORT, *supra* note 5, at 98-99.

374. *Id.* at 99.

stated the point when it said, “[m]any problems typically associated with capital trials can be averted by a trial judge who is particularly familiar with capital cases.”<sup>375</sup>

Trial lawyers for both the defense and prosecution are all too familiar with the problems associated with litigating a complex case before a judge who is not steeped in the procedure, forensics, evidence, and other unique aspects of death penalty litigation. The litigators should litigate and the judge should have independent expertise upon which to draw in managing this life or death litigation.<sup>376</sup>

*Recommendation 39:*

*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.*<sup>377</sup>

California law does not provide for such a standing committee. The Illinois Supreme Court had already established a standing Committee on Capital Cases.<sup>378</sup> The Commission suggested that the Committee continue its work analyzing the death penalty system, but also recommended that the Committee expand its role throughout the state to act as a resource panel for judges handling capital cases.<sup>379</sup> A California standing committee would make resources available to judges presiding over capital cases, helping to ensure that trial judges have the latest information available and improving the uniformity of managing capital sentencing procedures.<sup>380</sup> Judges would also benefit from the knowledge of others who

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375. *Id.* at 100.

376. For instance, we expect that Major League Baseball umpires be more than general sports enthusiasts. We expect that they not only be experts on the rules of baseball but have experience in calling professional games under pressure. We expect that the umpire will be more qualified when there is more on the line—the division championship or the World Series, for example. Although the author ordinarily eschews sports metaphors, it is rather compelling to compare the demand of the public for the best referees in sporting events with the relative lack of concern for requiring judges with the most relevant experience when it comes to refereeing a trial in which the loser may be put to death.

377. ILLINOIS COMMISSION REPORT, *supra* note 5, at 100.

378. *Id.*

379. *Id.* at 100-01

380. *Id.* at 101.

have experienced similar problems in their cases.<sup>381</sup>

6. *Trial Lawyers: Recommendations 40 Through 45*

The Illinois Commission made six specific recommendations pertaining to trial lawyers who handle capital cases.<sup>382</sup> 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.<sup>383</sup> Recommendation 41 also creates a Capital Litigation Trial Bar.<sup>384</sup>

*Recommendation 40:*

*The Commission supports new Illinois Supreme Court Rule 416(d) regarding qualifications for counsel in capital cases.*<sup>385</sup>

California law does not establish minimum qualifications for retained defense counsel or for the prosecuting attorney.<sup>386</sup> In California, there are minimum requirements for appointed defense counsel at trial<sup>387</sup> and appointed defense counsel on direct appeal and habeas corpus,<sup>388</sup> but these requirements do not apply to retained counsel or to the prosecutor.

The American Bar Association has recently revised the guidelines for defense counsel in capital cases.<sup>389</sup> The guidelines now apply to all lawyers handling capital cases rather than just to appointed counsel.<sup>390</sup> The Illinois Commission specifically supports the Illinois Supreme Court Rule that also applies these standards to retained counsel.<sup>391</sup> If the goal is to avoid the conviction of the innocent and ensure fairness and justice, retained counsel should also meet minimum stan-

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381. *Id.*

382. *Id.* at 105-14.

383. ILLINOIS COMMISSION REPORT, *supra* note 5, at 105.

384. *Id.* at 106-07.

385. *Id.* at 106.

386. *See* CAL. R. CT. 4.117 (2003) (establishing qualifications for appointed trial counsel in capital cases but not for privately retained counsel or prosecutors).

387. *Id.* R. 76.6.

388. *Id.* R. 4.117.

389. AM. BAR ASS'N, GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES (2003) [hereinafter ABA GUIDELINES FOR APPOINTMENT].

390. *Id.* at 35.

391. ILLINOIS COMMISSION REPORT, *supra* note 5, at 106 (quoting Illinois Supreme Court Rule 416(d)).

standards.

California also does not comply with this recommendation, since it does not set any standards for prosecutors.<sup>392</sup> The Illinois Commission found that prosecutorial misconduct led to over twenty-six percent of reversals in Illinois, and constituted an “error that did not warrant reversal” in a significant number of other cases.<sup>393</sup> Prosecutorial misconduct also contributes to appellate reversal of California cases.<sup>394</sup> Certainly, no prosecutor wants to have a case reversed, particularly a capital case. Mandatory training of prosecutors would help to reduce the incidence of misconduct. This would help avoid the unfairness associated with that misconduct and would also avoid retrials and, on occasion, reversals where retrial is barred.

*Recommendation 41:*

*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.*<sup>395</sup>

California has neither a Capital Litigation Trial Bar nor a requirement that lead or co-counsel belong to such a bar. The Illinois Commission noted: “Society as a whole has an important interest in the fair and just administration of capital punishment.”<sup>396</sup> Therefore, minimum standards should apply to “counsel for *all* capital defendants.”<sup>397</sup> To accomplish this goal, California should create a Capital Litigation Trial Bar, and require counsel to apply for certification to be admitted as a member of the Capital Litigation Trial Bar.

*Recommendation 42:*

*The Commission supports new Illinois Supreme Court*

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392. CAL. CT. R. 4.117, 76.6.

393. ILLINOIS COMMISSION REPORT, *supra* note 5, at 105.

394. *See, e.g.*, *People v. Batts*, 30 Cal. 4th 660 (2003) (overturning a defendant’s murder conviction because prosecutor misconduct at the first trial barred the subsequent retrial); *People v. Hill*, 17 Cal. 4th 800 (1998) (reversing defendant’s multiple convictions—including first degree murder—because prosecutor’s misconduct created a poisonous atmosphere that prevented a fair trial).

395. ILLINOIS COMMISSION REPORT, *supra* note 5, at 107.

396. *Id.* (quoting SUPREME COURT STANDING COMMITTEE SUPPLEMENTAL REPORT 7 (Oct. 2000)).

397. *Id.*

*Rule 714 which imposes requirements on the qualifications of attorneys handling capital cases.*<sup>398</sup>

The Illinois Commission recognized that standards will not eliminate poor advocacy on behalf of death penalty defendants.<sup>399</sup> They conceded that some attorneys who have demonstrated poor advocacy would still have met the minimum qualifications.<sup>400</sup> Nevertheless, the Commission recognized that the minimum standards and continuing education would have a positive impact.<sup>401</sup>

The Illinois Commission recommendation also allows a lawyer to sit “third chair” and thereby gain experience in capital litigation.<sup>402</sup> There is also a procedure for a waiver of the strict qualifications if a particular lawyer warrants admission despite a lack of compliance with the minimum qualifications.<sup>403</sup>

*Recommendation 43:*

*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.*<sup>404</sup>

California law does not require that the State Public Defender participate in locating qualified counsel around the state. The California Appellate Project does work with the California Supreme Court in locating qualified counsel for appointment to direct appeals and habeas corpus proceedings in capital cases.<sup>405</sup> There is no centralized process to qualify trial counsel, however. The Commission found that the State Appellate Defender should take this action because the state’s new certification rules created practical concerns about the availability of qualified local counsel for capital defendants tried in small counties.<sup>406</sup> While California does not have certification rules for the trial level, the rational underlying the

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398. *Id.* at 108.

399. *Id.*

400. *Id.*

401. ILLINOIS COMMISSION REPORT, *supra* note 5, at 108.

402. *Id.* at 109.

403. *Id.*

404. *Id.* at 110.

405. *See* CALIFORNIA APPELLATE PROJECT, *supra* note 371.

406. ILLINOIS COMMISSION REPORT, *supra* note 5, at 110.

recommendation is applicable. California has many small counties where qualified local counsel may be difficult to find.

*Recommendation 44:*

*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.*<sup>407</sup>

The Illinois Commission recommended that the training be mandatory for both prosecution and defense lawyers.<sup>408</sup> In addition the Commission recommended that the training be of the highest quality and adequately funded.<sup>409</sup> California does not meet this recommendation because capital case training is not mandatory. Based on the author's observations, lawyers can take on death penalty cases in California without any formal training in capital cases. Without public funding and mandatory attendance; however, many lawyers on both sides handle death penalty cases without adequate training.<sup>410</sup>

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407. *Id.*

408. *Id.*

409. *Id.*

410. While private lawyers can sometimes devote more time than some public defenders, given the extraordinary demands of the public defender caseload, private lawyers do not necessarily have more training or experience than public defenders. In fact, sometimes the decision to hire a private lawyer in lieu of a public defender can be disastrous. As Justice Gardner of the California Court of Appeal said in *People v. Huffman*, 71 Cal. App. 3d 63, 70 fn.2 (1977):

"It is an odd phenomenon familiar to all trial judges who handle arraignment calendars that some criminal defendants have a deep distrust for the public defender. This erupts from time to time in savage abuse to these long-suffering but dedicated lawyers. It is almost a truism that a criminal defendant would rather have the most inept private counsel than the most skilled and capable public defender. Often the arraigning judge appoints the public defender only to watch in silent horror as the defendant's family, having hocked the family jewels, hire a lawyer for him, sometimes a marginal misfit who is allowed to represent him only because of some ghastly mistake on the part of the Bar Examiners . . . ."

A recent example of this phenomenon involved a lawyer, already being sued by other clients and under investigation by the State Bar, who convinced family members of a defendant to hire her on a death penalty case. She had only been practicing for two years and had no capital experience. After the death verdict, she resigned from the State Bar with investigations pending. See *People v. Ryan Hoyt*, Santa Barbara Superior Court Case Number 1014465, wherein the author was substituted in to attempt to obtain a new trial; the appeal is pending before the California Supreme Court, number to be assigned.

California law does not provide such funding. In recent years, the Habeas Corpus Resource Center, the Office of the State Public Defender, and the California Appellate Project provide some training for defense lawyers. Private organizations, such as The California Public Defenders Association and the California Attorneys for Criminal Justice, provide most of the extensive training sessions which are available to capital case defense lawyers.<sup>411</sup> The California District Attorney's Association provides training for prosecutors. Attendees at these training sessions must pay their own way or be reimbursed by their employers. However, employers may not have the budget to reimburse their employees. In addition, employees take these training courses at their own election; nothing requires that they be trained on capital litigation.

*Recommendation 45:*

*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.*<sup>412</sup>

The Illinois Commission recommended that police and judges also receive this training.<sup>413</sup> The Commission made the point that based on its extensive study, these problems recur

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411. Each year CACJ, along with the California Public Defenders Association, co-sponsors the Capital Case Defense Seminar in Monterey, during the President's Day Weekend in February. The four-day program is an intensive educational opportunity for those involved in death penalty defense and it includes lectures, plenary sessions, and specialized workshops. With the 2001 seminar attendance topping 1,200, the CACJ/CPDA Capital Case Defense Seminar is the largest of its type held in the nation. *See, e.g., CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE, SEMINARS,* at <http://www.cacj.org/seminars.htm> (last visited Aug. 6, 2003).

412. ILLINOIS COMMISSION REPORT, *supra* note 5, at 111.

413. *See id.* at 39, 96 (describing the Commission's Recommendation 16, regarding police, and Recommendation 35, regarding judges).

in capital cases and lead to injustice.<sup>414</sup> It also emphasized that both the defense and the prosecution should be aware of these pitfalls.<sup>415</sup> California has no such requirement.

7. *Pretrial Proceedings: Recommendations  
46 Through 54*

The Illinois Commission made nine recommendations pertaining to pre-trial proceedings in capital cases.<sup>416</sup> 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.<sup>417</sup>

*Recommendation 46:*

*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.*<sup>418</sup>

The Illinois Commission concluded that discovery depositions simply permit both sides to hear critical evidence before a trial.<sup>419</sup> The Commission echoed the Illinois Supreme Court's conclusion that pre-trial discovery procedures provide an extra step toward a fair trial, and that it is better for all concerned, including witnesses, victims, and survivors, to do it right the first time rather than having everyone endure a second trial.<sup>420</sup>

California law does not permit discovery depositions in capital cases. California has a limited provision for a conditional examination where a witness may become unavailable,<sup>421</sup> but this is not a discovery deposition.<sup>422</sup> California

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414. *Id.* at 105, 111.

415. *Id.* at 111.

416. *Id.* at 115-26.

417. *Id.* at 115.

418. ILLINOIS COMMISSION REPORT, *supra* note 5, at 115.

419. *Id.* at 116-17 (quoting the Illinois Supreme Court Committee).

420. *Id.*

421. CAL. PENAL CODE §§ 1335-1345 (West 2003).

422. A conditional examination can only be taken if the witness is in danger of becoming unavailable as a witness. The Sixth and the Fourteenth Amendments to the United States Constitution require that the state make a "good faith effort to obtain [the witness's] presence at trial." *Barber v. Page*, 390 U.S. 719 (1968). The Court emphasized the importance of confrontation and cross-examination before the "contemporaneous trier of fact." *Id.* California cases have further emphasized that transcript testimony, of which a conditional ex-



used to have a liberal preliminary examination procedure that allowed broad cross-examination of prosecution witnesses and allowed the defense to depose witnesses.<sup>423</sup> The law was amended by initiative,<sup>424</sup> however, to allow the prosecution to introduce police officer hearsay testimony in lieu of live witnesses<sup>425</sup> and to prevent the defense from deposing most witnesses.<sup>426</sup> This latter provision expressly states that the preliminary hearing “shall not be used for the purposes of discovery” and that the section “shall not be construed to compel or authorize the taking of depositions of witnesses.”<sup>427</sup> In addition, many capital cases are indicted before the grand jury where the defense counsel has no opportunity for participation at all.<sup>428</sup>

An opportunity to evaluate the live testimony of critical witnesses prior to trial is invaluable to both the prosecution and the defense. Prior to Proposition 115, when California allowed full preliminary hearings, both sides to the case had an opportunity to evaluate the strengths and weaknesses of the witness before trial. This made it easier and more meaningful to discuss pre-trial disposition of a case. It also allowed the prosecution to better evaluate the charging decision at the information stage.

Discovery depositions would accomplish much the same purpose. Both sides would have an opportunity to evaluate the strengths and weaknesses of testimony after it was subjected to cross-examination. Defense lawyers could be better prepared, and both the defense and the prosecution could de-

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amination is one form, can only be used after due diligence is exercised to bring the live witness before the court by interstate process, *People v. Jones* 89 Cal.Rptr. 661 (1970); *People v. Blackwood* 188 Cal.Rptr. 359 (1983), or even by international law, *People v. St. Germain*, 187 Cal.Rptr. 915 (1982) (requiring the party to use federal law to obtain the attendance of a witness who is a national or resident of the United States who is presently in a foreign country). Therefore, the use of conditional examinations is greatly limited. Conditional examinations are limited to questions and answers which would be admissible at trial. Discovery depositions, on the other hand, allow direct and cross-examination of a witness in a fashion calculated to lead to the discovery of relevant evidence.

423. CAL. PENAL CODE § 866 (West 1983), *amended by* Cal. Proposition 115 (1990).

424. Cal. Proposition 115 (1990).

425. CAL. PENAL CODE § 872(b) (West 2003).

426. *Id.* § 866.

427. *Id.* § 866(b)-(c).

428. *Id.* §§ 888-92.

tect false accusations and perjured testimony before trial.

*Recommendation 47:*

*The Commission supports the provisions of the new Illinois Supreme Court rule 416(f) 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.*<sup>429</sup>

The Illinois Commission observed:

The trial judge has ultimate responsibility for ensuring that the trial moves at an appropriate pace and that decisions are fairly made. The trial judge is the person responsible for managing the conduct of both the prosecution and defense before the jury, and supervising the overall conduct of the trial to ensure that a fair and just result is obtained. A great many problems can be avoided by active and interested judicial management.<sup>430</sup>

California law does not mandate case management conferences which ensure compliance with discovery rules. In fact, California law has been amended over recent years to reduce judicial supervision of discovery procedures.<sup>431</sup> A false economy exists in allowing the courts to withdraw from supervising discovery issues rather than affirmatively insuring compliance. Failure to resolve discovery disputes early on results in even greater expenditure of judicial resources on appeal.<sup>432</sup>

*Recommendation 48:*

*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 re-*

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429. *Id.* at 117.

430. ILLINOIS COMMISSION REPORT, *supra* note 5, at 117.

431. CAL. PENAL CODE §§ 1054-1054.9 (West 2003).

432. See Benjamin Hoorn Barton, *Why Do We Regulate Lawyers?: An Economic Analysis of the Justifications for Entry and Conduct Regulation*, 33 ARIZ. ST. L.J. 429, 450 (2001).

*quired to be disclosed has been disclosed.*<sup>433</sup>

The Illinois Commission reviewed cases where information was not disclosed to the defense,<sup>434</sup> and found that “[t]he omission of key information, regardless of whether intentional or accidental, can pose a serious threat to the truth-seeking process.”<sup>435</sup> The Illinois Commission had before it one of the truly tragic examples of a “tunnel vision” prosecution, where prosecutors did not turn over exculpatory evidence because of their desire to win.<sup>436</sup> They prevailed at trial and Rolando Cruz received a death sentence.<sup>437</sup> They tried the case three times and Mr. Cruz spent years on death row.<sup>438</sup> In the end, the prosecutors were wrong. Mr. Cruz was innocent.<sup>439</sup> Even more tragically, while the police, prosecutors, and courts were tied up convicting and re-convicting Mr. Cruz, the real killer was out raping and killing others, including an eight-year-old girl.<sup>440</sup>

California law does not require the state to hold a conference with those who participated in the investigation and trial preparation of the case. Nor does it require certification that all information required to be disclosed has been disclosed. To avoid injustice such as that suffered by Mr. Cruz, California should adopt these safeguards as recommended by the Illinois Commission.

*Recommendation 49:*

*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 de-*

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433. ILLINOIS COMMISSION REPORT, *supra* note 5, at 118.

434. *Id.*

435. *Id.*

436. The Illinois Commission referred to Mr. Cruz’s case. *Id.* at 126. For a fuller account of the painful story, see THOMAS FRISBIE & RANDY GARRETT, VICTIMS OF JUSTICE (1998).

437. See IllinoisDeathPenalty.com, *For Rolando Cruz and Alejandro Hernandez, The Third Time Was a Charm*, at <http://www.illinoisdeathpenalty.com/cruz.html> (last visited Sept. 9, 2003).

438. *Id.*

439. *Id.*

440. *Id.*

*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.*<sup>441</sup>

The Illinois Commission found value in requiring the police and prosecutors to be as candid as possible with the defense and the courts.<sup>442</sup> Regardless of the prosecution's desire to convict, prosecutors have an ethical obligation to seek justice, and a responsibility to ensure that justice is done.<sup>443</sup>

California law does not define exculpatory evidence. Although both federal and state case law on exculpatory evidence exists, California does not have a statute or rule implementing the broad definition contained in the recommendation requiring disclosure.<sup>444</sup> Recently, the California Supreme Court expanded the definition of exculpatory evidence to include evidence that is harmful to the prosecution's case.<sup>445</sup> This recommendation goes beyond that definition.

*Recommendation 50:*

*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 dis-*

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441. ILLINOIS COMMISSION REPORT, *supra* note 5, at 119.

442. *Id.* at 119-120.

443. *See* CAL. BAR. R. 5-110 (2002).

444. *See, e.g.,* Brady v. Maryland, 373 U.S. 83 (1963) (holding that suppression, by the prosecution, of evidence favorable to an accused, upon request, violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution); *see also In re Sassounian*, 887 P.2d 527 (Cal. 1995) (holding the prosecution's duty of disclosure applies only to evidence that is *both* favorable to the defendant *and* material on either guilt or punishment).

445. "Evidence is favorable and must be disclosed if it will either help the defendant or hurt the prosecution." *People v. Coddington*, 2 P.3d 1081, 1132 (2000).

*closed to the defense in advance of trial.*<sup>446</sup>

The Illinois Commission found that in a number of the thirteen cases in which the state released death row inmates, accomplices or informers had testified.<sup>447</sup> The Commission noted that non-death cases had also been reversed because defense counsel had not been fully informed about plea agreements with testifying accomplices or informers.<sup>448</sup> These findings from the Commission's two-year study made it clear that full and candid disclosure was required.

Nevertheless, California law does not require that deals made with witnesses be reduced to writing. In fact, it is common practice for the prosecution to claim that no deal exists, only to find that the unwritten agreement with the witness benefits the witness later, after the defendant has been convicted.<sup>449</sup> In *People v. Kasim*,<sup>450</sup> the district attorney stated in his closing argument that there was no plea agreement between his office and the main witnesses.<sup>451</sup> He further stated that this should enhance the credibility of such witnesses.<sup>452</sup> The court of appeals later discovered that while there was no written agreement, the witnesses received benefits resulting from their testimony.<sup>453</sup> California should adopt the Commission's recommendation requiring plea agreements to be in writing to ensure that situations like *Kasim* are avoided in the future.

*Recommendation 51:*

*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*

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446. ILLINOIS COMMISSION REPORT, *supra* note 5, at 120.

447. *Id.*

448. *Id.*

449. See *People v. Kasim*, 56 Cal. App. 4th 1360 (Ct. App. 1997), for a particularly egregious example of this practice. In that case, the prosecutor argued to the jury that the nonexistence of a deal should enhance the witness's credibility. *Id.* at 1370.

450. 56 Cal. App. 4th 1360 (1997).

451. *Id.* at 1371.

452. *Id.*

453. *Id.* at 1376 (explaining that the witnesses had criminal records expunged to avoid deportation, remained free of confinement, and had probation infractions overlooked or probation terms revised).

*the identification and background of the witness.*<sup>454</sup>

The Illinois Commission considered prompt disclosure “particularly important.”<sup>455</sup> Although it did not expand on the remark, practical experience teaches that the circumstances of in-custody informants are particularly hard to investigate as time passes. Typically, it is necessary to interview other inmates, and sometimes correctional officers, to understand the context of the informant’s purported testimony. These people are hard to locate, and they have difficulty remembering critical facts as time passes.

Disclosure of information about an in-custody informant may be governed by California statute,<sup>456</sup> and may also be governed by federal law.<sup>457</sup> Neither the timing nor the extent of disclosure as recommended is required under current California law. As the Illinois Commission recommends, prompt disclosure should be required, so that the defense may prepare an appropriate cross-examination of any in-custody informants.<sup>458</sup> Without such a cross-examination, the jury will be unable to make an accurate assessment of the informant’s credibility.<sup>459</sup>

*Recommendation 52:*

*(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*

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454. ILLINOIS COMMISSION REPORT, *supra* note 5, at 121.

455. *Id.*

456. CAL. PENAL CODE § 1054.1 (West 2003).

457. *See, e.g., Brady v. Maryland*, 373 U.S. 83 (1963).

458. ILLINOIS COMMISSION REPORT, *supra* note 5, at 121.

459. *See id.* at 122-23.

*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.<sup>460</sup>*

The Illinois Commission took note of considerable literature on the inherent problems with testimony from in-custody informants.<sup>461</sup> From the study it determined, "Testimony from in-custody witnesses has often been shown to have been false, and several of the thirteen cases of men released from death row involved, at least in part, testimony from an in custody informant."<sup>462</sup>

California law provides for an in limine hearing on the foundational facts pertaining to the admissibility of evidence.<sup>463</sup> However, current California law does not require that the court hold a hearing on admissibility or consider the criteria set forth in this recommendation. California should adopt these criteria to protect against the possibility of unreliable testimony.

*Recommendation 53:*

*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.<sup>464</sup>*

California law does not require the court to scrutinize the police tactics within the meaning of this recommendation. Illinois has a procedure for a pre-trial hearing on the voluntariness of a confession if a defendant moves to suppress it.<sup>465</sup>

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460. *Id.* at 122.

461. *Id.*

462. *Id.*

463. CAL. EVID. CODE § 402 (West 2003).

464. ILLINOIS COMMISSION REPORT, *supra* note 5, at 123.

465. *Id.*

That practice is similar to the procedures for a hearing on a motion in limine under California practice.<sup>466</sup> The Illinois Commission intended for this rule to go beyond Illinois' existing procedures, requiring the trial judge in capital cases "to carefully examine police or prosecutor methods during the interrogation process which misstate or overstate the evidence of the suspect's guilt, or the likelihood that he or she will be found guilty, in order to induce him or her to confess."<sup>467</sup> The Commission stated that the judges should address whether the prosecution established, by a preponderance of the evidence, that the confession was voluntary and sufficiently trustworthy to be accepted as evidence against the defendant.<sup>468</sup>

*Recommendation 54:*

*The commission makes no recommendation about whether or not plea negotiations should be restricted with respect to the death penalty.*<sup>469</sup>

The Commission was concerned that prosecutors may use the threat of the death penalty during plea negotiations.<sup>470</sup> The Illinois Supreme Court reversed at least two cases where capital punishment was imposed after the district attorney promised not to seek such punishment.<sup>471</sup> In both *People v. Walker*<sup>472</sup> and *People v. Brownell*,<sup>473</sup> the court reversed because the defendant waived his right to a jury trial based on the district attorney's promises during negotiations not to seek the death penalty.<sup>474</sup> The court found that allowing the district attorney to change his mind was a violation of due process<sup>475</sup> as well as cruel and unusual punishment.<sup>476</sup>

Although the Commission could not come to a specific recommendation on restrictions on coercive plea bargaining, it did so in the context of having adopted other recommenda-

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466. See CAL. EVID. CODE § 402 (West 2003).

467. ILLINOIS COMMISSION REPORT, *supra* note 5, at 123.

468. *Id.*

469. *Id.* at 124.

470. *Id.*

471. *Id.*

472. 419 N.E.2d 1167 (Ill. 1981).

473. 449 N.E.2d 1318 (Ill. 1983).

474. See, e.g., *id.* at 1322.

475. See, e.g., *id.* at 1323.

476. See *Walker*, 419 N.E.2d at 1177 (Ryan, J., concurring).



tions that would “significantly narrow the class of cases in which the death penalty is being sought.”<sup>477</sup> Illinois’ decision not to make specific recommendations was premised specifically on the prior recommendations that (a) the eligibility factors be limited to five and (b) the selection of cases for death be subject to mandatory state-wide review. In the words of the Illinois Commission, “the issue of potentially coercive plea negotiations would likely be significantly reduced if all parts of the new scheme are adopted.”<sup>478</sup>

Since California does not follow the recommendations which comprise “all parts of the new scheme,” its death penalty system is susceptible to the abuse of coercive plea bargaining addressed in this section of the Commission Report.

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

The Illinois Commission made five recommendations regarding the guilt-innocence phase of the capital trial.<sup>479</sup> One of the recommendations is constitutionally required under existing precedent from the Supreme Court.<sup>480</sup> 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, California complies with only one.<sup>481</sup> That one is also arguably compelled by the Constitution, prohibiting introduction of polygraph results in the guilt-innocence phase of the trial.<sup>482</sup> California case law is in accord.

The other three recommendations require that the courts provide specific cautionary jury instructions on eyewitness identification, jail-house informants, and non-recorded statements. California has pattern jury instructions in the California Approved Jury Instructions, Criminal (CALJIC); however, they do not cover the specific material recommended by the Commission.

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477. ILLINOIS COMMISSION REPORT, *supra* note 5, at 124.

478. *Id.*

479. *Id.* at 127-36.

480. *See infra* note 517.

481. *See infra* notes 516-18 (discussing Recommendation 59).

482. *Id.*

*Recommendation 55:*

*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.*<sup>483</sup>

The Illinois Commission recognized a growing body of literature concerning problems with eyewitness identification testimony.<sup>484</sup> Expert testimony on the pitfalls of such identification could be helpful to the trier of fact in certain cases. The recommendation of the Commission is extremely modest: it should be up to the judge to determine if such expert testimony would be helpful in a given case.<sup>485</sup>

As a matter of federal constitutional law, it seems that this recommendation is required in all states.<sup>486</sup> The Illinois Commission cites a state case in which a per se ban on such expert testimony was imposed and upheld by the courts of that state.<sup>487</sup> However, that case flies in the face of the United States Supreme Court's rulings.<sup>488</sup>

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483. ILLINOIS COMMISSION REPORT, *supra* note 5, at 127.

484. *Id.* at 127 & 135 n.1; see also *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 LAW & HUMAN BEHAVIOR NO. 6, 603 (1998); *Eyewitness Evidence: A Guide for Law Enforcement*, National Institute of Justice, U.S. Department of Justice (Oct. 1999).

485. ILLINOIS COMMISSION REPORT, *supra* note 5, at 129.

486. While there is no United States Supreme Court case directly on point, *Ake v. Oklahoma*, 470 U.S. 68 (1985), stands for the proposition that a defendant is entitled to experts to assist in his or her defense. This, read in conjunction with *Crane v. Kentucky*, 476 U.S. 683 (1986), suggests that the courts cannot make a blanket ruling excluding expert evidence of the circumstances of key prosecution evidence: "[T]he Constitution leaves to the judges who must make these decisions 'wide latitude' to exclude evidence that is 'repetitive . . . only marginally relevant' or poses an undue risk of 'harassment, prejudice, [or] confusion of the issues.'" *Id.* at 689-90 (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986)). Moreover, "we have never questioned the power of States to exclude evidence through the application of evidentiary rules that themselves serve the interests of fairness and reliability — even if the defendant would prefer to see that evidence admitted." *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973). Nonetheless, without "[signaling] any diminution in the respect traditionally accorded to the States in the establishment and implementation of their own criminal trial rules and procedures," we have little trouble concluding on the facts of this case that the blanket exclusion of the proffered testimony about the circumstances of petitioner's confession deprived him of a fair trial. *Id.* at 302-03.

487. ILLINOIS COMMISSION REPORT, *supra* note 5, at 135, n.2 (citing *State v. Coley*, 32 S.W.3d 831, 838 (Tenn. 2000)).

488. *Id.*

No California statutes or guidelines explicitly direct the trial judge to determine whether expert testimony is admissible. However, California case law has specifically held that it is error to exclude expert testimony regarding eyewitness identification if three criteria are met: first, the prosecutor must rely on eyewitness testimony as a key element of his or her case; second, the eyewitness testimony must not be substantially corroborated; and third, the expert must offer testimony on specific psychological factors shown by the record, the explanation of which would be of assistance to the jury.<sup>489</sup> California adopts Recommendation 55, but the recommendation appears to be compelled by the Federal Constitution, as well as California case law.<sup>490</sup>

*Recommendation 56:*

*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.*<sup>491</sup>

The Illinois Commission found that Illinois had come a long way in recognizing the problems with eyewitness identification.<sup>492</sup> Nevertheless, the Commission determined that specific problems discovered in the research and in actual misidentification cases should be put before the jury by way of judicial comment.<sup>493</sup> The Commission also found that the

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489. *People v. McDonald*, 69 P.2d 709, 726 (Cal. 1984).

490. *See supra* note 487 (discussing constitutional requirements). The California Supreme Court has held that expert testimony regarding eyewitness identification can only be inadmissible where other evidence “substantially corroborates the eyewitness identification and gives it independent reliability.” *People v. Jones*, 70 P.3d 359, 374 (Cal. 2003). This analysis, favoring the introduction of expert testimony, necessitates a case-by-case analysis of the availability and sufficiency of other, corroborating evidence. *See id.* The trial court does the analysis, and the decision to admit or exclude expert testimony remains primarily a matter within the trial court’s discretion. *Id.*

491. ILLINOIS COMMISSION REPORT, *supra* note 5, at 129.

492. *Id.* at 130-31.

493. *Id.* at 130. Eyewitness identification raises the possibility of human error and mistake. *Id.* at 130-31. The chance of human error and mistake is often

court should specifically admonish the jury to carefully examine the testimony in light of all of the other evidence in the case. It made these recommendations “[i]n light of new information regarding the potential for mistaken eyewitness testimony and the drastic consequences if such mistakes are made in a capital case . . . .”<sup>494</sup>

California does not require such jury instructions. California jury instructions do contain some criteria for evaluating eyewitness identifications.<sup>495</sup> These criteria need not be given *sua sponte*, however, and are limited to cases with “no

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due to the “probable likeness or similarity of objects and persons” or because of cross-racial identification. *Id.* at 131. Furthermore, cross racial identification contributes to the chance of misidentification; if the identifying witness is a different race than the perpetrator, this may have an impact on the accuracy of the witness’s original perception and subsequent identification, because people may have greater difficulty in identifying members of a different race. *Id.* at 130-31.

494. *Id.* at 129-31.

495. CALIFORNIA JURY INSTRUCTIONS: CRIMINAL 2.92 (2001 & Supp. 2003) [hereinafter CALJIC] The instructions state:

In determining the weight to be given to eyewitness identification testimony, you should consider the believability of the eyewitness as well as other factors which bear upon the accuracy of the witness’s identification of the defendant, including, but not limited to, any of the following:

[The opportunity of the witness to observe the alleged criminal act and the perpetrator of the act;]

[The stress, if any, to which the witness was subjected at the time of the observation;]

[The witness’s ability, following the observation, to provide a description of the perpetrator of the act;]

[The extent to which the defendant either fits or does not fit the description of the perpetrator previously given by the witness;]

[The cross-racial [or ethnic] nature of the identification;]

[The witness’s capacity to make an identification;]

[Evidence relating to the witness’s ability to identify other alleged perpetrators of the criminal act;]

[Whether the witness was able to identify the alleged perpetrator in a photographic or physical lineup;]

[The period of time between the alleged criminal act and the witness’s identification;]

[Whether the witness had prior contacts with the alleged perpetrator;]

[The extent to which the witness is either certain or uncertain of the identification;]

[Whether the witness’s identification is in fact the product of [his] [her] own recollection;]

[ ;] and

Any other evidence relating to the witness’s ability to make an identification.

*Id.*

substantial corroborative evidence.”<sup>496</sup> California jury instructions do not contain a cautionary admonition,<sup>497</sup> but they should, per the Commission’s recommendation.

*Recommendation 57:*

*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.*<sup>498</sup>

Based on the Commission’s two-year study, the need for such a specific instruction was clear: “In light of the frequency with which such testimony has appeared in cases of those who were ultimately released from death row, the Commission believes that a special emphasis on this credibility issue is warranted.”<sup>499</sup> The Illinois Commission looked to the experience of other states for guidance on how to word the instruction properly.<sup>500</sup> Specifically, the Commission looked to Maryland’s, Oklahoma’s, and California’s jury instructions relating to in-custody informant testimony.<sup>501</sup> Of the three, the Commission found Maryland’s and Oklahoma’s instructions to be the best examples of how Illinois should construct its instruction.<sup>502</sup> Maryland’s instruction advised the jury to give careful consideration not only to accomplices or in-custody informants, but also to any witness promised leniency, whereas the Oklahoma instruction specifically targeted informants.<sup>503</sup>

Under current California law, evaluation of in-custody informants is covered only by the standard credibility instruction.<sup>504</sup> In 2000, the standard instruction was amended to allow jurors to consider one additional piece of evidence in

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496. *People v. Wright*, 755 P.2d 1049, 1059 (Cal. 1988).

497. CALJIC 2.91 does not admonish the jury to *carefully* examine the evidence. In other words, there is nothing cautionary about the instruction; it simply restates the burden of proof that the prosecutor has to prove each element beyond a reasonable doubt. Even this instruction need not be given *sua sponte* since the jury is instructed that the people must prove each element of the charged crime beyond a reasonable doubt. *People v. Richardson*, 148 Cal. Rptr. 120, 127 (Ct. App. 1978).

498. ILLINOIS COMMISSION REPORT, *supra* note 5, at 131.

499. *Id.* at 132.

500. *Id.*

501. *Id.*

502. *Id.*

503. *Id.*

504. CALJIC, *supra* note 495, at R. 2.20.

determining believability: "Whether the witness is testifying under a grant of immunity."<sup>505</sup> However, the California courts have held that the general instruction on bias, interest, or other motive is adequate, and the court does not necessarily have to instruct that the testimony of a paid informer should be viewed with caution.<sup>506</sup>

*Recommendation 58:*

*[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.*<sup>507</sup>

The Illinois Commission found that its recommendation struck a proper "balance between the interests of effective law enforcement and the rights of the defendant."<sup>508</sup> This recommendation should help encourage police to record interrogations and is consistent with the extensive literature on false confessions or unreliable reports of confessions which were referred to in other parts of the report.<sup>509</sup>

Like Illinois, California has a general instruction relating

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505. *Id.* As with other recent amendments or additions, this amendment falls short of the Commission's recommendation, and the vast majority of the approximately 620 condemned people in California did not derive any benefit from it. In determining whether California's current death row population was tried justly and fairly and how many innocents are on death row, we have to look at California's unamended credibility instruction.

506. *People v. Castro*, 160 Cal. Rptr. 156, 158-59 (Ct. App. 1979).

507. ILLINOIS COMMISSION REPORT, *supra* note 5, at 133.

508. *Id.* at 133.

509. *See, e.g., id.* at 24-29, 115-26; *see also* Clifford Zimmerman, *Back from the Courthouse: Corrective Measures to Address the Role of Informants in Wrongful Convictions*, in *WRONGLY CONVICTED: PERSPECTIVES ON FAILED JUSTICE*, (Rutgers University Press: New Brunswick, 2001); W.S. White, *False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions* 32 HARV. C.R.-C.L. L. Rev. 105 (1997); Drizin & Colgan, *Let the Cameras Roll: Mandatory Videotaping of Interrogations Is the Solution to Illinois' Problem of False Confessions*, 32 LOY. U. CHI. L.J. 339 (2001); *DNA Voids Murder Confession*, CHI. TRIB., Jan. 5, 2002; *Cops Urged to Tape Their Interrogations*, CHI. TRIB., Jan. 6, 2002.

to alleged confessions or admissions of the defendant.<sup>510</sup> Under Illinois law, if the court determines that the defendant made a voluntary statement, then this statement will be admissible in court and is substantive evidence of his or her guilt.<sup>511</sup> It is left up to the jury to determine whether the defendant actually made the statement and what weight the statement should be given.<sup>512</sup> However, the Commission intended its recommendation to allow the court to advise the jury that recorded statements may have greater reliability, turning the jury's attention to the steps the police took to obtain the statement.<sup>513</sup> This will help the jury identify and reject questionable and untrustworthy statements.<sup>514</sup> To strike a proper balance between the interests of law enforcement and the rights of defendants, California should adopt a jury instruction similar to Recommendation 58.

*Recommendation 59:*

*Illinois courts should continue to reject the results of polygraph examination during the innocence/guilt phase of capital trials.*<sup>515</sup>

The Sixth and Fourteenth Amendments seemingly require rejection of polygraph results during the innocence/guilt phase of the trial.<sup>516</sup> A majority of the Supreme Court has held "there is simply no consensus that polygraph evidence is reliable."<sup>517</sup>

California case law prohibits the introduction of polygraph results in all proceedings.<sup>518</sup> Therefore, irrespective of whether the Constitution compels this result, California is in accord with Recommendation 59.

9. *The Sentencing Phase: Recommendations*

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510. CALJIC, *supra* note 495, at R. 2.71.

511. ILLINOIS COMMISSION REPORT, *supra* note 5, at 133.

512. *Id.*

513. *Id.*

514. *Id.* at 134.

515. *Id.*

516. *Id.* (citing *People v. Melock*, 599 N.E.2d 941 (1992)).

517. *United States v. Scheffer*, 523 U.S. 303, 303 (1998).

518. The California Supreme Court continues to find that polygraph results are unreliable under the "Kelly-Frye" rule articulated in *People v. Kelly*, 549 P.2d 1240, 1244 (Cal. 1976) (adopting the rule from *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923)). *See also* *People v. Ayala*, 1 P.3d 3 (Cal. 2000).

*60 Through 64*

The Illinois Commission made five recommendations regarding the sentencing phase of trial.<sup>519</sup> 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.<sup>520</sup> 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).<sup>521</sup>

*Recommendation 60:*

*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.*<sup>522</sup>

California meets this requirement with qualifications. The California Penal Code requires both the prosecution and the defense to provide discovery no less than thirty days before trial, unless one party shows good cause why it should not provide discovery.<sup>523</sup> The courts have held that this statute applies to the penalty phase of a capital case as well as the guilt-innocence phase.<sup>524</sup> In California, the prosecution also has a statutory obligation to produce evidence which it intends to introduce in aggravation "within a reasonable period of time as determined by the court, prior to trial."<sup>525</sup> The Federal Constitution also requires disclosure of exculpatory evidence to the defense.<sup>526</sup>

Illinois discovery rules require earlier discovery and differ in some other specifics. The California rules could be amended to be more liberal, or at least provide for the earlier disclosure of evidence relating to the penalty phase.

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519. ILLINOIS COMMISSION REPORT, *supra* note 5, at 138-50.

520. *Id.* at 141-42.

521. *Id.* at 142-48.

522. *Id.* at 138.

523. CAL. PENAL CODE § 1054.7 (West 2003).

524. *People v. Superior Court (Mitchell)*, 859 P.2d 102, 106-08 (Cal. 1993).

525. CAL. PENAL CODE § 190.3 (West 2003).

526. *Brady v. Maryland*, 373 U.S. 83 (1963).



*Recommendation 61:*

*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:] (6) Defendant's background includes a history of extreme emotional or physical abuse; and (7) Defendant suffers from reduced mental capacity.*<sup>527</sup>

In California, the defense may present mental health issues to the jury;<sup>528</sup> however, the statutory mitigating factors only pertain to the defendant's mental state at the time of the offense.<sup>529</sup> No provision specifically includes the "defendant's history of extreme emotional or physical abuse" as referred to in this recommendation. California law has a catch-all provision for mitigating evidence,<sup>530</sup> but this provision is required under the Federal Constitution.<sup>531</sup> Though it may be possible to present evidence and argue the defendant's history, the jury is not specifically instructed that such history is a mitigating factor.

The Illinois Commission also specifically recommended expanding the list of statutory mitigating factors to include that the defendant "suffers from reduced mental capacity."<sup>532</sup> California juries are also not specifically instructed that this evidence could be considered a mitigating factor; therefore, California does not follow this recommendation.

*Recommendation 62:*

*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.*<sup>533</sup>

The California Supreme Court held that the defendant has no right to allocution<sup>534</sup> although a contrary belief had

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527. ILLINOIS COMMISSION REPORT, *supra* note 5, at 141.

528. CAL. PENAL CODE § 190.3(d), (h) (West 2003).

529. *Id.*

530. *Id.* § 190.3(k).

531. *Lockett v. Ohio*, 438 U.S. 586, 604 (1978).

532. ILLINOIS COMMISSION REPORT, *supra* note 5, at 141.

533. *Id.* at 142.

534. *People v. Keenan*, 758 P.2d 1081, 1102 (Cal. 1988).

persisted for some time.<sup>535</sup> There may be a federal constitutional right to allocution,<sup>536</sup> but California continues to reject this proposition.<sup>537</sup>

The Illinois Commission surveyed the law of several other states on this subject and concluded that such a right was workable and recognized elsewhere.<sup>538</sup> The Commission reasoned that the prosecution may comment on the defendant's lack of remorse; thus, the defendant should be allowed to make comments in his or her favor without cross-examination.<sup>539</sup> California also permits the prosecutor to comment on the defendant's lack of remorse.<sup>540</sup> If the defendant is not called to testify, often for good reason, he or she has no way to express remorse before the jury. Regardless of whether the Constitution recognizes a right to allocution, allocution plays an important role in avoiding wrongful convictions.

*Recommendation 63:*

*The jury should be instructed as to the alternative sentences that may be imposed in the event that the death penalty is not imposed.*<sup>541</sup>

Supreme Court precedent requires the court to instruct the jury at the penalty phase that the alternative to voting for death will be life without the possibility of parole.<sup>542</sup>

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535. The right was thought to exist in California, in part because Bernard Witkin referred to it in his influential treatise on California criminal law. B.E. WITKIN, CALIFORNIA CRIMINAL PROCEDURE § 607(3) (1963). Witkin, a renowned California legal scholar and long-time attorney for the California Supreme Court, simply stated in his treatise that the defendant had a right of allocution without citation to any authority. However, after Mr. Witkin's retirement, the California Supreme Court held to the contrary. *Keenan*, 758 P.2d at 1102.

536. *Dorszynski v. United States*, 418 U.S. 424 (1974).

537. *People v. Lucero*, 3 P.3d 242, 262 (Cal. 2001).

538. ILLINOIS COMMISSION REPORT, *supra* note 5, at 142-44.

539. *Id.* at 144.

540. *See, e.g., People v. Gonzales*, 800 P.2d 1159, 1186-87 (Cal. 1990). The court stated that remorse is a mitigating factor and that the absence of a mitigating factor cannot be considered aggravating unless it is specifically listed as an aggravating factor in California Penal Code section 190.3. However, the court circumvented this by finding that absence of remorse could be considered an aggravating factor under section 190.3(a). For a discussion of the abuse of this over broad factor, see *supra* text accompanying notes 36-41.

541. ILLINOIS COMMISSION REPORT, *supra* note 5, at 144.

542. *Kelley v. South Carolina*, 534 U.S. 246, 248 (2002).

*Recommendation 64:*

*[The state courts] should continue to reject the results of polygraph examinations during the sentencing phase of capital trials.*<sup>543</sup>

California case law still prohibits the introduction of polygraph results in all proceedings.<sup>544</sup> Therefore, California follows this recommendation.

10. *Imposition of Sentence: Recommendations 65 Through 69*

The Illinois Commission made five recommendations relating to the imposition of the sentence of death.<sup>545</sup> These recommendations impose procedural requirements on the manner in which the trial court imposes a death sentence.

*Recommendation 65:*

*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 . . ."*<sup>546</sup>

This recommendation is met in California. California requires unanimity on the part of the jury, but it does not require unanimity as to particular factors in aggravation.<sup>547</sup> California juries are instructed: "To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole."<sup>548</sup> The term "unanimously" is not used but is implied by the use of "each of you."<sup>549</sup>

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543. ILLINOIS COMMISSION REPORT, *supra* note 5, at 148.

544. *See supra* note 518.

545. ILLINOIS COMMISSION REPORT, *supra* note 5, at 151-63.

546. *Id.* at 151.

547. *See* CAL. PENAL CODE § 190.3 (West 2003); CALJIC, *supra* note 495, at R. 8.88.

548. CALJIC, *supra* note 495, at R. 8.88.

549. ILLINOIS COMMISSION REPORT, *supra* note 5, at 152.

*Recommendation 66:*

*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 concurs 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).<sup>550</sup>*

The Illinois Commission specifically uses the term “concur” and states that the judge should impose natural life if he or she does not concur.<sup>551</sup> In this regard, the Commission stated that, “[t]his proposal is designed to address the situation in which the trial judge has some lingering concern about the defendant’s guilt, or when the judge believes the verdict of death may have been influenced by passion or prejudice.”<sup>552</sup> This gives the judge much broader authority to avoid an injustice than under California law. In California, the judge is limited to “[making] a determination as to whether the jury’s findings and verdicts that the aggravating circumstances outweigh the mitigating circumstances are contrary to the law or the evidence presented.”<sup>553</sup>

A California trial judge reviews procedure but only reweighs the evidence to determine if a death verdict is contrary to the law or the evidence.<sup>554</sup> Under the California death penalty system, the judge neither substitutes his or her judgment, nor decides whether he or she concurs in the result. The California standard is more liberal than that applied at a motion for new trial but is not the same as asking whether the judge concurs in the verdict of death.<sup>555</sup> Califor-

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550. *Id.*

551. *Id.*

552. *Id.* at 153.

553. CAL. PENAL CODE § 190.4(e) (West 2003).

554. *See id.* § 190.4(e); *People v. Rodrigues*, 885 P.2d 1 (Cal. 1994).

555. California Penal Code section 190.4(e) requires the judge to independently weigh the evidence of aggravating and mitigating circumstances. *People v. Weaver*, 29 P.3d 103, 171-72 (Cal. 2001). The judge is not asked if she or he concurs in the judgment, which would give the judge an effective veto. A motion for a new trial under California Penal Code section 1181 is less liberal. Under *Jackson v. Virginia*, 443 U.S. 307, 318 (1979), the court asks only whether a rational trier of fact could find the defendant guilty beyond a reasonable doubt. *See also* *People v. Hatch*, 991 P.2d 165, 173 (Cal. 2000) (affirming the *Jackson* standard for California). Arguably, either the trial court or an appellate court

nia should adopt this recommendation, because it would protect the defendant in those situations where the jury rendered its verdict based on sympathy and passion for the victim, or where the trial judge otherwise does not concur.

*Recommendation 67:*

*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.*<sup>556</sup>

After a finding of special circumstances in California, the two sentencing options are “death” or “life without possibility of parole.” However, the default alternative of “natural life” in Illinois would be limited to the five eligibility factors, whereas California has over twenty-five “special circumstances.”<sup>557</sup> Reduction of the eligibility factors guarantees to a greater extent that only heinous crimes will trigger a possible death sentence.<sup>558</sup> California’s list of twenty-five eligibility factors is too expansive and allows for a minimum sentence of life without the possibility of parole for crimes that may not warrant it.<sup>559</sup>

*Recommendation 68:*

*[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.*<sup>560</sup>

This is constitutionally required following the Supreme Court’s decision in *Atkins v. Virginia*.<sup>561</sup> In his last days in office, Governor Gray Davis signed SB3, legislation allowing a capital defendant to apply for a mental retardation hearing

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would be competent to apply the *Jackson* standard. Section 190.4(e) requires re-weighing of the evidence, thereby giving the judge more leeway to reject a death sentence than strictly applying the new trial standard, but less leeway than in states where the judge can veto simply because she or he does not concur.

556. ILLINOIS COMMISSION REPORT, *supra* note 5, at 155.

557. *See id.*; CAL. PENAL CODE § 190.2-.3 (West 2003).

558. *See* ILLINOIS COMMISSION REPORT, *supra* note 5, at 155.

559. *See* CAL. PENAL CODE § 190.2 (West 2003).

560. ILLINOIS COMMISSION REPORT, *supra* note 5, at 156.

561. 536 U.S. 304 (2002).

before trial.<sup>562</sup>

*Recommendation 69:*

*[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.*<sup>563</sup>

The Illinois Commission was aware of the serious problems with testimony from in-custody informants, single eyewitnesses, and accomplices.<sup>564</sup> Scholarly studies and the Commission's own review of the cases of people released from Illinois death rows demonstrate the dangers of conviction of the innocent and the attendant failure to apprehend the real killers.<sup>565</sup> In this recommendation the Commission suggested that a court should not impose the irreversible sentence of death when such a significant possibility of a wrongful conviction exists.<sup>566</sup>

California has not implemented the recommended police practices or the other procedural safeguards<sup>567</sup> that the Commission presupposed when it made this recommendation. California does not require corroboration of in-custody informants regarding defendant admissions in capital cases, nor is there an exclusion from death eligibility for cases based on a single eyewitness without corroboration. California does, however, have a general evidentiary prohibition against conviction of a person of any criminal offense based on the uncor-

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562. *Davis Signs Bill to Ease Collection of Future Online Tax*, SAN DIEGO UNION TRIB., Oct. 11, 2003, [http://www.signonsandiego.com/news/uniontrib/sat/news/news\\_1n11bills.html](http://www.signonsandiego.com/news/uniontrib/sat/news/news_1n11bills.html) (last visited Oct. 16, 2003). This law, adding California Penal Code section 1376, implements the Supreme Court's decision in *Atkins v. Virginia*, 536 U.S. 304 (2002). See S.B. 3, 2003 Leg. (Cal. 2003).

563. ILLINOIS COMMISSION REPORT, *supra* note 5, at 158.

564. *Id.* at 158-60.

565. *Id.* at 19-43, 127-34.

566. *Id.* at 158-60.

567. *Id.*

roborated statement of an accomplice.<sup>568</sup> California would benefit from adopting a statute that both prohibits uncorroborated testimony of an in-custody informant and exempts convictions based on single eyewitness testimony from death eligibility. Such a statute would protect the accused from those in-custody informants who may conjure up false testimony to further their own interests or who may have misidentified the accused.

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

The Illinois Commission made six recommendations relating to proceedings that follow sentencing and conviction.<sup>569</sup> 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.

California actually prohibits proportionality review by the California Supreme Court.<sup>570</sup> Prosecutors may be compelled to provide ongoing discovery after conviction on demand, but there are no uniform rules or requirements. Post-conviction petitions, habeas corpus in California, must be filed while the direct appeal is still pending. Furthermore, there are no mandatory evidentiary hearings on habeas and there are no special rules for actual innocence claims.<sup>571</sup> California has no statutory scheme for clemency procedures.

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568. CAL. PENAL CODE § 1111 (West 2003).

569. ILLINOIS COMMISSION REPORT, *supra* note 5, at 165-76.

570. *See, e.g.*, *People v. Marshall*, 790 P.2d 676, 691-92 (Cal 1990); *see also* *People v. Jones*, 64 P.3d 762, 786-87 (Cal. 2003) (holding that the California death penalty scheme is not unconstitutional for failing to provide inter-case proportionality review).

571. CAL. CT. R. 4.551(f) provides that the court must order an evidentiary hearing . . . if, after considering the verified position, the return, any denial, any affidavits or declarations under penalty of perjury, and matters of which judicial notice may be taken, the court finds there is a reasonable likelihood that the petitioner may be entitled to relief and the petitioner's entitlement to relief depends on the resolution of an issue of fact.

*Id.* This mandate is largely illusory, however, as the court decides whether there is a reasonable likelihood that the petitioner may be entitled to relief. There is no alternate provision or procedure for cases in which actual innocence is alleged. *See id.* R. 4.550-4.551.

*Recommendation 70:*

*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.*<sup>572</sup>

The Illinois Commission recommendation for the state supreme court to reweigh the aggravating and mitigating circumstances and to do a proportionality review is intended to supplement the trial court's concurrence procedures.<sup>573</sup>

In California, the trial judge performs a limited review, restricted to determining "whether the jury's findings and verdicts at aggravating circumstances outweigh mitigating circumstances are contrary to the law or evidence presented."<sup>574</sup> Neither the California Supreme Court<sup>575</sup> nor the trial court does a proportionality review.<sup>576</sup>

Although proportionality review is not constitutionally required,<sup>577</sup> nineteen other death penalty states require some form of such a review.<sup>578</sup> The Illinois Commission found value in ensuring that the death penalty "is being applied in a rational and even-handed manner throughout the state" and to monitor "geographic" and "race effects."<sup>579</sup> To perform a proper proportionality review, the state would have to develop a state-wide database on homicides similar to that developed in New Jersey.<sup>580</sup>

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572. ILLINOIS COMMISSION REPORT, *supra* note 5, at 166.

573. *Id.* at 166-68.

574. CAL. PENAL CODE § 190.4(e) (West 2003).

575. *See* *People v. Lang*, 782 P.2d 627, 661-62 (Cal. 1989).

576. The trial judge has no authority to do an inter-case proportionality review. *See* *People v. Marshall*, 790 P.2d 676, 692 (Cal. 1990). However, the judge can do an "intra-case" review to determine if the punishment is proportionate to the individual defendant's culpability. *Id.* at 937-38; *see also* *People v. Dillion*, 668 P.2d 697, 720-21 (Cal. 1983).

577. *Pulley v. Harris*, 465 U.S. 37, 51-54 (1984).

578. ILLINOIS COMMISSION REPORT, *supra* note 5, at 166 (referring to Alabama, Delaware, Georgia, Idaho, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, North Carolina, Pennsylvania, South Carolina, South Dakota, Tennessee, and Washington).

579. *Id.* at 167.

580. *Id.* at 168. The New Jersey database collects information at the trial level. *Id.* This database includes information on the defendant and victim, ra-



*Recommendation 71:*

*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. Following conviction, a public prosecutor or other government lawyer has the continuing obligation to make timely disclosure to the 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 defendant or mitigate the defendant's capital sentence. For the purposes of this post-conviction disclosure responsibility "timely disclosure" contemplates that the prosecutor or other government lawyer should have the opportunity to investigate matters related to new evidence.<sup>581</sup>*

The California Supreme Court does not promulgate any special rules of professional conduct concerning the prosecutor's duty to disclose exculpatory evidence. A California statute, effective January 1, 2003, permits post-conviction discovery upon request and a showing of good cause.<sup>582</sup> No rule creates an ethical, ongoing duty upon the prosecution to turn over exculpatory information to the defendant or defense counsel post-conviction as contemplated by this Illinois Commission recommendation. Like Illinois, California should clarify that the prosecution's duty to disclose exculpatory evidence extends beyond the date of conviction.

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cial and socio-economic characteristics of all those involved, representation by counsel, the aggravating factors the prosecution proposed and those actually found, mitigation evidence, the factual circumstances of the crime, and the impressions of the trial judge. *Id.* The Administrative Office of the Courts completes the collection of the data. *Id.*

581. *Id.*

582. CAL. PENAL CODE § 1054.9(a)-(b) (West 2003).

*Recommendation 72:*

*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 affirmation of the direct appeal from the trial.*<sup>583</sup>

The Illinois Commission was concerned about allowing post-conviction petitions to be filed too far in the future.<sup>584</sup> The statutory scheme in Illinois required a defendant to file for relief before his or her direct appeal was completed.<sup>585</sup> However, the Commission recognized that “requiring a capital defendant to file a post-conviction petition before his [or her] original appeal is complete represents an unwise policy choice.”<sup>586</sup>

The Illinois Commission recommended that post-conviction petitions (a petition for writ of habeas corpus in California) be filed after the conclusion of the direct appeal.<sup>587</sup> The California Supreme Court specifically requires that the defendant file the petition within 180 days after the reply brief is due on direct appeal.<sup>588</sup> This requirement was recently increased from 90 days; however, the petition must still be filed before the direct appeal concludes. The Commission also pointed out that implementing this recommendation would require that the state supreme court promptly dispose of all capital cases, and that Illinois had a history of doing this.

*Recommendation 73:*

*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.*<sup>589</sup>

When the Commission made its recommendations, Illinois law provided for the filing of the post-conviction petition

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583. ILLINOIS COMMISSION REPORT, *supra* note 5, at 169.

584. *See id.* at 169-70.

585. *Id.* at 170.

586. *Id.*

587. *Id.*

588. SUPREME CT. POLICIES REGARDING CASES ARISING FROM JUDGMENT OF DEATH, *supra* note 268, Policy 3:1-1.1.

589. *Id.*

in the trial court.<sup>590</sup> Under this recommendation, the trial court would then have to set its evidentiary hearing within one year of the filing of the petition.<sup>591</sup>

California does not specify a time period within which to convene an evidentiary hearing on a post-conviction petition for writ of habeas corpus.<sup>592</sup> More significantly, California does not require an evidentiary hearing at all. Unlike Illinois, California procedure does not have the additional safeguard of an evidentiary hearing in a trial court. In California death penalty cases, the petition for writ of habeas corpus is filed directly with the Supreme Court.<sup>593</sup> However, for systems that do employ evidentiary hearings, such a recommendation helps resolve the concern that post-conviction proceedings in capital cases delay the ultimate disposition of the case.<sup>594</sup> This recommendation would help ensure that post-conviction proceedings occur in a timely fashion.<sup>595</sup>

*Recommendation 74:*

*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.<sup>596</sup>*

Here, the Illinois Commission specifically made special provisions for post-conviction petitions where actual inno-

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590. ILLINOIS COMMISSION REPORT, *supra* note 5, at 171.

591. *Id.* at 170.

592. The ordinary rules governing petitions for writ of habeas corpus provide that the court must immediately after the filing of a return proceed to hearing. CAL. PENAL CODE § 1483 (West 2003); *see* CAL. R. CT. 4.551(f). However, the direct filings in the California Supreme Court do not follow these rules.

593. SUPREME CT. POLICIES REGARDING CASES ARISING FROM JUDGMENT OF DEATH, *supra* note 268, Policy 3.

594. ILLINOIS COMMISSION REPORT, *supra* note 5, at 171.

595. *Id.*

596. *Id.*

cence is asserted.<sup>597</sup> The Commission recognized that constitutional due process may require some sort of relief; however, they stated, "The commission has unanimously recommended that specific provision should be clearly made in the Post-Conviction Hearing Act to permit the assertion of claims of actual innocence at any time following conviction in capital cases."<sup>598</sup>

California law does not implement this recommendation. A petition for writ of coram nobis or vobis may be filed under common law but is disfavored by the courts.<sup>599</sup> Bars to successive litigation effectively defeat the recommendation's purpose.

*Recommendation 75:*

*[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.*<sup>600</sup>

The Illinois Commission recognized that last minute petitions can place the administrative board in Illinois and the governor under tremendous time pressure.<sup>601</sup> The Commission concluded that the recommended procedures would permit a more orderly review process in which the governor may receive meaningful input from the board.<sup>602</sup>

The California Constitution has been interpreted to provide the governor with the power to grant clemency in death penalty cases.<sup>603</sup> California statutes set forth procedures primarily for non-death cases.<sup>604</sup> The procedure is almost entirely discretionary and provides no time restraints.

The idea of meaningful input and review by the governor is questionable in California since no governor in forty years has commuted a death sentence.<sup>605</sup> However, if there is to be

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597. *Id.* at 172.

598. *Id.*

599. *See* Carlisle v. United States, 517 U.S. 416, 429 (1996). *Cf. In re Clark*, 855 P.2d 729, 748, 768 (Cal. 1993).

600. ILLINOIS COMMISSION REPORT, *supra* note 5, at 173.

601. *Id.* at 174.

602. *Id.*

603. CAL. CONST. art. XIII, § 5.

604. CAL. PENAL CODE §§ 4800-4906 (West 2003).

605. *See supra* note 313.

a system of executive review, it should be organized and timely.

*12. Funding: Recommendations 76 Through 82*

The Illinois Commission made seven recommendations pertaining to funding by the state,<sup>606</sup> one of which applies only to Illinois.<sup>607</sup> These recommendations attempt to ensure that lawyers handling capital cases have adequate funding and are properly compensated for their time.<sup>608</sup> They also seek to assure that funds for law enforcement equipment, particularly recording devices, are available and properly administered throughout the state.<sup>609</sup>

*Recommendation 76:*

*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.*<sup>610</sup>

Though its legislative and executive branches have devoted some attention to death penalty litigation,<sup>611</sup> California is not implementing the reforms contemplated by the Illinois Commission.

California's executive branch, legislative committees, and supreme court should formally coordinate efforts to effectuate the recommended reforms. The cost of death penalty trials affects the whole criminal justice system; money that could have been spent on proving guilt or innocence is instead spent on the execution of criminals, some who are later found to be innocent. Capital cases are very costly; one report estimates that between 1982 and 1997 the extra cost of capital trials was \$1.6 billion.<sup>612</sup> California averages more than twenty new

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606. ILLINOIS COMMISSION REPORT, *supra* note 5, at 177-86.

607. *Id.* at 178 (stating that "The Capital Crimes Litigation Act . . . should be reauthorized by the General Assembly."). California does not have any present legislation comparable to the act. Therefore, California does not follow this recommendation. To avoid dispute, this article deems this recommendation inapplicable and the author removes it from consideration.

608. *Id.* at 177-82.

609. *Id.* at 183.

610. *Id.* at 177.

611. See *Legislative Session Complicated by Politics, of All Things*, CHI. DAILY LAW BULLETIN, Jan. 7, 2002, at 23.

612. NBER Working Paper No. w8382, Issued in July 2001, at

death sentences per year, and it has carried out ten executions since it reinstated capital punishment in 1977.<sup>613</sup> According to a report in the *Sacramento Bee*, the death penalty costs California ninety million dollars in excess of the ordinary costs of the justice system annually, indicating that the state has spent more than one billion dollars on the death penalty in the course of achieving these ten executions.<sup>614</sup>

*Recommendation 77:*

*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.*<sup>615</sup>

Since January 1, 2000, Illinois has had in place a Capital Crimes Litigation Act that provides for the Capital Litigation Trust Fund, which in turn provides funding for both prosecution and defense.<sup>616</sup> While the fund is a source of additional attorney compensation, it also covers many expenses that result from a properly tried capital case.<sup>617</sup> It includes funds for investigation, experts, forensic, witnesses, and other costs associated with capital cases.<sup>618</sup> Existing California law covers some of the provisions of the Illinois Act.<sup>619</sup> California has funding provisions for capital cases, including a statute providing for defense expenses in indigent cases.<sup>620</sup> Though the statute does authorize funds for investigators and experts for indigent defendants, the process is much more constricting when compared to the Illinois process.<sup>621</sup> In California, an attorney can ask the court for funds for the specific payment of investigators, experts, and others for defense preparation, but

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<http://www.deathpenaltyinfo.org/article.php?did=108&scid=7>.

613. N. Y. TIMES, Jan. 14, 2003, at <http://www.deathpenaltyinfo.org/article.php?did=108&scid=7>.

614. SACRAMENTO BEE, Mar. 18, 1988, at

<http://www.deathpenaltyinfo.org/article.php?did=108&scid=7>.

615. ILLINOIS COMMISSION REPORT, *supra* note 5, at 178.

616. *Id.* at 178-79.

617. See 725 ILL. COMP. STAT. 124/15 (2003).

618. See 725 ILL. COMP. STAT. 124/15 (2003).

619. See 725 ILL. COMP. STAT. 124/15 (2003); CAL. PENAL CODE §§ 987.2, 987.9 (West 2003).

620. CAL. PENAL CODE § 987.9.

621. Compare 725 ILL. COMP. STAT. 124/15 (2003) with CAL. PENAL CODE § 987.9 (West 2003).

the decision lies in the hands of the trial judge.<sup>622</sup> Further, funds in California are distributed in the form of reimbursements, whereas funds in Illinois are done as appropriations.<sup>623</sup>

The Illinois Commission recommends that this Act continue in existence and be renewed. California should do the same with what provisions it currently has in place and implement the additional provisions of the Act.

*Recommendation 78:*

*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.*<sup>624</sup>

Hourly rates for appointed counsel at the trial and appellate levels are far below the rates earned by competent private criminal defense counsel. Furthermore, where trial counsel is appointed at an hourly rate, the courts routinely reduce the number of hours for which they will provide compensation resulting in substantial underpayment of counsel. In many cases in California, indigent defense services are provided by contract lawyers who often take on the entire fiscal year's cases for a flat fee.<sup>625</sup>

Expenses may be covered by application for funds<sup>626</sup> but no central statewide system ensures that individual courts are providing adequate funding in any given case, or that different locations within the state receive equivalent funding. Because public defenders, private lawyers, contract defense lawyers, and other appointed lawyers handle death penalty cases throughout the state, this proposal would have to be implemented by a statewide statute as the Illinois Commis-

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622. See CAL. PENAL CODE § 987.9.

623. Compare 725 ILL. COMP. STAT. 124/15 (2003) with CAL. PENAL CODE § 987.9 (West 2003).

624. ILLINOIS COMMISSION REPORT, *supra* note 5, at 179.

625. The California Supreme Court has questioned whether contracts for indigent defense services create conflicts of interest. See *People v. Barboza*, 627 P.2d 188 (Cal. 1981). However, low-bid, flat-fee indigent defense contracts still exist. See Meredith Anne Nelson, Comment, *Quality Control for Indigent Defense Contracts*, 76 CAL. L. REV. 1147 (1988).

626. CAL. PENAL CODE § 987.9 (West 2003).

sion recommended.<sup>627</sup>

*Recommendation 79:*

*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.*<sup>628</sup>

The Illinois Commission observed that, particularly in rural counties, funding may not be adequate to allow counsel to adequately prepare for trial.<sup>629</sup> The application for state funds in California is subject to the discretion of the local judges.<sup>630</sup> A state-wide system for allocating funds would be an improvement because it would allow the public defender to utilize resources that would enable proper preparation, thereby effectuating fairness amongst all capital cases.<sup>631</sup>

California law does not require a review for disparity between areas within the state. California does provide a means by which public defenders throughout the state may apply for money for assistance from experts, investigators, and others, including second counsel.<sup>632</sup> No provision accommodates other trial related expenses, however, which might place a significant burden on small or rural public defender offices.

*Recommendation 80:*

*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.*<sup>633</sup>

The California State Public Defender's Office and the State California Appellate Project (CAP) are both understaffed and underfunded. Despite that fact, they both do an outstanding job of assisting other capital counsel. Their ef-

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627. ILLINOIS COMMISSION REPORT, *supra* note 5, at 179-80.

628. *Id.* at 181.

629. *Id.*

630. *Id.*

631. *Id.* at 181.

632. CAL. PENAL CODE § 987.9 (West 2003).

633. ILLINOIS COMMISSION REPORT, *supra* note 5, at 181.



forts largely focus on appointed appellate and habeas counsel, however. Appointed counsel at the trial level and retained counsel can avail themselves of the expertise of individuals at the State Public Defender and CAP, but they have no formal statewide support system. Education and training of trial level counsel are left to privately funded organizations, such as the California Public Defenders Association and California Attorneys for Criminal Justice.

*Recommendation 81:*

*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.*<sup>634</sup>

Current California law provides for some assistance to public defenders and prosecutors on student loans.<sup>635</sup> Private lawyers appointed to represent indigent capital defenders bear the burden of a large part of the capital litigation in California, yet receive no assistance.<sup>636</sup> Certainly, the salaries of public defenders at all levels could be increased significantly to attract the most qualified lawyers for death penalty cases.

*Recommendation 82:*

*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.*<sup>637</sup>

Police agencies receive state money in various forms, but the earmarked funds are inadequate for the purposes of im-

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634. *Id.* at 182.

635. See CAL. EDUC. CODE § 69740-69748 (West 2003). Effective Jan. 1, 2002, these statutes provide for \$2,000 per year up to a total of \$11,000 contribution to student loans. *Id.* At the time of this writing, however, the program has not been funded. Interview with Jim Egar, Public Defender for Santa Barbara County, Cal., in Santa Barbara, Cal. (Sept. 11, 2003).

636. Dave Orrick, *Fund Created to Pay for Quality Death Penalty Defense Attorneys Runs Dry*, CHI. DAILY HERALD, Aug. 9, 2002.

637. ILLINOIS COMMISSION REPORT, *supra* note 5, at 183.

plementing the recommendations of the Illinois Commission regarding recording of interviews, interrogations, and identification procedures.

13. *General Recommendations: Recommendations 83 Through 85*

The Illinois Commission made three general recommendations which pertain to improving the capital system and avoiding errors.<sup>638</sup> 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.

*Recommendation 83:*

*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.*<sup>639</sup>

California law does not follow most of the recommendations, and therefore, no attempt to broaden the application of such recommendations to non-capital cases has been made. All three branches of government within the state of California will have to work independently and coordinate with each other to effectuate these necessary changes. Once that is underway, California could begin to consider how to improve the criminal justice system as a whole. Many of the recommendations, such as those regarding police practices, forensics, and funding could transfer directly to non-capital litigation.

*Recommendation 84:*

*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 of-*

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638. *Id.* at 186-206.

639. *Id.* at 187.

*fice 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.*<sup>640</sup>

Some data is collected but no systematic collection of data on the details of capital cases and the background of the defendant is or has been obtained sufficient to conduct a meaningful analysis as recommended by the Illinois Commission.

*Recommendation 85:*

*Judges should be reminded of their obligation under Canon 3 to report violations of the Rules of Professional Conduct by prosecutors and defense lawyers.*<sup>641</sup>

The California Code of Judicial Ethics suggests that a judge has an ethical duty to “take appropriate corrective action” if the judge has personal knowledge that a lawyer has committed a violation of the Rules of Professional Conduct.<sup>642</sup> The judge has no duty to report the violations to the state bar or to take any other specific action unless a defense lawyer has been found to have provided ineffective assistance of counsel. No similar provision pertains to prosecutors.

#### V. NEED FOR A MORATORIUM AND FURTHER STUDY

The Illinois Commission has made eighty-five specific recommendations to try to avoid the travesty, documented in its state, of condemning the innocent to death while the real killers are free to kill again. Connecticut, Nevada, Arizona, and other states have recognized the wisdom of many of these same recommendations.

It is clear that the death penalty system in California is broken. California’s system has condemned 622 people to its death row. Most have never had their cases reviewed by the courts, and many do not even have lawyers to initiate a review.<sup>643</sup> California has recently enacted standards for lawyers

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640. *Id.* at 188-89.

641. *Id.* at 191.

642. CAL. CT. R., APPENDIX: CODE OF JUDICIAL ETHICS, Cannon D(2).

643. Approximately 140 of the 622 prisoners on California’s death row do not have an attorney representing them. *Interview with Michael Millman, supra* note 18. Another 110 have an appellate lawyer, but no attorney to prepare and file a Petition for Writ of Habeas Corpus. *Id.* As of March 31, 2002, only 189 of

appointed to handle capital trials, but they do not help this large population who did not have the benefit of these new rules. Yet, even these new rules do not meet Illinois standards, leaving California's current compliance with the Illinois Recommendations at a mere 6.17%.<sup>644</sup>

We know that there are innocent people condemned to die in California. To assume otherwise would fly in the face of what we know from other jurisdictions and would ignore the real infirmities already identified in California's death penalty system. Taking a conservative figure from Illinois' experience and the history of exonerations nationwide, we must assume that at least ten percent of the condemned people in California are innocent.<sup>645</sup> That means that over sixty innocent people are awaiting death, over sixty killings have been unsolved, and over sixty real killers have not been identified.

This article simply brings the problem to the forefront. It does not identify or answer all of the questions which need to be asked. It certainly does not solve the problems. The problems need to be addressed systematically and hundreds of cases need to be scrutinized individually. Systemic changes need to be made consistent with the Illinois Commission Report. Even then, the penal system, which is susceptible to the frailties of human nature, cannot ensure that California will not execute the innocent or that it will not convict based on race, geography, poverty, mental illness, or mere randomness.

At the very least, California must impose a moratorium on executions while these problems are studied. The call for a moratorium of executions throughout the death penalty states has been surveyed by Jeffrey Kirchmeier in an article published in the *University of Colorado Law Review*.<sup>646</sup> A moratorium on executions may engender emotion and political debate. With a system as broken as California's, however, what is needed is a rational and dispassionate look at what is really happening in this state, around the country, and, for that matter, the world.

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the 610 prisoners had their sentences affirmed by the California Supreme Court or reversed on appeal. CONDEMNED INMATE SUMMARY, *supra* note 3, at 103.

644. *See infra* Part IV.

645. *See id.*

646. Jeffrey L. Kirchmeier, *Another Place Beyond Here: The Death Penalty Moratorium Movement in the United States*, 73 U. COLO. L. REV. 1 (2002).

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*Appendix*

## The Illinois Recommendations: Comparison to California

<b>Illinois Commission Report Recommendation</b>	<b>California Compliance</b>	<b>Comments on California Law</b>
<b>Recommendation 1:</b> 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	NOT MET	Not required under current California law, and current case law excuses failure to pursue leads, interview witnesses and collect evidence
<b>Recommendation 2:</b> (a) The police must list on schedules all existing items of relevant evidence, including exculpatory evidence, and their location. (b) Record-keeping 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.	NOT MET	No requirement under current California law.

Illinois Commission Report Recommendation	California Compliance	Comments on California Law
<p><b>Recommendation 3:</b> 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.</p>	NOT MET	<p>No requirement under current California law. The public defender is only appointed for adults at the arraignment. Therefore, invocation of right to counsel by an arrestee results in returning arrestee to custody until arraignment. Arrestees often “voluntarily” waive their right to counsel while awaiting arraignment. Also, it is arguably permissible for officers to deliberately violate <i>Miranda</i> in order to obtain confessions which can be used for further investigation and impeachment if the defendant testifies.</p>
<p><b>Recommendation 4:</b> 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.</p>	NOT MET	<p>No requirement under current California law. Video taping is common but not required. Also, it is common to video tape only after preliminary discussions with the defendant have taken place.</p>
<p><b>Recommendation 5:</b> Any statements by a homicide suspect which are not recorded should be repeated to the suspect on tape, and his or her comments recorded.</p>	NOT MET	<p>No requirement under current California law.</p>

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<b>Illinois Commission Report Recommendation</b>	<b>California Compliance</b>	<b>Comments on California Law</b>
<p><b>Recommendation 6:</b> 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 audiotaped.</p>	NOT MET	No requirement under current California law.
<p><b>Recommendation 7:</b> 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.</p>	NOT MET	California Penal Code Section 633 allows a blanket exception to the California "eavesdropping statutes" for law enforcement personnel or anyone acting at their direction. Therefore, there is no restriction that the suspect be aware that he is talking with a police officer or that, in fact, the person be a police officer.
<p><b>Recommendation 8:</b> 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</p>	NOT MET	No requirement under current California law.

Illinois Commission Report Recommendation	California Compliance	Comments on California Law
<b>Recommendation 9:</b> 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.	NOT MET	No requirement under current California law.
<b>Recommendation 10:</b> 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.	NOT MET	No requirement under current California law. Police practice is contrary in that the investigating officers usually conduct the identification procedures.
<b>Recommendation 11:</b> (a) Eyewitnesses should be told explicitly that the suspected perpetrator might not be in the lineup or photospread, and therefore 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.	NOT MET	No requirement under current California law. A requirement similar to (a) is often followed but is not required, and there is no requirement similar to (b).



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Illinois Commission Report Recommendation	California Compliance	Comments on California Law
<p><b>Recommendation 12:</b> 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.</p>	<p>NOT MET</p>	<p>No requirement under current California law. (This writer believes that this recommendation should be instituted only if the procedure is "double-blind" since there would be a greater risk of suggestibility if the administrator knew the suspect's identity and showed subjects to the witness one at a time.)</p>
<p><b>Recommendation 13:</b> Suspects should not stand out in the lineup or photo spread as being different from the distractors, based on the eyewitnesses' previous description of the perpetrator, or based on other factors that would draw attention to the suspect</p>	<p>NOT MET</p>	<p>No requirement under current California law. Current case law may require suppression at trial of an unduly suggestive line-up or photospread. However, the specifics of this recommendation are not met. Also, research shows that a false identification at an improper line-up or photo spread can significantly contaminate the identifying witnesses' testimony. See Gary L. Wells et al., <i>Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads</i>, 22 LAW &amp; HUM. BEHAV. 603 (1998).</p>

<b>Illinois Commission Report Recommendation</b>	<b>California Compliance</b>	<b>Comments on California Law</b>
<b>Recommendation 14:</b> 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	NOT MET	No requirement under current California law. (See comment for Recommendation 13 regarding contamination of witness testimony.)
<b>Recommendation 15:</b> When practicable, the police should videotape lineup procedures, including the witness' confidence statement.	NOT MET	No requirement under current California law.

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<b>Illinois Commission Report Recommendation</b>	<b>California Compliance</b>	<b>Comments on California Law</b>
<p><b>Recommendation 16:</b> 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:</p> <ol style="list-style-type: none"> <li>1. The risks of false testimony by in-custody informants (“jailhouse snitches”).</li> <li>2. The risks of false testimony by accomplice witnesses.</li> <li>3. The dangers of tunnel vision or confirmatory bias.</li> <li>4. The risks of wrongful convictions in homicide cases.</li> <li>5. Police investigative and interrogation methods.</li> <li>6. Police investigating and reporting of exculpatory evidence.</li> <li>7. Forensic evidence.</li> <li>8. The risks of false confessions.</li> </ol>	NOT MET	No requirement under current California law.
<p><b>Recommendation 17:</b> Police academies, police agencies, and the [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 of foreign nationals.</p>	NOT MET	No requirement under current California law. There may be some training on this issue but it is not mandatory nor is it universal.

Illinois Commission Report Recommendation	California Compliance	Comments on California Law
<p><b>Recommendation 18:</b> The [state attorney general] should remind all law enforcement agencies of their notification obligations under the Vienna Convention on Consular Relations and undertake 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 U.S. State Department Manual.</p>	NOT MET	California Penal Code Section 834(c) now requires advisement of rights under the VCCR. It is unknown how much discussion of this issue has occurred or the extent to which it has reached the officers and detectives working on actual cases. There is no requirement of regular reviews to ensure full compliance.
<p><b>Recommendation 19:</b> The statute relating to the [state law enforcement training standards board] should be amended to add police perjury (regardless of whether there is a criminal conviction) as a basis upon which the Board may revoke certification of a peace officer.</p>	NOT MET	No requirement under current California law
<p><b>Recommendation 20:</b> An independent state forensic laboratory should be created, operated by civilian personnel, with its own budget, separate from any policy agency or supervision.</p>	NOT MET	No requirement under current California law. The State of California does have a State Department of Justice Forensic Laboratory within its Division of Law Enforcement. However, it is not independent and is used selectively by law enforcement. It is not available for use by the defense, even on court order.

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<b>Illinois Commission Report Recommendation</b>	<b>California Compliance</b>	<b>Comments on California Law</b>
<b>Recommendation 21:</b> 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.	NOT MET	No requirement under current California law. Some funding and outsourcing is available but not to the degree required by the recommendation.
<b>Recommendation 22:</b> The Commission supports the [state supreme court rule] establishing minimum standards for DNA evidence.	NOT MET	No requirement under current California law.
<b>Recommendation 23:</b> The Federal government and [state] should provide adequate funding to enable the development of a comprehensive DNA database.	NOT MET	No requirement under current federal or state law. The proposed Innocence Protection Act has not been enacted.
<b>Recommendation 24:</b> [State] statutes should be amended to provide that in a capital case 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.	NOT MET	No requirement under current California law.

Illinois Commission Report Recommendation	California Compliance	Comments on California Law
<b>Recommendation 25:</b> In capital cases forensic testing, including DNA testing pursuant to [state law], should be permitted where it has a 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.	NOT MET	No requirement under current California law. California Penal Code Sections 1405 and 1054.9(e), effective January 1, 2003, address only some of the issues in this recommendation.
<b>Recommendation 26:</b> 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 [state law] when the defendant faces the possibility of a capital sentence. ...	MET WITH QUALIFICATIONS	California Penal Code Section 987.9 provides for the funds for capital defense at the trial level in cases where the defendant can show indigence. Individual trial court judges have wide discretion to grant or deny particular requests. Furthermore, funds available on direct appeal and habeas corpus proceedings are limited and are insufficient for expensive procedures or complex cases
<b>Recommendation 27:</b> The current list of 20 eligibility factors should be reduced to a smaller number	NOT MET	California currently has a list of 25 separate eligibility factors under California Penal Code Section 190.2 and the additional sections referred to in 190.3, many of which have subparts.

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<b>Illinois Commission Report Recommendation</b>	<b>California Compliance</b>	<b>Comments on California Law</b>
<b>Recommendation 28:</b> There should be only five eligibility factors: [murder of multiple persons, murder of a police officer or firefighter, murder of an officer or inmate in a correctional institution, murder to obstruct justice, and murder involving torture.]	NOT MET	See comment for Recommendation 27.
<b>Recommendation 29:</b> 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 rule or legislation.	NOT MET	There is great disparity in the filing decisions from county to county in California, which gives rise to serious geographical denial of equal protection

Illinois Commission Report Recommendation	California Compliance	Comments on California Law
<p><b>Recommendation 30:</b> The death sentencing statute should be revised to include a mandatory review of death eligibility undertaken by a state-wide review committee. In the 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 exception circumstances, for the failure to submit the case for review. . . .</p>	NOT MET	No requirement under current California law.
<p><b>Recommendation 31:</b> 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.</p>	NOT MET	No requirement under current California law. The death penalty itself can be elected at almost any time by the prosecutor and even after initially declining to pursue it. California Penal Code Section 190.3 requires the prosecution to disclose aggravating evidence within a "reasonable time" prior to trial, but there is no requirement its intention to seek the death penalty at a particular time or to announce the factors to be relied upon.



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<b>Illinois Commission Report Recommendation</b>	<b>California Compliance</b>	<b>Comments on California Law</b>
<b>Recommendation 32:</b> 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.	NOT MET	No requirement under current California law although there is non-mandatory judicial education.
<b>Recommendation 33:</b> The Commission supports [expanded judicial training be required prior to assignment of a capital case to a judge.]	NOT MET	No requirement under current California law.
<b>Recommendation 34:</b> In light of the changes in the Illinois Supreme Court rules governing the discovery procedures 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.	NOT MET	No requirement under current California law.
<b>Recommendation 35:</b> All judges 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: [same as topics required for police in Recommendation 16]	NOT MET	No requirement under current California law.

<b>Illinois Commission Report Recommendation</b>	<b>California Compliance</b>	<b>Comments on California Law</b>
<b>Recommendation 36:</b> 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.	NOT MET	No requirement under current California law. California has some resources but training is not mandatory and does not meet the recommendations.
<b>Recommendation 37:</b> The Illinois Supreme Court should consider ways in which information regarding relevant 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	NOT MET	No requirement under current California law.

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<b>Illinois Commission Report Recommendation</b>	<b>California Compliance</b>	<b>Comments on California Law</b>
<p><b>Recommendation 38:</b> The Illinois Supreme Court, or the chief judges 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.</p>	NOT MET	No requirement under current California law.
<p><b>Recommendation 39:</b> The [state supreme court] should consider appointment of a standing committee of trial judges and/or appellate justices familiar with capital cases management to provide resources to trial judges throughout the state who are responsible for trying capital cases.</p>	NOT MET	No requirement under current California law.
<p><b>Recommendation 40:</b> The Commission supports new Illinois Supreme Court Rule 416(d) regarding qualifications for counsel in capital cases.</p>	NOT MET	No requirement under current California law regarding minimum qualifications for retained counsel. There are minimum requirements for appointed counsel at trial (California Rule of Court 76.6) and on direct appeal and habeas corpus (California Rule of Court 4.117), but these do not apply to retained counsel.

Illinois Commission Report Recommendation	California Compliance	Comments on California Law
<b>Recommendation 41:</b> 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.	NOT MET	No requirement under current California law.
<b>Recommendation 42:</b> The Commission supports new Illinois Supreme Court rule 714 which imposes requirements on the qualifications of attorneys handling capital cases.	NOT MET	See comment for Recommendation 40.
<b>Recommendation 43:</b> 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.	NOT MET	No requirement under current California law.
<b>Recommendation 44:</b> 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.	NOT MET	No requirement under current California law, particularly with respect to public funding. Limited programs in recent years have been funded and provided by the Habeas Corpus Resource Center. Private organizations, such as the California Public Defender's Association and the California Attorneys for Criminal Justice, hold more extensive training sessions which are available to capital case defense lawyers.

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<b>Illinois Commission Report Recommendation</b>	<b>California Compliance</b>	<b>Comments on California Law</b>
<b>Recommendation 45:</b> 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: [same as topics required for police and judges in Recommendations 16 and 35]	NOT MET	No requirement under current California law.
<b>Recommendation 46:</b> The Commission supports new Illinois Supreme Court rule 416(e) which permits discovery deposition in capital cases on leave of the court for good cause.	NOT MET	No requirement under current California law.
<b>Recommendation 47:</b> The Commission supports the provisions of the new Illinois Supreme Court rule 416(f) mandating case management conferences in capital cases. The Illinois Supreme Court should consider adoption of a rule requiring a final case management conferences 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.	NOT MET	No requirement under current California law.

<b>Illinois Commission Report Recommendation</b>	<b>California Compliance</b>	<b>Comments on California Law</b>
<b>Recommendation 48:</b> 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.	NOT MET	No requirement under current California law.

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<b>Illinois Commission Report Recommendation</b>	<b>California Compliance</b>	<b>Comments on California Law</b>
<p><b>Recommendation 49:</b> 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 mitigate the defendant’s potential sentence.</p>	<p>NOT MET</p>	<p>No requirement under current California law. There is federal and state case law on exculpatory evidence but no statute or rule implementing the broad definition contained in the recommendation requiring disclosure.</p>

Illinois Commission Report Recommendation	California Compliance	Comments on California Law
<p><b>Recommendation 50:</b> Illinois law should require that any discussions with a witness or the 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.</p>	NOT MET	No requirement under current California law.
<p><b>Recommendation 51:</b> 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.</p>	NOT MET	Disclosure is governed by federal law, <i>e.g.</i> , <i>Brady v. Maryland</i> 373 U.S. 83 (1963), and by California Penal Code Section 1054.1. Neither the timing nor the extent of disclosure as recommended is required under current California law.



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Illinois Commission Report Recommendation	California Compliance	Comments on California Law
<p><b>Recommendation 52:</b> (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-evidentiary hearing, the trial judge shall use the following standards: . . . (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. . . .</p>	<p>NOT MET</p>	<p>California Evidence Code Section 402 provides for an <i>in limine</i> hearing on the admissibility of evidence. However, current California law does not require the court to consider the criteria set forth.</p>

Illinois Commission Report Recommendation	California Compliance	Comments on California Law
<p><b>Recommendation 53:</b> 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 introduce an involuntary or untrustworthy confession.</p>	NOT MET	No requirement under current California law.
<p><b>Recommendation 54:</b> The Commission makes no recommendation about whether or not plea negotiations should be restricted with respect to the death penalty.</p>	NOT MET	<p>While the Commission could not come to a specific recommendation on restrictions on coercive plea bargaining, it did so in the context of its other recommendations being adopted. First, there are no restrictions on coercive plea bargaining in California of the sort contemplated in the Report. Second, the failure to make specific recommendations was premised specifically on the prior recommendations that (a) the eligibility factors be limited to five (there are at least 25 under California law) and (b) there be a review process on the selection of cases for death. Therefore, California fails to meet these criteria and is susceptible to the abuse of coercive plea bargaining addressed in this section of the Report.</p>

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Illinois Commission Report Recommendation	California Compliance	Comments on California Law
<p><b>Recommendation 55:</b> 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.</p>	Constitutionally Required	No requirement under current California statutory law. The requirement appears to be mandated by the Sixth and Fourteenth Amendments and California case law.
<p><b>Recommendation 56:</b> 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 [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.</p>	NOT MET	No requirement under current California law. California Jury Instructions - Criminal (CALJIC) 2.92 does contain some criteria for evaluating eyewitness identifications. It is not required to be given <i>sua sponte</i> , it is limited to cases where there is "no substantial corroborative evidence", and it does not contain the cautionary admonition.
<p><b>Recommendation 57:</b> 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.</p>	NOT MET	No requirement under current California law.
<p><b>Recommendation 58:</b> [A special jury should be given when a confession is not recorded.]</p>	NOT MET	No requirement under current California law.
<p><b>Recommendation 59:</b> Illinois courts should continue to reject the results of polygraph examination during the innocence/guilt phase of capital trials.</p>	MET	Seemingly required by the Sixth and Fourteenth Amendments, however, there is some dispute in other states and California case law does meet this requirement.

Illinois Commission Report Recommendation	California Compliance	Comments on California Law
<b>Recommendation 60:</b> The Commission supports the new amendments to [Illinois] Supreme Court Rule [611] which makes the rules of discovery applicable to the sentencing phase of capital cases.	MET WITH QUALIFICATIONS	California Penal Code Section 190.3 requires discovery to be provided to the defense, however, the timing and detail of the Illinois Rule is more favorable to the defense.
<b>Recommendation 61:</b> 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.	NOT MET	California Penal Code Section 190.3 (d) and (h) present mental health issues to the jury, however, there is no provision to specifically include the "defendant's history of extreme emotional or physical abuse." Section 190.3 (k) is a catch all provision required under the federal Constitution, <i>e.g., Lockett v. Ohio</i> 438 U.S. 586 (1978), to cover other mitigating evidence. To the extent that this recommendation goes beyond that which is required by the federal Constitution, it is not met.
<b>Recommendation 62:</b> The defendant should have the right to make a statement on his own behalf during the aggravation/mitigation phase, without being subject to cross-examination.	NOT MET	There is no right to allocution under current California law.
<b>Recommendation 63:</b> The jury should be instructed as to the alternative sentences that may be imposed in the event that the death penalty is not imposed.	Constitutionally Required	This recommendation follows the federal requirement under <i>Kelley v. South Carolina</i> 534 U.S. 246 (2002).

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Illinois Commission Report Recommendation	California Compliance	Comments on California Law
<p><b>Recommendation 64:</b> [The state] courts should continue to reject the results of polygraph examinations during the sentencing phase of capital trials</p>	MET	California case law still prohibits the introduction of polygraph results at sentencing.
<p><b>Recommendation 65:</b> 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 unanimously, after weighing the factors in aggravation and mitigation, that death is the appropriate sentence. . .</p>	MET	CALJIC 8.88 states, "To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." The term "unanimously" is not used but unanimity is required by this instruction.
<p><b>Recommendation 66:</b> 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 concurs 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 adoption of a new death penalty scheme limited to five eligibility factors).</p>	NOT MET	California Penal Code Section 190.4(e) requires the trial judge to reweigh the evidence presented to the penalty phase jury. However, the judge decides whether the verdict is contrary to the law or the evidence. This standard is more liberal than that applied at a motion for new trial but is not the same as asking whether or not the judge concurs in the verdict of death.

Illinois Commission Report Recommendation	California Compliance	Comments on California Law
<p><b>Recommendation 67:</b> 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, the mandatory alternative sentence would be natural life.</p>	<p>NOT MET</p>	<p>After a finding of special circumstances in California, the two sentencing options are death or life without possibility of parole. However, the recommendation of "natural life" in Illinois would be limited to the five eligibility factors whereas there are over 25 under Penal Code Section 190.2 and the sections referred to in 190.3.</p>
<p><b>Recommendation 68:</b> [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.</p>	<p>Constitutionally Required</p>	<p>The recommendation is constitutionally mandated by <i>Atkins v. Virginia</i> 536 U.S. 304 (2002).</p>
<p><b>Recommendation 69:</b> [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 the 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.</p>	<p>NOT MET</p>	<p>No requirement under current California law.</p>

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<b>Illinois Commission Report Recommendation</b>	<b>California Compliance</b>	<b>Comments on California Law</b>
<b>Recommendation 70:</b> 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.	NOT MET	No requirement under current California law to do a proportionality review. There is an independent weighing of sorts by the trial judge under Penal Code Section 190.4(e); however, the recommendation that the Supreme Court reweigh in addition to the trial court's concurrence is not followed in California.
<b>Recommendation 71:</b> 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 [language concerning the ongoing duty to turn over exculpatory information].	NOT MET	There are no special rules of professional conduct promulgated by the California Supreme Court for prosecutors. State and federal case law suggests that prosecutors are held to higher standards. California Penal Code Sections 1054.9(a) and (b) were added, effective January 1, 2003, permitting post-conviction discovery upon request and a showing of good cause. However, there is no rule creating an ongoing ethical duty upon the prosecution to turn over exculpatory information.

Illinois Commission Report Recommendation	California Compliance	Comments on California Law
<p><b>Recommendation 72:</b> 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 affirmance of the direct appeal from the trial.</p>	<p>NOT MET</p>	<p>The Illinois Commission recommends that the time for filing a post-conviction petition, which would be a Petition for Writ of Habeas Corpus in California, be after the direct appeal is concluded. California Supreme Court Policy 3:1-1.1 requires that the Petition be filed 180 days after the Reply Brief is due on direct appeal. This requirement was just increased to 180 days from 90 days, however, the practical effect is still to require the filing of the Petition before the direct appeal is concluded.</p>
<p><b>Recommendation 73:</b> The Illinois Post-Conviction Hearing Act should be amended to provide that the trial court should convene the evidentiary hearing on the petition within one year of the date the petition is filed.</p>	<p>NOT MET</p>	<p>There is no time period under current California law and, more importantly, no requirement of an evidentiary hearing at all.</p>



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Illinois Commission Report Recommendation	California Compliance	Comments on California Law
<p><b>Recommendation 74:</b> 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.</p>	NOT MET	<p>There is no requirement under current California law. A Petition for Writ of Coram Nobis (or Vobis) may be filed under common law but is disfavored by the courts. Bars to successive litigation effectively defeat the recommendation's purpose</p>
<p><b>Recommendation 75:</b> [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 [after the setting of] an execution date.</p>	NOT MET	<p>The California Constitution, Article 8, Section V, has been interpreted to provide the Governor with the power to grant clemency in death penalty cases. California Penal Code Sections 4800 <i>et seq.</i> set forth procedures primarily for non-death cases. The procedure is almost entirely discretionary.</p>

<b>Illinois Commission Report Recommendation</b>	<b>California Compliance</b>	<b>Comments on California Law</b>
<b>Recommendation 76:</b> 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.	NOT MET	Some attention is being given to capital case litigation by the legislative and executive branches but actual reforms are not being implemented as contemplated by the Illinois Commission
<b>Recommendation 77:</b> 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.	Not Applicable	Because California does not have such an Act and, it could be argued that recommendation is not met. On the other hand, this is arguably peculiar to Illinois and, therefore, the recommendation should be deemed inapplicable.
<b>Recommendation 78:</b> 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.	NOT MET	Hourly rates for appointed counsel at the trial and appellate levels are far below the rates earned by competent private criminal defense counsel. Furthermore, the courts, and in particular the California Supreme Court, routinely reduce the number of hours for which they will provide compensation resulting in substantial underpayment of counsel.

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Illinois Commission Report Recommendation	California Compliance	Comments on California Law
<p><b>Recommendation 79:</b> 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.</p>	NOT MET	<p>There is no requirement in current California law that there be no disparity between areas within the state. California Penal Code Section 987.9 provides a basis for an application by public defenders throughout the state for experts, investigators and others, including second counsel. However, there is no provision to accommodate other trial related expenses which might place a significant burden on small or rural public defender offices. In addition, the application for these funds is subject to the discretion of the local judges to a certain extent.</p>
<p><b>Recommendation 80:</b> The work of the State Appellate Defender's office in providing statewide trial support in Capital Cases should continue, and funds should be appropriate for this purpose.</p>	NOT MET	<p>The California State Public Defender's Office and CAP are both understaffed and underfunded. Despite that fact, both do an outstanding job of assisting other capital counsel. However, their efforts are largely focused on appointed appellate and habeas counsel, leaving support and education to largely privately funded organizations such as CPDA and CACJ.</p>

Illinois Commission Report Recommendation	California Compliance	Comments on California Law
<b>Recommendation 81:</b> The Commission supports the recommendation 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 qualified counsel.	NOT MET	Under current California law, public defenders and prosecutors receive some assistance on student loans. Private lawyers, who bear the burden of a large part of the capital litigation in California, receive no assistance.
<b>Recommendation 82:</b> 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.	NOT MET	Police agencies receive state money in various forms but none is earmarked specifically for these purposes (to the knowledge of this writer).
<b>Recommendation 83:</b> 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.	NOT MET	California law does not meet the recommendations regarding capital cases and, therefore, there is no attempt to broaden the application of such recommendations to non-capital cases.

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<b>Illinois Commission Report Recommendation</b>	<b>California Compliance</b>	<b>Comments on California Law</b>
<p><b>Recommendation 84:</b> 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.</p>	<p>NOT MET</p>	<p>Some data is collected but (to the knowledge of this writer) no systematic collection of data on the details of capital cases is or has been conducted.</p>

<b>Illinois Commission Report Recommendation</b>	<b>California Compliance</b>	<b>Comments on California Law</b>
<p><b>Recommendation 85:</b> Judges should be reminded of their obligation under Canon 3 to report violations of the Rules of Professional Conduct by prosecutors and defense lawyers.</p>	<p>NOT MET</p>	<p>Cannon D(2) of the California Code of Judicial Ethics suggests that a judge has an ethical duty to "take appropriate corrective action" if the judge has personal knowledge that a lawyer has committed a violation of the Rules of Professional Conduct. There is no duty to report the violations to the State Bar or to take any other specific action unless a defense lawyer has been found to have provided ineffective assistance of counsel. There is no similar provision pertaining to prosecutors.</p>
<p><b>TOTALS</b></p>	<p>NOT MET: 76 MET: 3 MET WITH QUALIFICATIONS: 2 CONSTITUTIONALLY REQUIRED: 3 NOT APPLICABLE: 1 COMPLIANCE: 5 OF 81=6.17%</p>	