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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORINIA, SOUTHERN DIVISION

ERNEST DEWAYNE JONES, Petitioner, v. VINCENT CULLEN, Warden of California State Prison at San Quentin, Respondent.	Case No. CV-09-2158-CJC DEATH PENALTY CASE

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EXHIBITS IN SUPPORT OF MOTION FOR AN EVIDENTARY HEARING VOLUME 1

EXHIBIT A
DECLARATION OF FLOYD NELSON

DECLARATION OF FLOYD NELSON

I, Floyd Nelson, declare as follows:

1. For a period of time in 1992, Ernest Jones and I were inmates housed in the same part of the Los Angeles County Jail. I am a few years older than Ernest, but he and I were both from the same area of South Central Los Angeles, and so I knew of him prior to being housed together. While we were housed in the county jail together, I came to know him better.

2. During this time period, Ernest and I were both housed in the mainline part of the jail. At that point in time, mainline was very overcrowded. The cells were so crowded that there was hardly room to move. In our part of mainline, inmates were housed in a two-tier setup where one tier was right on top of the other. The upper tier consisted of cells that were originally meant to hold four men, while the lower tier consisted of cells that were originally meant to hold six men.

3. In practice, however, both of these cell configurations ended up housing more men than they were supposed to hold. The jail had more inmates than it had bunk spaces to hand out, and as a result, newly-arrived inmates were often assigned spaces on the cell floors. It was common to see eight people in a six-man cell, and five or six guys in a four-man cell. Sometimes, guys were even assigned sleeping spaces in the dayroom. There were seldom enough blankets or mattresses for the guys who were on the floor, and even when blankets and mattresses became available, it was on a first-come, first-serve basis. Inmates basically had to fend for themselves in this environment.

4. In addition to being overcrowded, mainline cells were often filled with inmates that did not get along. Guys from different neighborhoods and ethnicities were placed together in cells even though the guards often knew the neighborhoods the guys came from and which neighborhoods did not get along. Fights were inevitable when rivaling inmates ended up in the same cell, and they also occurred on the tier during periods when the cell doors were open. Even

so, the jail staff generally did not move inmates from one part of mainline to another because of problems between cellmates - the inmates involved in those situations just had to deal with it.

5. Despite these space and safety issues, it was still better to be housed on mainline than it was to be housed in one of the high-power portions of the jail, such as the 1700/1750 tier. Although being housed in a high-power unit meant that an inmate had an individual cell and a little more privacy, it was on the whole a far more dangerous place to be. Most of the guys who were sent there had gotten into bad enough trouble while on mainline that the jail staff felt that they needed to be separated from the rest of the population. Generally, these inmates were a very determined and serious-minded bunch: when an inmate on high-power had a problem with another inmate on high-power, he had all the time that he wanted to plot an attack without other distractions. Although successful attacks required more creativity on high-power because of the more restrictive environment, inmates could count on them happening, and they were often more severe. It was a rough place to be, and as a result, guys at the jail tended to prefer mainline, regardless of its problems.

6. When Ernest first arrived at county jail, he was pretty concerned with his case. He tried to discuss it with me once or twice, but I let him know early on that doing so, especially with others, was not a good idea. That said, I occasionally helped him with filling out some forms or other paperwork when he needed assistance. I normally kept to myself and did not do this kind of thing for others, but since Ernest was from my neighborhood, I was willing to look after him a little bit in that way.

7. Ernest generally got along with the others that he was housed with, as well as the jail personnel. He was not known as a troublemaker. One thing that really stood out about him, however, was the way his moods shifted back and forth. These mood swings were intense: it was like he had two completely different personalities, and he did not seem to be aware when he switched between one and the other.

8. When Ernest was in an up mood, he was a sociable guy. During these periods, he talked with others, played cards, and did what was expected of him as an inmate. This was his general mode of operation for the majority of the time. Even so, there were other times when his mood swung into an entirely different mode, and when this happened, he acted like a different person. During these periods, he was extremely agitated. He had conspiracy theories about how everybody was out to get him, and when he got into this mindset, he liked to talk about these theories. I usually tuned him out as best as I could when he was like this. I knew that if I waited long enough his mood would shift back to normal, and then it was easy to get along with him again.

9. To deal with his issues, Ernest was taking psych meds on a regular basis. Back then, guys who were on medication received their meds during pill call, which happened three or four times a day. Pill call was held in the dayroom, which was a communal room where guys on mainline were in theory allowed to mingle with each other at different times during the day. In practice, the dayroom was rarely open back then for the general population, and during pill call, it was only open for the guys who needed medication. Each morning, the guys like Ernest who needed medication formed a line in a part of the dayroom that was connected to a smaller room that the jail's medical staff used to hand out pills. Meds were handed out on an alphabetical basis, and so depending on where an inmate's name fell in the alphabet, he might be waiting in line for an hour or an hour-and-half. Inmates who needed multiple doses of meds per day went through this process several times per day.

10. Although the dayroom was originally intended to be used as a gathering space for guys on mainline to hang out and mingle during the day, it was rarely used for this purpose during this time period. Instead, inmates were occasionally allowed to spend time with one another on the tier at various points during the day. How often this occurred depended on the attitudes and wishes of the guards who were working on any given day, as well as on whether the

jail was on lockdown, which happened from time to time after major incidents, such as riots and assaults on guards.

11. When inmates had a court appearance, their days began very early, usually around 3:30 a.m. or 4:00 a.m. On court days, after the inmates woke up, they went to a holding area on their floor, and from there were transferred downstairs, where they were sorted into holding cells that corresponded with the courthouse that they were heading to that day. Inmates were placed in restraints at this time. For most mainline inmates, this meant being handcuffed to one another in four-man chains. There were also some inmates who were individually restrained in a more restrictive manner. These restraints typically included a waist chain with attached handcuffs and leg shackles. Inmates who received these extra restraints included the following groups: inmates associated with gangs; inmates who were housed on high-power; and inmates who were classified in the "keep-away" category. This "keep-away" group included inmates who were in protective custody, such as child molesters, as well as inmates who were known to have severe problems dealing with other inmates.

12. From the jail, inmates were put on a bus to their destination courthouse. When they got to the courthouse, they were put into a large general holding cell, and from there they were moved to a smaller holding cell closer to their courtroom. By this point, it was usually about 7:30 a.m. or 8:00 a.m. At this smaller holding cell, they were given an opportunity to change into their dress clothes.

13. After their day in court finished up, inmates went back to the jail by bus, where they were searched for contraband. This often did not happen until after 7:00 p.m., and by the time inmates got back to their cells, it was often as late as 9:00 p.m. Because of these long hours, doing this routine day after day was very tiring, especially for inmates with long trials.

14. Towards the end of 1992, I was transferred out of the Los Angeles County Jail and ended up spending time at a few different state prisons around California. I lost touch with Ernest at this point, although I may have seen him in passing at different points between 1993

and 1995 when I periodically returned to the county jail. During these instances, though, we were housed in different units, and we did not have any regular contact.

15. Although I was not asked to testify at Ernest's capital trial, if I had been asked to do so, I would have attested to what is written above.

The foregoing is true and correct and executed under penalty of perjury under the laws of the United States and the State of California on December 17, 2010.

FLOYD NELSON

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EXHIBITS IN SUPPORT OF MOTION FOR AN EVIDENTARY HEARING VOLUME 1

EXHIBIT B
DECLARATION OF LARRY WILLIAMS

DECLARATION OF LARRY WILLIAMS

I, Larry Williams, declare as follows:

1. I was Ernest Jones's cellmate for several months in 1989 at Folsom State Prison. In addition to being cellmates, Ernest and I also worked together at the metal fabrication shop as part of the prison's industrial program.

2. I arrived at Folsom State Prison in 1987. Folsom had several industrial programs that inmates were allowed to take part in back then, and when I first arrived, I put my name on the program's waitlist so that I could have an opportunity to work and earn some money. There were very few open spots available at that time, though, and the waitlist was long. It was considered a privilege to be able to work, and the people in charge of the industrial programs were quick to remind the workers that it was a privilege that could easily be taken away and given to someone else who was waiting for the opportunity. In my case, it took nearly two years before I made it off of the waitlist and was given a job in the prison's metal fabrication shop.

3. The inmates who were given work assignments within the prison's industrial program were housed together in the same part of the same building, which at the time was Building Three. Each of the buildings at Folsom had an "A" side and a "B" side, and in Building Three, all of the workers were housed on one side, while all of the non-workers were housed on the other. Prior to receiving my work assignment, I had been housed on the non-working side of Building Three; when I found out that I had received my work assignment, I went over to the workers' side and moved into Ernest's cell.

4. I had not known Ernest very well prior to moving in with him, but as soon as we began sharing a cell, I could tell that we would get along with each other. He was generally mild-mannered, and he often had a smile on his face. He kept to himself quite a bit, as did I, and I did not have to worry about him causing problems with others or bringing trouble back to the cell. Ernest was from Los Angeles, and although there were a good number of guys back in those days that were either displaying red colors or blue colors to demonstrate their affiliation

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with different gang sets, Ernest did not. As far as I could tell, he was non-affiliated and was able to get along with guys from a variety of different places and backgrounds. I felt comfortable around him, and others seemed to as well.

5. As Ernest's cellmate, I noticed that although Ernest was usually an easygoing and upbeat guy, there were occasions when his mood changed and he started feeling down. When this happened, he became much less talkative to the point where he did not say much at all. I also noticed a kind of sadness come over him that became apparent in his facial expressions. It was often like he was not there, like his mind was elsewhere. These down moods typically went away after a bit of time had passed, though, and then he went back to being his usual smiling self.

6. When Ernest and I were living together, our weekdays were pretty regimented due to our work schedules. We usually got up around 4:00 a.m., went to the chow hall between 5:00 a.m. and 5:30 a.m., and then moved over to our work assignments by about 6:00 a.m. Once we got to work, we stayed there through the early part of the afternoon. Since we were both assigned to work in the metal fabrication unit, our job was to make a range of different metal items, such as gun racks for law enforcement, bumpers for patrol cars, and things like that. We worked in an assembly line setup where each guy in the shop had one or two tasks that he repeated through the work day, like making a cut or drilling a hole. Aside from a thirty minute lunch break, we did our work more or less continuously until about 2:00 p.m. or 3:00 p.m. in the afternoon. After that, we returned to our building, where we were able to take showers and spend time in our cells.

L.W. and two twenty-minute breaks L.W.

7. During the work week, Ernest generally liked to look at magazines and watch television in our cell in his free time. Going to the prison's yard for exercise was not an option for workers on weekdays, since yard time was already over by the time we got back from our industrial programs. During the weekend, though, Ernest liked to take full advantage of his yard time. He liked to work out, and he got his exercise in a variety of ways, including doing

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calisthenics, running around the yard's track and practicing gymnastic moves, such as flips. It was a strenuous routine, and one that stuck out in my mind at the time because I did not recall ever seeing other guys doing flips on the yard.

8. Although Ernest enjoyed going to the yard because it allowed him to exercise, the yard was also a dangerous place. Folsom had a very violent atmosphere back in those days, and even the slightest displays of disrespect often resulted in stabbings or killings. On one occasion, I saw a man get stabbed for simply cutting in line at the canteen. As soon as the guy who cut in line had gotten to the front, another inmate stabbed him. Nobody else in that line wanted to appear to be involved with the attack, and so it only became apparent that the attack had even happened once everyone else left the area and the guy who had been stabbed was still there, slumped against the wall. On another occasion, I saw a guy get stabbed in the side by the weight pile. He was able to walk over to where the COs were standing with the piece of metal that he had been stabbed with sticking out of him, but as soon as he got to the COs, he fell to the ground. He died a short while later.

9. Staying safe was a big concern outside of the yard area, as well. Guys sometimes attacked each other in the dining hall during mealtimes, and we also had to be mindful that something could always go down when we were on the tier. Our cells were very small – they were originally meant to be one-man cells, but had been converted into two-man cells at some point before we got there. When we went to sleep at night, we had to lie down in a position where our feet were pointing out toward the cell doors, with our heads facing the walls. This position enabled us to better protect our heads in the event that someone tried to attack us by sticking their arms L.W. or spears L.W. through the bars when we were sleeping. These kinds of attacks happened from time to time at Folsom, especially between members of the prison's different racial and ethnic communities. When there was tension between communities, the guys who were not affiliated with any of Folsom's gangs had to be extra-careful, as we had nobody backing us up and were going to be the first targets in these racially-motivated attacks. Since Ernest and I

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were in the non-affiliated category, the possibility of being the first victims of those attacks was something we always had to be mindful of.

10. A lot of the guys at Folsom who were disturbed by what they were experiencing there turned to drinking and using drugs. In our building, it was pretty common for guys to make homemade alcohol, or pruno, from fruit juice. Some inmates also crushed up pills and snorted the resulting powder in order to get high. Marijuana was also available for those who wanted it. Inmates who drank and did drugs had to be careful not to get too drunk or high, though, because that was when others took advantage of them. While at Folsom, I saw inmates who had taken heavy doses of drugs get victimized by others who could overpower them in their intoxicated state. In one situation, an attacking L.W. intoxicated L.W. inmate went so far as to scrape off some red dye from a pack of Pall Mall cigarettes and then smear it over ~~the intoxicated inmate~~ L.W. his own L.W.'s lips, as if he were a woman wearing lipstick. While they were in the back corner of a cell, ~~he~~ L.W. the attacking inmate L.W. then went on to completely take the intoxicated inmate's manhood away. I knew the guy that this happened to pretty well, and as time went on, it happened to him more and more. It hurt just knowing what he was going through.

11. Although Ernest did not use drugs in my presence, he did drink from time to time when he and I were cellmates. In Ernest's case, drinking put him into a visibly better mood. He smiled more when he drank, and he got really happy. The drinking eventually got him into trouble, though. During our last month of living together, our cell was searched and Ernest was written up for manufacturing a batch of pruno. The guards walked by, smelled a bunch of pruno in our cell, and we both got written up.

12. After this pruno write-up, I moved to a different cell in Building Three. As it turned out, I ended up staying in the industrial program only for a short period after that. Although I liked my job in the metal fabrication shop well enough, I really disliked that I had to be strip-searched every single day before I returned from work. This felt degrading. Once I

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had saved up enough money to tide me over for a while, I decided to give up my spot in the industrial program so that I could focus on doing leatherwork in the hobby shop instead.

13. I eventually moved to a different building altogether, but I still saw Ernest from time to time doing his exercises and flips out on the yard. After Ernest left Folsom, I lost touch with him entirely. Based on his good attitude and the way he was generally able to get along with people without inviting trouble, I figured that he was going to be alright once his sentence was up and he made his way back to Los Angeles. As a result, I was very surprised when I recently learned that Ernest had been charged with and convicted of murder in the mid-1990s. I was never contacted by any members of his defense team during his trial, and I was not asked by anyone to testify as a witness. If I had been, though, I would have testified to what is written above.

The foregoing is true and correct and executed under penalty of perjury under the laws of the United States and the State of California on February 14, 2011.

Larry Williams

Larry Williams

L.W.
LW

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EXHIBIT C
DECLARATION OF JIMMY CAMEL

DECLARATION OF JIMMY CAMEL

I, Jimmy Camel, declare as follows:

1. Ernest Jones and I were cellmates at Folsom State Prison for over a year in the late 1980s and 1990. I got to know him while he was working in the metal fabrication section of the prison's work facility, which was located very close to where I was manufacturing license plates. We also saw each other and got to talk at meal times.

2. I first got to Folsom State Prison in 1984, and Ernest arrived there a couple of years later. At some point after he arrived, he was assigned to the same unit of the prison that I was in. Our unit was composed of five tiers that were stacked vertically on top of one another, and he was given a spot in a two-man cell on the second tier. I was in a two-man cell on the third tier, which was directly above him. These cells were originally one-man cells that had been converted into two-man cells by simply adding another bunk to them. They were very cramped; there was really enough room for only one cellmate at a time to use the floor space. When the guards did their daily inmate counts, the inmates generally had to stand one in front of the other, as there was not enough room for inmates to stand comfortably side-by-side. We had to stand carefully so that the guards could see both inmates at once.

3. I knew Ernest only a short while before he and I were housed together, but based on what I knew, he had the makings of a good cellmate. Ernest was in his mid-twenties at the time, but unlike a lot of the other guys his age, he actively avoided having anything to do with gang activity. He was not into gambling, borrowing money from others, or otherwise creating situations where he was going to have to repay others a favor. He took care of himself without inviting unwanted attention from known gang members and others looking to make trouble. Several times, gang-affiliated inmates he knew from his Los Angeles neighborhood were attacked or stabbed by other gang members who were upset with the way their fellow gang members were handling themselves. Even though his friends from home asked him to take part

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in these attacks or retaliation, Ernest refused to do so. Instead, he focused his efforts on trying to improve himself.

4. Despite Ernest's positive outlook, Folsom State Prison was a madhouse during the time that he and I were there. From the moment I arrived to the day I left in August of 1990, the prison was a very dangerous place where almost anything could happen at any time. Inmates got attacked just about everywhere - on the tier, on the yard, in the dining hall, in the chapel, in the visiting room, and in the medical center. Nowhere was completely safe. Many of the inmates in the prison were gang-affiliated, and there was a lot of violence going on both within and between different gangs. When rival gang members attacked each other, retaliation often followed. Arguments over money or property also often turned violent. On one occasion, I saw a coworker get stabbed right in front of me with a homemade sword because of a dispute over a black-and-white television. This inmate later died on the way to the hospital. Even though inmates like Ernest and I were not affiliated with any gang and did not mess with other inmates' property, we still had to be on high-alert and aware of our surroundings at all hours of the day in case anything happened around us.

5. The violence within the prison reached a point where we could not even let our guard down while we were sleeping. In order to be prepared for attacks and assaults during the night, we slept in our prison-issued jumpsuits with our boots on, which allowed to us to be ready in the event that we were suddenly woken up and needed to defend ourselves. We slept lightly and got up as quickly as possible when we heard any movement on cell bars in the darkness. And this was only at night. When the cell doors opened for us to go to breakfast, anything was possible. We never knew what another inmate might do to us or to those around us. There was at least one occasion where I heard an inmate getting stabbed in the tier right above me right after the cell doors opened around 5:30 a.m. By the time the closest correctional officer had figured out what had happened and put out a "man down" call, the perpetrator of the stabbing was already gone. On another occasion, three inmates on the third tier who were members of the

Aryan Brotherhood (AB) killed an unaffiliated white inmate who was acting as a pot dealer within the prison. The three AB inmates felt that the pot dealer owed them protection money, but he had not paid up. This killing occurred just before the guards' evening inmate count, and after the inmate was confirmed dead, a couple of correctional officers dragged his body in front of my cell as they took it off the tier.

6. During our time at Folsom State Prison, Ernest was usually in a pretty good mood. He worked every weekday from after breakfast until about 2:45 p.m. as a metal fabricator within the prison's industrial program for inmates. After work, he came back to our cell and exercised, often practicing martial arts stretches that he said he learned from his brother-in-law. He got along well with others, and he liked to joke around, laugh, and tell stories about his sister and brother-in-law. He generally tried to focus on the positive as much as he could when he was in this mood.

7. Although Ernest usually had a positive attitude and got along well with others, there were some occasions where I could tell that he was feeling down. When this happened, he often laid down on his bunk and took deep breaths while looking at the wall or the floor. It was like he was off in his own world when he did this. He sometimes asked me for advice on how to approach the situations that were upsetting him, and when he did this, I usually listened and told him how I generally took care of the kinds of problems that were bothering him. After a couple of hours passed, his mood usually swung back the other direction, and he began feeling good again.

8. Ernest grew up in Los Angeles, but he did not talk a lot about his parents. From what he said, his sister and his brother-in-law mostly took care of him, and when he spoke about family members, it was usually about them. He told me that his brother-in-law was an important influence in his life, especially when it came to showing him how to deal with his emotions. This brother-in-law was a martial arts expert, and when Ernest was young, he tried to show Ernest how to use meditation-style techniques to remain calm when he felt like he was starting to

feel overwhelmed. These lessons stuck with Ernest, and even when we were living together, he was still trying to use them when he began to get upset.

9. Towards the end of my stay at Folsom, one of the female COs named Hernandez who used to work in our building was reassigned to work near the prison industries area. The COs working out in the prison industries area were assigned to watch over the inmates during the workdays. They generally got along well with the workers, although there was occasionally a CO or two assigned to the area who wrote up guys for being out-of-bounds when all they had done was cross through a gate to get coffee or tobacco. In Hernandez's case, though, she generally had a good relationship with the guys working there, Ernest included. When she had been working in our building, the two of them used to talk from time to time, and they seemed to respect one another. One day when Ernest was out near his work area, Hernandez heard another inmate who was standing near Ernest say something that she felt was derogatory toward her. When Hernandez asked Ernest to repeat what the other guy had said, Ernest replied that he had not heard the other guy say anything bad. Hernandez became very upset at Ernest for not repeating what she thought she had heard, and as a result of this, some COs came in our cell a day or two later and tore it up.

10. During this cell search, some pruno, or homemade alcohol, that I was making was discovered by a CO. Although I explained to the CO that the pruno was mine and that Ernest had nothing to do with manufacturing it, he got written up, too. Like a lot of the guys at Folsom, I made pruno from time to time in order to have a drink every now and then. After going through all of the craziness and violence of Folsom Prison each day, sometimes I just needed to have a drink to deal with what was going on around me. It was not that different from a guard going home and having a drink to deal with seeing the very same things.

11. Due to these pruno write-ups, both of our transfers out of Folsom were delayed by a month or two. This delay upset Ernest a lot. Like most of the inmates incarcerated there at that time, Ernest could not wait to leave Folsom and its violent atmosphere. I felt the same way, and

when I finally got my chance to transfer out of the prison in August of 1990, it felt like a huge weight had been lifted from my shoulders. After all of those years of being in a state of high-alert, the moment I stepped on to the transfer bus I felt like I could finally let my guard down a little bit and breathe. That was a great day.

12. The last time I saw Ernest was the day he left Folsom Prison on a transfer bus in the summer of 1990. I have not heard from him since. Until very recently, I had no idea that Ernest had later been convicted of capital murder. I was shocked to hear this news – the Ernest I knew at Folsom State Prison was focused on putting his life back together. He was not a violent person when I knew him – more than anything, he was very focused on staying positive and getting his life back in order.

13. I was not contacted by any members of Ernest's defense team while he was on trial for his homicide charges, nor was I asked by anyone to testify at his trial. If I had been, I would have testified to what is written above.

The foregoing is true and correct and executed under penalty of perjury under the laws of the United States and the State of California on February 16, 2011.

Jimmy Camel

JIMMY CAMEL

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Attorneys for Petitioner ERNEST DEWAYNE JONES

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORINIA, SOUTHERN DIVISION

ERNEST DEWAYNE JONES, Petitioner, v. VINCENT CULLEN, Warden of California State Prison at San Quentin, Respondent.	Case No. CV-09-2158-CJC DEATH PENALTY CASE

EXHIBITS IN SUPPORT OF MOTION FOR AN EVIDENTARY HEARING VOLUME 1

EXHIBIT D
DECLARATION OF JAMES S. THOMSON

DECLARATION OF JAMES S. THOMSON

I, James S. Thomson, declare as follows:

1. I am an attorney licensed to practice law by the State of California. My law practice focuses on criminal litigation in state and federal courts; I litigate trial, appellate, and post-conviction cases, with an emphasis on capital cases.

2. I am admitted to practice in California state courts, the United States Supreme Court; the United States Courts of Appeals for the Sixth and Ninth Circuits; the United States District Courts for the Eastern, Northern, Southern, and Central Districts of California; and the United States District Courts of Alaska, Montana, and the Eastern District of Tennessee. I also have been admitted to practice *pro hac vice* in cases in the Arizona, Florida, Montana, and Nevada state courts, the United States District Courts of Hawai'i and Nevada, and the High Court of the Territory of American Somoa.

3. I was admitted to practice law in California in May 1978. From 1978 to 1994, I maintained a private practice in Sacramento, California. During approximately my first two years of practice, my case load consisted primarily of criminal cases, with a small percentage of civil matters. Since 1980, I have exclusively represented persons charged with, or convicted of, criminal conduct. In 1994, I relocated my law office to its current location in Berkeley, California.

4. Since 1982, the substantial majority of my practice has been capital litigation in trial, appellate, post-conviction, and clemency proceedings. I have represented approximately fifty persons charged with or convicted of capital crimes in trial, appellate, or post-conviction proceedings.

5. At the trial level, I have represented more than twenty-five defendants in capital cases in state courts in California, one defendant in a capital case in Florida, and two defendants in capital cases in Montana. Since 1982, when I was first appointed to represent a capital defendant, nine of my capital cases in California courts proceeded to trial, and seven of those advanced through a penalty phase proceeding. My first capital trial took place in Santa Rosa, Sonoma County, on a change of venue from Sacramento County in 1983-1984.

6. At the post-conviction level, I have represented petitioners in capital cases in Arizona, California, Montana, Nevada, and Tennessee.

7. I have represented criminal defendants in complex criminal cases in the United States District Courts for the Northern and Eastern Districts of California. I have represented seven defendants in federal death penalty cases at the trial level in the Eastern and Northern District Courts of California and the District Court of Hawai'i. I was also appointed by the High Court of American Samoa to represent a capitally charged defendant. My most recent trial occurred in 2009 in the United States District Court for the Northern District of California in *United States v. Dennis Cyrus, Jr.*, Case No. 05-00324.

8. Currently, I am counsel of record in several capital cases before the California Supreme Court and the United States District Courts.

9. I served as Chair and as a Member of the California State Bar Board of Legal Specialization, Criminal Law Advisory Commission and the Independent Inquiry and Review Panel, Program for Certifying Legal Specialists (1986-1992). I also served for the Sacramento County Bar Association as Indigent Criminal Defense Panel Committee Chair (1981-1983), Vice Chair (1987), and Member (1980-1989), and the Sacramento County Bar Association Judiciary Committee, as Chair, Vice Chair, and Member (1982-1984). During my tenure on the Indigent Criminal Defense Panel Committee, I worked with judges and other attorneys to develop criteria, evaluate, and classify approximately 250 private attorneys for appointment to cases, including capital litigation.

10. For almost thirty years, I have been a member and officer of California Attorneys for Criminal Justice (CACJ). CACJ is a non-profit California corporation that currently has approximately 2,000 members, primarily criminal defense attorneys practicing before state and federal courts. In 1994, I was President of CACJ. Before serving as President, I served as President-Elect, Vice President, Treasurer, and Secretary. I also have prepared several amicus briefs on behalf of CACJ. I have served as Assistant Editor of CACJ's Forum magazine. I chaired the CACJ Death Penalty Committee from 1988 through 1991, and I was Co-Chair in 2005 and 2006.

11. I also am a member of the California Public Defenders Association. CPDA is a non-profit California corporation with a membership of approximately 4,000 criminal defense attorneys in public and private practice. CPDA has provided continuing legal education for criminal defense attorneys for almost forty years.

12. In addition to my criminal law practice, I have lectured extensively on criminal and civil litigation issues at continuing legal education conferences and seminars, including the annual CACJ and CPDA Capital Case Defense Seminar (CCDS). In 1988, 1989, and 1990, I was Chair of the CCDS Planning Committee. I also served as a member of the CCDS Planning Committee in 2005, 2006, and 2008.

13. I was an editor and author of the California Death Penalty Defense Manual published by CACJ and CPDA in 1985 and subsequent years. I co-authored the Penalty Phase Mitigation sections of the 1990 and 1991 Manuals. I was co-editor of the Arizona Capital Case Defense Manual published by Arizona Attorneys for Criminal Justice and the Arizona Capital Representation Project in 1995.

14. I was the Founding President in 1986 and President in 1987 of the Criminal Defense Lawyers of Sacramento.

15. In 1992, I co-founded the Bryan R. Shechmeister Death Penalty College, located at the University of Santa Clara School of Law. I continue to coordinate the Death Penalty College with the Director and have been a member of the faculty since its inception.

16. I am one of the trial attorneys in the Mexican Capital Legal Assistance Program sponsored by the Government of Mexico to provide assistance to Mexican nationals facing the death penalty in the United States. My area of coverage extends from Kern County to Siskiyou County, including Sacramento County, California.

17. I have consulted with attorneys in over 200 capital cases involving guilt and penalty phase and appellate and post-conviction strategies; selection of defenses; plea negotiation; retaining and working with investigators, experts, and other witnesses; development and presentation of statutory and constitutional issues; and other litigation questions.

18. I have qualified and testified as an expert regarding the standard of practice

applicable to criminal defense attorneys in capital and noncapital cases on several occasions. I also have submitted declarations to various courts on right-to-counsel issues in other cases.

19. At the request of counsel for Troy Ashmus, I provide this declaration to describe the prevailing professional norms in 1986 of defense attorneys representing clients in capital trial proceedings. Many of the standards, prevailing practices, and responsibilities that I describe in this declaration continue to comprise the current standard of care exercised by defense counsel representing defendants charged with capital crimes. For simplicity and clarity, however, I use the past tense to describe defense counsel's duties.

20. As a result of my training, background, and experience, I am familiar with the standard of care that a defense attorney must meet in order to provide effective representation in capital trial proceedings from the time of Mr. Ashmus's arrest in 1984 through sentencing in 1986. In addition to my experiences outlined above, at the time, I had or was representing numerous capital defendants at the trial level in Sacramento County and, as a result of my work on the Indigent Criminal Defense Panel Committee, was familiar with the standards of representation practiced, and expected of, trial attorneys representing capital defendants. In addition, I have reviewed the testimony and declarations of several attorneys in capital habeas proceedings. The descriptions of the prevailing standard of care contained in these declarations comport with my own understanding of expectations of trial counsel at the time of the trials in those cases.[1] A list of the material that I reviewed is contained in the Appendix to this Declaration.

21. Prior to and at the time of Mr. Ashmus's trial, the prevailing standard of care of attorneys appointed to represent criminal defendants included the duty to conduct a reasonable investigation of the circumstances of the case and explore all avenues leading to facts relevant to potential guilt or penalty defenses. This responsibility was imposed by case law, professional standards, practice materials and manuals, and capital defense trainings, each of which explained

[1] I was not asked to, and do not offer, any opinions as to whether trial counsel in those cases complied with the prevailing standards.

the scope of counsel's duties and responsibilities.

22. Beginning as early as 1978 in California, there were seminars and publications available to the criminal defense bar involving many subjects relevant to the investigation, preparation, and presentation of capital cases.[2] Several organizations, including CACJ, CPDA, the California Appellate Project (CAP), the Office of the State Public Defender (OSPD), and county public defender offices, regularly conducted trainings and seminars in California for capital practitioners. In addition, national training programs were regularly sponsored by the NAACP Legal Defense Fund, the National Legal Aid and Defender Association, the Southern Poverty Law Center, and other organizations. Publications from various criminal defense organizations in California tracked developments in capital cases, promoted successful strategies and practices, and provided trial attorneys with resources to assist in the investigation, development, selection, and presentation of guilt and penalty phase defenses. The California Death Penalty Defense Manual was published in 1980 and updated annually thereafter. The 1986 version of the Manual was published in January 1986.

23. In large measure, these trainings and materials drew upon the successful practices employed by attorneys at the trial level in persuading district attorneys to withdraw special circumstances or not seek a death sentence, and juries and judges to acquit defendants of capital crimes, find the special circumstances not true, or return or impose a sentence less than death. These successful practices were regularly disseminated in publications by the OSPD, CAP, CACJ, CPDA, and other organizations. In addition, these practices formed the basis for recommendations to defense attorneys contained in the annual revisions to the California Death Penalty Defense Manual and the various training seminars regularly conducted in and outside of California.

24. In 1987, the National Legal Aid and Defender Association adopted the Standards for Counsel in Capital Cases (NLADA Standards). These standards "codified" the prevailing national practice of attorneys representing capital defendants that had been developed since the

[2] *See, e.g.*, Exh. 164 Declaration of Jack M. Earley in *Wrest v. Calderon*, at 5.

reinstatement of capital punishment following the United States Supreme Court's decision in *Furman v. Georgia*, 408 U.S. 238 (1972). As explained above, California had established a state-wide standard of care several years prior to the publication of, and more rigorous than, the NLADA Standards.

25. In 1989, the American Bar Association published Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (ABA Guidelines), which federal courts have cited in determining whether counsel's performance satisfied the minimum requirements of the Sixth Amendment to the United States Constitution. The ABA Guidelines track the NLADA Standards, and similarly synthesized the standards of care that had been in existence for several years prior to their publication. The introduction to the 1989 ABA Guidelines states that "[t]hese Guidelines amplify previously adopted Association positions on effective assistance of counsel in capital cases." American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 1 (1989). Significantly, in support of its recommendations, the Commentary to the Guidelines repeatedly cites to the 1986 California Death Penalty Defense Manual, other training materials, and sources published prior to Mr. Ashmus's trial.[3] As with the

[3] *See, e.g.*, American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases at 36 n.5 (citing Dennis Balske, *The Death Penalty Trial: A Practical Guide*, The Champion (Mar. 1984), and the 1986 California Death Penalty Defense Manual, in support of Guideline 1.1.); *id*. at 36-37, 39 nn.11, 14, & 28 (citing Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. Rev. 299 (1983), in support of Guideline 1.1.); *id*. at 37 n.15 (citing Indiana Public Defender Council, Indiana Death Penalty Defense Manual (1985), in support of Guideline 1.1.); *id*. at 75 n.7 (citing Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. Rev. 299 (1983), in support of Guideline 8.1.); *id*. at 75 n.9 (citing Comment, *The Cost of Taking a Life: Dollars and Sense of the Death Penalty*, 18 U.C. Davis L. Rev. 1221 (1985), in support of Guideline 8.1.); *id*. at 77 n.1 (citing material in the 1986 California Death Penalty Defense Manual, in support of Guideline 9.1.); *id*. at 92 n.2 (citing the 1986 California Death Penalty Defense Manual, in support of Guideline 11.3.); *id*. at 92 n.3 (citing Dept. of Public Advocacy, Kentucky Public Advocate Death Penalty Manual (1983), in support of Guideline 11.3.); *id*. at 98 n.10 (citing Indiana Public Defender Council, Indiana Death Penalty Defense Manual (1985), in support of Guideline 11.4.1.); *id*. at 100 n.5 (citing Indiana Public Defender Council, Indiana Death Penalty Defense Manual (1985), in support of Guideline 11.4.2.); *id*. at 100 n.6 (citing material in the 1986 California Death Penalty Defense Manual, in support of Guideline 11.4.2.); *id*. at 103 n.1 (citing Indiana Public Defender Council, Indiana Death Penalty Defense Manual (1985), in support of Guideline 11.5.1.); *id*. at 98 n.10 (citing Tennessee Association of Criminal Defense Lawyers, The TACDL Death Penalty Defense Manual: Tools for the Ultimate Trial (1985), in support of Guideline 11.5.1.); *id*. at 36 n.5 (citing Dennis Balske, *New Strategies for the Defense of Capital* Case, 13 Akron L. Rev. 331 (1979), in support of Guideline 11.5.1); *id*. at 106 nn.1-2 (citing material in the 1986 California

NLADA Standards, the prevailing standards in California in 1986 exceeded the requirements of the ABA Guidelines.[4]

26. At the time of Mr. Ashmus's trial, defense counsel understood that representing a defendant in a capital case was a complex and time-consuming endeavor. In addition to the enormous responsibilities normally attendant to preparing to defend against homicide charges, trial counsel was obligated to concurrently investigate and prepare the penalty phase defense.[5] Trial counsel's challenges were compounded by counsel's need to understand and analyze the evidence the prosecution intended to introduce, and the available defense evidence on guilt and penalty issues, before counsel could fully develop and formulate an effective theory of the case and defense strategy for either phase of the trial.[6]

27. Since the reinstatement of capital punishment in California in 1977, defense attorneys have been aware that successful penalty phase investigation and presentation of compelling mitigating evidence has had a high degree of success. Michael Millman, the Executive Director of the California Appellate Project, explained in the introduction of the 1986 California Death Penalty Defense Manual:

> Creative, high-quality lawyering will significantly reduce the chances that any particular defendant is actually sentenced to death and ultimately executed. The truth is that energetic representation makes a significant difference even in apparently "hopeless" cases. The LWOP [life without the possibility of parole]

Death Penalty Defense Manual, in support of Guideline 11.6.1.); *id*. at 110 n.3 (citing material in the 1986 California Death Penalty Defense Manual, in support of Guideline 11.6.2.); *id*. at 115 n.2 (citing Indiana Public Defender Council, Indiana Death Penalty Defense Manual (1985), and Dept. of Public Advocacy, Kentucky Public Advocate Death Penalty Manual (1983), in support of Guideline 11.7.1.); *id*. at 121 n.3 (citing the 1986 California Death Penalty Defense Manual, in support of Guideline 11.7.3.); *id*. at 136-37 nn.3, 4, 9, & 15 (citing material in, or directly to, the 1986 California Death Penalty Defense Manual, in support of Guideline 11.8.6.); *id*. at 136 n.5 (citing Indiana Public Defender Council, Indiana Death Penalty Defense Manual (1985), in support of Guideline 11.8.7.); *id*. at 137 n.8 (citing Dept. of Public Advocacy, Kentucky Public Advocate Death Penalty Manual (1983), in support of Guideline 11.8.7.); *id*. at 140 n.2 (citing the 1986 California Death Penalty Defense Manual, in support of Guideline 11.9.1.); *id*. at 142 nn.1, 3, & 5 (citing Indiana Public Defender Council, Indiana Death Penalty Defense Manual (1985), in support of Guideline 11.9.2.); *id*. at 142 n.4 (citing material in the 1986 California Death Penalty Defense Manual, in support of Guideline 11.9.2.).

[4] *See, e.g.*, Exh. 163 Declaration of Michael Burt in *Thomas v. Calderon*, at 9 n.2, 18-19.

[5] ABA Guidelines 11.4.1., 11.8.3.

[6] *See, e.g.*, Exh. 164 Declaration of Jack M. Earley in *Wrest v. Calderon*, at 7.

> verdicts in dozens of egregious cases in which the prosecution sought death demonstrate that even where the defendant is accused of multiple grisly murders a death verdict is not a foregone conclusion.[7]

28. At the time of Mr. Ashmus's trial, what constituted compelling mitigation was well-known. In an article published in 1983, Professor Gary Goodpaster, who taught at U.C. Davis School of Law, explained the obligations of defense counsel:

> First, counsel must portray the defendant as a human being with positive qualities. The prosecution will have selectively presented the judge or jury with evidence of defendant's criminal side, portraying him as evil and inhuman, perhaps monstrous. Defense counsel must make use of the fact that few people are thoroughly and one-sidedly evil. Every individual possesses some good qualities and has performed some kind deeds. Defense counsel must, therefore, by presenting positive evidence of the defendant's character and acts, attempt to convince the sentencer that the defendant has redeeming qualities. A true advocate cannot permit a capital case to go to the sentencer on the prosecution's one-sided portrayal alone and claim to be rendering effective assistance.
>
> As the second element of the mitigating case, the defense must attempt to show that the defendant's capital crimes are humanly understandable in light of his past history and the unique circumstances affecting his formative development, that he is not solely responsible for what he is. Many child abusers, for example, were abused as children. The knowledge that a particular abuser suffered abuse as a child does not, of course, excuse the conduct, yet it makes the crime, inconceivable to many people, more understandable and evokes at least partial forgiveness. Counsel's demonstration that upbringing and other formative influences may have distorted the defendant's personality or led to his criminal behavior may spark in the sentencer the perspective or compassion conducive to mercy.[8]

Two years later, in *People v. Deere*, 41 Cal. 3d 353, 366-67 (1985), the California Supreme Court quoted these passages in support of its observation that "[t]here is no mystery as to the kind of evidence defense counsel should prepare and present at the penalty phase."

29. In 1986, attorneys representing capital defendants were required to conduct an exhaustive investigation of the defendant's background and social history, make an informed and considered determination of the reasons why the jury should impose a life sentence, and conduct a well-conceived presentation of the mitigation evidence.[9] Indeed, the Manual contained the

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[7] Michael Millman, *Introduction, General Strategy* A-2-3, 1986 California Death Penalty Defense Manual (citing statistics that only one in ten cases charged as a special circumstance first-degree murder results in a death sentence and noting that "dozens of egregious cases" have resulted in LWOP verdicts).

[8] Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. Rev. 299, 317-18 (1983).

[9] *See, e.g.*, ABA Guidelines 11.4.1.C; Dennis Balske, *The Death Penalty Trial: A*

training material for a Death Penalty Seminar for Investigators, conducted on October 5, 1985, that cautioned that the "[f]ailure to conduct a thorough investigation may constitute ineffective assistance of counsel" and cited as support for that statement *In re Hall*, 20 Cal. 3d 40 (1980), *People v. Rodriquez*, 73 Cal. App. 3d 1023 (1977), and Professor Goodpaster's article.

30. In order for counsel to make informed strategic decisions concerning the appropriate mitigation to present, the prevailing standard of care required that attorneys appointed to represent capital defendants investigate, review, and integrate into the defense strategy myriad information concerning the client, his family, and the environmental factors that affected their behavior, personality, and mental functioning.[10] At the time of Mr. Ashmus's trial, the information that was required to be explored included, but was not limited to, the client's and his or her family members' developmental, medical, and mental health history, educational history, military history, employment and training history, family and social history (including physical, sexual, and emotional abuse), prior criminal history, prior correctional history, and religious and cultural influences.[11] As Thomas Nolan stated in his Declaration in *Karis v. Calderon,* trial counsel's responsibilities were well-established years before Mr. Ashmus's trial:

> In 1982, as today, the standard of practice required penalty phase counsel to

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Practical Guide, The Champion 40, 42 (Mar. 1984), reprinted in the 1986 California Death Penalty Defense Manual ("In order to be able to give the jury a reason not to kill, you must conduct the most extensive background investigation imaginable."); Jeff Blum, *Investigation In A Capital Case: Telling The Client's Story*, The Champion 27 (Aug. 1985), reprinted in the 1986 California Death Penalty Defense Manual.

[10] *See, e.g.*, ABA Guidelines 11.8.3.F., 11.8.6.; Lois Heaney, *Constructing A Social History*, H-47 (1983), reprinted in the 1986 California Death Penalty Defense Manual; Jayson Wechter, *Environmental Factors in Penalty Phase Presentation*, 87H-7 reprinted in the 1987 California Death Penalty Defense Manual (Penalty phase "requires a detailed and comprehensive investigation which should be part biography, part ethnography, part psychological case study, and part family profile."); Exh. 164 Declaration of Jack M. Earley in *Wrest v. Calderon*, at 7; Exh.156 Declaration of Thomas Nolan in *Karis v. Calderon*, at 8.

[11] *See, e.g.*, ABA Guidelines 11.8.6.; Blum, *supra*, at 27; Casey Cohen, *Personal History Worksheet for Penalty Phase Investigation*, H-38-41 in the 1986 California Death Penalty Defense Manual (outlining the topics and assessment questions, portions of which were drawn from Robert Carter, *Presentence Report Handbook* (Jan. 1978)); *Mitigating Factors*, Death Penalty UPDATE (1982), reprinted in the 1986 California Death Penalty Defense Manual (listing potential mitigating factors to consider); Exh. 158 Declaration of Leslie Abramson in *Williams v. Vasquez*, at 4-5; Exh. 160 Declaration of Susan Sawyer in *Williams v. Vasquez*, at 4-5.

> investigate, prepare and consider presenting evidence of the client's family history, including family dynamics, any physical abuse, mental and physical illness, and the family's socioeconomic status. Then as now, every juror wanted to know where the defendant came from and how he came to sit before them convicted of a capital crime. Jurors intuitively understand that some people are dealt a poor hand in life, through their genetic and social inheritance and their family environment.[12]

31. At the time of Mr. Ashmus's trial, counsel routinely sought to collect all documents concerning the client's social history and background, including records relating to the defendant's parents, siblings, and other family members.[13] Such documents often contained important information relating to the defendant's mitigating environment in which he or she was raised, the cause and influences on his or her behavior; and the defendant's genetic predisposition to developing mental illness.[14] As Jayson Whechter, a criminal defense investigator in San Francisco in the 1980s, wrote:

> Along with interviewing family members about the defendant, a history and profile should be constructed on the family itself, for in order to understand the defendant, one must understand his parents, siblings, grandparents, aunts, uncles, and cousins, and the social dynamics between them.[15]

These documents were essential to the development of an accurate and compelling case in

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[12] Exh. 156 Declaration of Thomas Nolan in *Karis v. Calderon*, at 13.

[13] *See, e.g.*, Patti Nelson, *The Stinson Case: A Lawyer's Approach to Penalty Phase* (July 1982), reprinted in the 1986 California Death Penalty Defense Manual; Blum, *supra*, at 27 ("Places such as schools, rehabilitation programs, hospitals, prisons, summer camps, etc., harbor documents that chart your client's development and accurately record physical or emotional problems, life changing events, specific needs, and professional recommendations."); Exh. 164 Declaration of Jack M. Earley in *Wrest v. Calderon*, at 7-9; Exh. 162 Declaration of Michael N. Burt in In *re Clark*, at 12; Exh. 157 Declaration of Jack M. Earley in *Williams v. Vasquez*, at 9-10, 37; Exh. 156 Declaration of Thomas Nolan in *Karis v. Calderon*, at 15.

[14] *See, e.g.*, Lois Heaney, *Preparing the Penalty Phase*, H-52 (1983), reprinted in the 1986 California Death Penalty Defense Manual ("In almost every case sufficient digging will uncover some very difficult and traumatic experiences in the defendant's background."); Michael Millman, *Law Related to Penalty Phase Investigation*, Death Penalty Workshop for Investigators, conducted on October 5, 1985, H-35, reprinted in the 1986 California Death Penalty Defense Manual (listing mitigating factors from California Supreme Court decisions including parental psychological problems, difficult family life, and emotional disturbances); Exh. 164 Declaration of Jack M. Earley in *Wrest v. Calderon*, at 9; Exh. 157 Declaration of Jack M. Earley in *Williams v. Vasquez*, at 9.

[15] Wechter, *supra*, at 87H-8; *see also* Exh. 162 Declaration of Michael N. Burt in In *re Clark*, at 10 (collecting "data regarding Petitioner's family medical and psychiatric history" "is an absolute prerequisite to any competent evaluation by mental health experts").

mitigation because they provided contemporaneous evidence of the events and influences affecting the client's life, were potential sources of witnesses and leads to other documents, and had particular credibility with juries, as they almost always were created prior to the capital crime.

32. Counsel's obligation to collect records was independent of the discovery provided by the State. For many reasons, the defense was in a better position to collect such records. First, defense counsel had a wealth of information unavailable to the State that contained leads to institutions and persons possessing relevant records. Second, capital defense attorneys had a more sophisticated understanding of mitigation than most prosecutors and thus were cognizant of the need to collect more than the obvious documents, such as the defendant's educational or criminal records. Third, defense counsel were aware that record collection often required persistence and knowledge of the document maintenance practices of various institutions in order to obtain complete sets of documents.

33. At the time of Mr. Ashmus's trial, the prevailing standard of care also required capital defense attorneys to interview persons regarding all potential mitigation themes, including, but not limited to, family members, friends, neighbors, teachers, co-workers, employers, law enforcement personnel, psychologists, physicians, counselors, and institutional personnel.[16] Identifying and interviewing potential witnesses required a systematic approach, with adjustments made to the investigation plan as information was obtained and witnesses were interviewed. Trial counsel did not fulfill his or her obligations by focusing the investigation on a small set of witnesses or limiting the inquiry to a specific time period or potential mitigation theme. For example, trial counsel could not confine the investigation to teachers to the exclusion of other witnesses such as juvenile authorities.[17] Only after a thorough investigation and careful

[16] *See, e.g.*, Balske, *supra*, at 44 ("Interview anyone you can find who has had any contact with the defendant."); *id*. at 45 ("don't overlook persons like next-door neighbors"); Exh. 157 Declaration of Jack M. Earley in *Wrest v. Calderon*, at 8; Exh. 156 Declaration of Thomas Nolan in *Karis v. Calderon*, at 13-15.

[17] *See, e.g.*, Wechter, *supra*, at 87H-8 (noting need to interview institutional personnel); Exh. 160 Declaration of Susan Sawyer in *Williams v. Vasquez*, at 5.

consideration of the various options could an informed decision be made about what mitigation should be presented at trial; predetermining the penalty phase presentation by limiting the scope of the required investigation was contrary to the prevailing standards of trial attorneys in 1986.

34. As the prevailing standard of care in 1986 required trial counsel to conduct a thorough investigation, it was incumbent upon counsel to employ trained guilt and sentencing investigators in the development and presentation of defenses at trial.[18] Defense counsel routinely retained and used experienced, knowledgeable investigators to assist in the investigation and preparation of a capital case. Even when experienced guilt and penalty investigators were employed, however, trial counsel was required to maintain responsibility for the investigation and was not permitted to delegate strategic decision-making to investigators or others.[19] Counsel directed and controlled the investigation, guiding the investigators after counsel evaluated the information previously developed.[20]

35. As the mitigation investigation advanced, trial counsel was required to integrate the emerging information into the investigation and development of a penalty phase defense.[21] This required trial counsel to reformulate potential mitigation themes and appropriately re-direct questioning of potential witnesses.[22] This was particularly true when investigating sensitive

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[18] *See, e.g.*, ABA Guidelines 11.4.1; Exh. 163 Declaration of Michael Burt in *Thomas v. Calderon*, at 12 & n.10; Heaney, *Penalty Phase*, *supra*, at H-61 (critical to choose the proper person to conduct the social history investigation); Exh. 157 Declaration of Jack M. Earley in *Williams v. Vasquez*, at 36 ("A reasonably competent counsel in 1982 would have been aware that investigators specially trained to gather social history information should have been assigned to that task.").

[19] *See, e.g.*, Exh. 164 Declaration of Jack M. Earley in *Wrest v. Calderon*, at 10; Exh. 158 Declaration of Leslie Abramson in *Williams v. Vasquez*, at 5; Exh. 159 Declaration of Michael Adelson in *Williams v. Vasquez*, at 4; Exh. 160 Declaration of Susan Sawyer in *Williams v. Vasquez*, at 4.

[20] *See, e.g.*, Haney, *Penalty Phase*, *supra*, at H-61-62 (crucial for trial counsel to "stay integrated" in the social history investigation process); Exh. 157 Declaration of Jack M. Earley in *Williams v. Vasquez*, at 9; Exh. 158 Declaration of Leslie Abramson in *Williams v. Vasquez*, at 5; Exh. 159 Declaration of Michael Adelson in *Williams v. Vasquez*, at 4; Exh. 160 Declaration of Susan Sawyer in *Williams v. Vasquez*, at 4-5.

[21] ABA Guidelines 11.7.1.

[22] *See, e.g.*, Exh. 163 Declaration of Michael Burt in *Thomas v. Calderon*, at 10 & n.7.

issues such as mental illness, physical, psychological, and sexual abuse, and neglect.[23] As guilt phase and mitigation evidence was uncovered and developed, effective counsel integrated it into the trial strategy.

36. After documents had been gathered and witnesses interviewed, counsel was able to ascertain the significant events that had occurred throughout the defendant's life.[24] This provided a guide for understanding how genetic, environmental, psychological, familial, and cultural factors had affected the defendant's development, personality, mental functioning, and behavior and further formed the bases for constructing an accurate and reliable social history.[25] *See, e.g.*, American Bar Association, Toward a More Just and Effective System of Review in State Death Penalty Cases 50 (1990) ("penalty phase preparation requires extensive and generally unparalleled investigation into personal and family history") (citing Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. Rev. 299 (1983)).[26] A complete and accurate social history can only be created by reviewing the defendant's documentary history and interviewing all significant persons having knowledge of the defendant's life.

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[23] *See, e.g.*, Balske, *supra*, at 44 ("This message [that counsel needs to "know the worst as well as the best things about the client"] takes time to spread and often will require repeated visits with the respective witnesses before it will bear fruit, particularly if the facts involve sibling disclosure of parental abuse and other highly personal matters."); Blum, *supra*, at 28-29 ("Realize that certain information such as child sexual abuse or drug problems will not be easily shared with a stranger.").

[24] *See, e.g.*, Heaney, *Social History*, *supra*, at H-48 ("A social history supplies the background information about a client, from which a coherent presentation at the penalty phase, and in some cases the guilt phase, can be made.").

[25] *See, e.g*., Exh.156 Declaration of Thomas Nolan in *Karis v. Calderon,* at 8.

[26] This Report contained the American Bar Association's Recommendations Concerning Death Penalty Habeas Corpus and Related Materials from the American Bar Association Criminal Justice Section's Project on Death Penalty Habeas Corpus. The Report's Task Force was co-chaired by Chief Justice Malcolm Lucas and Fifth Circuit Judge Alvin Rubin. The Task Force, formed in 1988 "to study judicial review of cases in which defendants have been sentenced to death," ABA Report at 5, conducted public hearings in Atlanta, Dallas, and San Francisco. One of the major issues addressed by the Task Force was ensuring the quality of representation at the trial court level prior to adoption of restrictions on post-conviction judicial review of capital cases. Among witnesses who testified before the Task Force were California practitioners with knowledge of the prevailing standard of care and the deficiencies at the trial court level.

37. At the time of Mr. Ashmus's trial in 1986, it was standard practice for defense counsel in capital cases to retain and present the testimony of a social history expert.[27] To properly prepare a social historian to develop and testify about a capital defendant's psychosocial history, such an expert necessarily was provided with and reviewed all relevant records for the defendant and his family. In addition, the expert needed to interview the defendant and speak with family members, friends, and others with information about the defendant's life at his various stages of development and/or review the notes of interviews that had been conducted by the defense team with persons other than the defendant who possessed potentially relevant information.

38. In addition employing the services of a social historian, reasonably effective counsel in 1986 would have retained, worked with, directed, and presented mental health experts who could testify, among other things, to the existence of a mental disorder or dysfunction, the etiology of such conditions, and the effect that such conditions had on, or contributed to, the defendant's functioning and behavior throughout his or her life.[28] Trial counsel was obligated to control the selection and preparation of experts; ensure that such experts possessed relevant background and social history information about the defendant, including the penalty phase mitigation described above; follow up on the experts' recommendations concerning potential investigation and the need for additional expert services; educate the experts about their role in the case and the legal significance of their testimony, including the scope and definition of mitigation, of which many mental health experts in the mid-1980s were not familiar; guide the formulation of their opinions prior to their testimony to ensure proper framing of the scope of their testimony and limiting cross-examination; and prepare them for testifying, including pre-reviewing potential exhibits.[29]

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[27] *See, e.g.*, Nelson, *supra* (recounting the use of a psychologist to provide the jury with client's life story); Exh. 164 Declaration of Jack M. Earley in *Wrest v. Calderon*, at 9-10; *see also* ABA Guidelines 11.4.1.D.7., 11.8.3.F.2.

[28] *See, e.g.*, ABA Guidelines 11.4.1.D.7., 11.8.3.F.2.; Millman, *Penalty Phase Investigation*, *supra*, at H-37 (listing numerous types of experts that courts had approved funding for pursuant to Penal Code section 987.9); Exh. 164 Declaration of Jack M. Earley in *Wrest v. Calderon*, at 8.

[29] *See, e.g.*, Exh. 164 Declaration of Jack M. Earley in *Wrest v. Calderon*, at 5-7, 10-11;

39. As was the prevailing standard of care for capital defense attorneys in 1986, counsel also routinely investigated, developed, and presented evidence that the defendant would not pose a danger and would adjust well in prison if sentenced to life without the possibility of parole.[30] Frequently, this was accomplished through experts who drew upon the defendant's social history, adjustment to structured and institutional settings, and the likely conditions under which the defendant would serve an LWOP sentence as well as opining upon the defendant's likely future adjustment. Similarly, in appropriate cases, trial counsel was obligated to direct the jury's attention to the mitigating evidence presented through lay witnesses or documents in arguing that a defendant would not pose a danger if sentenced to LWOP.

40. The sources of evidence to support future adjustment mitigation included, but were not limited to, the defendant's prior institutional history, medical history, mental health history, developmental history, educational history, employment and training history, and prior criminal history, as well as interviews with family members, friends, neighbors, teachers, co-workers, law enforcement personnel, counselors, correctional officers, and jail personnel regarding the defendant's future positive adjustment to incarceration.[31] In addition to obtaining, reviewing, and considering the presentation of such information, trial counsel was obligated to account for the possibility that the prosecution might seek to introduce evidence about the defendant's prior conduct while incarcerated.

41. Indeed, defense counsel's duty to investigate the aggravating evidence the prosecutor was likely to present either in its case in chief or as impeachment or rebuttal was

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Exh. 157 Declaration of Jack M. Earley in *Williams v. Vasquez*, at 9.

[30] *See, e.g.*, ABA Guidelines 11.8.6.B.6.; Nelson, *supra* (recounting the testimony of correctional expert Ray Procunier); Balske, *supra*, at 46 ("correctional officers can testify to the availability of secure facilities for incarceration of inmates serving life or life-without-parole sentences"); *Mitigating Factors*, *supra*, at H-179 (noting that good adjustment to prison life and lack of a future danger was a factor used to grant clemency); Exh. 157 Declaration of Jack M. Earley in *Williams v. Vasquez*, at 36 (noting that in 1982 "individuals like Dr. [Craig] Haney, with sufficient education, training, and experience as mental health professions and correctional experts, were available to consult with counsel regarding the advisability of offering an opinion regarding prison adjustment and could, if appropriate, provide a reliable opinion with the parameters of the *Murtishaw*[, 29 Cal.3d 733 (1981)] decision.").

[31] *See, e.g.*, Blum, *supra*, at 28.

coextensive with the duty to investigate, develop, and present mitigating evidence.[32] The prevailing standard of care in 1986 required defense counsel to conduct an investigation of the defendant's criminal history and account for the possibility that the prosecution might seek to introduce evidence about the defendant's prior criminal conduct at the guilt or penalty phases of the trial.[33] Counsel's duties included collecting and reviewing materials that may serve to rebut potential aggravating evidence, collecting and reviewing evidence of the defendant's psychological and mental conditions that might support possible defenses to the aggravating nature of the criminal history, and directing further investigation as warranted by the unique circumstances of the past criminal behavior.[34]

42. In presenting the mitigation themes at trial, counsel was expected to use lay witnesses to document important facts, official records and other written material to document or corroborate witness testimony about important facts, and expert witnesses to interpret the defendant's social history[35] In preparing for and presenting evidence in the penalty phase, capital defense counsel was expected to select and prepare witnesses who could and would provide testimony consistent with and corroborative of the mitigation themes. Although counsel's ability to fulfill this duty was dependent upon whether counsel conducted a reasonable investigation, counsel had the distinct obligation to organize and structure the selection and preparation of evidence and witnesses into a forceful, unified presentation that was designed to be internally consistent and corroborated.[36] The prevailing standards of care required capital

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[32] *See, e.g.*, ABA Guidelines 11.8.5.

[33] *See, e.g.*, Exh. 156 Declaration of Thomas Nolan in *Karis v. Calderon*, at 35; Exh. 161 Deposition of Thomas Nolan in *Beardslee v. Woodford*, at 42 (discussing possible impeachment when a client testifies).

[34] *See, e.g.*, Gail Weinheimer & Michael Millman, *Legal Issues Unique to the Penalty Trial*, The Champion 33, 34-36, 37-38 reprinted in the 1986 California Death Penalty Defense Manual (outlining challenges to aggravating evidence); *General Principles Governing the Admissibility of Evidence in Aggravation*, H-113-126 in the 1986 California Death Penalty Defense Manual; *Evidence of Criminal Activity Involving the Use or Threat of Force or Violence: Principles of Exclusion*, H-127-148 in the 1986 California Death Penalty Defense Manual; Exh. 161 Deposition of Thomas Nolan in *Beardslee v. Woodford*, at 114.

[35] *See, e.g.*, ABA Guidelines 11.8.3, 11.8.6.

[36] *See, e.g.*, Exh. 157 Declaration of Jack M. Earley in *Williams v. Vasquez*, at 34-35; Exh. 164 Declaration of Jack M. Earley in *Wrest v. Calderon*, at 24-25, 26.

defense counsel to ensure that witnesses understood their role and the purpose and import of their testimony, prepared them to testify, and elicit mitigating information that they possessed.

43. In determining which witnesses to present, capital defense counsel was expected to select witnesses with an appreciation of their relative credibility and with the goal of presenting witnesses who had experiential knowledge about the client or the client's family across time periods, in different settings, and from different perspectives.[37] Counsel was also obligated to use all available, admissible documents to augment testimony, integrate witnesses' conclusions or observations with examples, and buttress the strength of evidence supportive of a mitigation theme.[38] The introduction to the penalty phase section of the 1986 California Death Penalty Defense Manual stated trial counsel's obligation succinctly: "counsel should err on the side of inclusion, and proffer all potentially mitigating evidence that is tactically advantageous to the defendant. It is for the courts, and not counsel, to determine the scope of evidence admissible in mitigation."

44. At the time of Mr. Ashmus's trial, the importance of a coherent and compelling penalty phase argument was well-accepted among capital defense attorneys. As the introduction to the penalty phase argument section of the 1986 California Death Penalty Manual stated: "The closing arguments of counsel are a critical stage of the penalty trial. For defense counsel there may be no more awesome task than delivering a plea for life."[39] Counsel was responsible for educating the jury as to the relevance of the testifying to the mitigation themes and what conclusions defense counsel wanted the jury to draw about the witnesses' credibility, presentation, and affect.[40] In fulfilling the latter duty, trial counsel was expected to prevent the jury from forming an inaccurate impression of the defendant's background, particularly if

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[37] *See, e.g.*, Blum, *supra*, at 29.

[38] *See, e.g.*, ABA Guidelines 11.8.6.C.; Balske, *supra*, at 44 (important to have lay witnesses "testify anecdotally about incidents in the defendant's life"); Exh. 164 Declaration of Jack M. Earley in *Wrest v. Calderon*, at 9.

[39] *Introduction, Penalty Phase Argument*, H-225, 1986 California Death Penalty Defense Manual.

[40] *See, e.g.*, Dennis Balske, *Putting it All Together: The Penalty-Phase Closing Argument*, The Champion 47, 48-51, reprinted in the 1986 California Death Penalty Defense Manual.

testimony was opaque or subject to inferences that undermined the mitigation themes. Most importantly, counsel was obligated to explain how the jury was to use the penalty phase evidence within the context of the jury instructions, ensuring that the jury accorded the mitigation its full effect in determining the appropriate punishment.[41]

45. Current counsel for Mr. Ashmus has provided me with the Declarations of Lorelei Sontag, Ph.D., George Woods, M.D., and Craig Haney, Ph.D. The information contained in these declarations and the supporting documents and witness accounts contained in the text and footnotes are the type of information routinely – and successfully – developed and presented on behalf of capital defendants at the time of Mr. Ashmus's trial.

The foregoing is true and correct and executed under penalty of perjury under the laws of the United States and the State of California on December 2, 2009.

JAMES S. THOMSON

[41] *See, e.g., id.*; Exh. 164 Declaration of Jack M. Earley in *Wrest v. Calderon*, at 27 ("A competent closing argument in the penalty phase of a capital case should convey why defense counsel believes that Petitioner deserves a sentence less than death, how the prosecutor's evidence in aggravation can be mitigated and why the prosecutor's argument is incorrect. It is also important for the jury to understand that sympathy and mercy are appropriate considerations at this stage of the proceedings and how the mitigating evidence that has been presented can legally be considered.").

APPENDIX

DOCUMENTS REVIEWED

Declaration of Thomas Nolan in *Karis v. Calderon*, January 16, 1995

Declaration of Jack Earley in *Williams v. Vasquez*, May 10, 1993

Declaration of Leslie Abramson in *Williams v. Vasquez*

Declaration of Michael Adelson in *Williams v. Vasquez*

Declaration of Susan Sawyer in *Williams v. Vasquez*, June 1993

Deposition of Thomas Nolan in *Beardslee v. Woodford*, August 25, 2000

Declaration of Michael Burt in *In re Clark*, March 20, 1992

Declaration of Michael N. Burt in *Thomas v. Calderon*, April 15, 1996

Declaration of Jack Earley in *Wrest v. Calderon*, April 25, 1996

Declaration Of Lorelei Sontag, Ph.D., November 1, 2009

Declaration Of George Woods, M.D., November 2, 2009

Declaration Of Craig Haney, Ph.D., October 28, 2009

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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORINIA, SOUTHERN DIVISION

ERNEST DEWAYNE JONES, Petitioner, v. VINCENT CULLEN, Warden of California State Prison at San Quentin, Respondent.	Case No. CV-09-2158-CJC DEATH PENALTY CASE

EXHIBITS IN SUPPORT OF MOTION FOR AN EVIDENTARY HEARING VOLUME 1

EXHIBIT E
DECLARATION OF QUIN DENVIR

DECLARATION OF QUIN DENVIR

I, Quin Denvir, declare as follows:

1. I am an attorney licensed to practice law in California since 1971. I received a Bachelor's degree from the University of Notre Dame in 1962 and a Masters degree from the American University in 1966. I served in the United States Navy, Supply Corps from 1962-1966, and retired at the rank of Lieutenant. I received my Juris Doctorate degree from the University of Chicago in 1969. I was a member of the University of Chicago Law Review and Order of the Coif.

2. From 1969-1970, I was an associate with the law firm Covington & Burling, in Washington D.C. From 1971-1973, I was a Directing Attorney of the California Rural Legal Assistance, Inc. From 1974-1975, I was a deputy public defender with the Monterey County Public Defender's Office and defended numerous clients charged with misdemeanors and felonies. In 1975 then-Governor Jerry Brown appointed me Chief Counsel for the California State Department of Health. I maintained that position through 1977, when I was the appointed the State Public Defender for the State of California. I was reappointed and served in that capacity until 1983.

3. From 1984-1996, I maintained a private practice, specializing in criminal defense representation at the trial, appellate and post-conviction levels. From 1996-2005, I was the Federal Defender for the Eastern District of California. In this capacity, I litigated complex and high profile prosecutions and argued cases before the United States Supreme Court. From 1996-1998, I was lead defense counsel in the prosecution of Theodore Kaczynski on federal capital charges. The prosecution of Mr. Kaczynski was resolved by a plea to Life Without the Possibility of Parole (LWOP). Since 2006, I have maintained a private practice.

4. I have briefed and argued three cases before the United States Supreme Court, over twenty-five cases before the Ninth Circuit Court of Appeals, over twenty-five cases before the California Supreme Court and over fifty cases before the California Court of Appeal.

5. I received the Annual Award in 1989 and the President's Award for a lifetime achievement in 1998 from the California Attorneys for Criminal Justice (CACJ). I also have

received the California Public Defenders Association (CPDA) Special Recognition Award.

6. I have been asked by the current attorneys for Troy Adam Ashmus to describe the prevailing standard of care attorneys representing individuals facing capital charges exercised or should have exercised in preparing for and investigating, developing, and presenting a penalty phase defense in California in 1986. Counsel has also asked me to review several declarations and testimony of attorneys describing the standard of care applicable to capital cases that were pending between 1981 and 1988 to opine on the accuracy of those descriptions (but not on the conclusions of whether trial counsel in those cases rendered effective assistance of counsel). The documents that were provided to me are the following: Declaration of Thomas Nolan in *Karis v. Calderon*, January 16, 1995; Declaration of Jack Earley in *Williams v. Vasquez*, May 10, 1993; Declaration of Leslie Abramson in *Williams v. Vasquez*, June 8, 1993; Declaration of Michael Adelson in *Williams v. Vasquez*, June 8, 1993; Declaration of Susan Sawyer in *Williams v. Vasquez*, June 1993; Deposition of Thomas Nolan in *Beardslee v. Woodford*, August 25, 2000; Declaration of Michael Burt in *In re Clark*, March 20, 1992; Declaration of Michael N. Burt in *Thomas v. Calderon*, April 15, 1996; and Declaration of Jack Earley in *Wrest v. Calderon*, April 25, 1996.

7. Following the reinstatement of capital punishment in California, the Office of the State Public Defender (OSPD) began to collect, analyze, and disseminate information to California defense attorneys concerning capital developments and strategies. In June 1979, the OSPD began publishing Death Penalty UPDATE, which summarized recent case law, court orders, and developments in capital trials and appellate proceedings in California and other jurisdictions. In May 1980, the Office of the State Public Defender, in cooperation with CACJ and CPDA, published and distributed the California Death Penalty Manual, the purpose of which was to provide guidelines and assistance to attorneys appointed to represent capitally charged or convicted individuals. To provide information to California defense practitioners and assess the trends in the prosecution of capital cases, the OSPD tracked cases in which capital charges had been filed and monitored them through resolution, whether by plea or jury verdict. As the agency represented individuals appealing felony convictions, it was privy to the

trial record in many cases that resulted in murder convictions, including the nature of the crime, and if it was a capital case, the facts that were presented in both aggravation and mitigation. The data concerning developments at the trial level provided critical information to California defense practitioners in the formulation of trial, appellate, and post-conviction strategies.

8. In 1986, the prevailing standard of care was primarily influenced by the successes attorneys had in securing a non-capital conviction or an LWOP or other non-death sentence. The strategies that produced such outcomes were studied and adopted, where appropriate, in subsequent cases. In cases where the crime was particularly aggravated, either because of the number of individuals killed, the manner in which they were murdered, or the particular vulnerable nature of the victim, the conduct undertaken by the defense attorney to secure an LWOP verdict warranted scrutiny and emulation.[1]

9. During my tenure as the State Public Defender, my staff sought to obtain information about successful trial practices and to include those strategies in training material and develop recommendations for investigating and presenting compelling mitigation themes, presenting mitigation in a manner that limited the opportunity for the introduction of aggravating evidence, and combining the introduction of documents and testimony to present a coherent and credible penalty phase defense, as well as other standards that defined practice of litigating a penalty phase case. Accounts of LWOP verdicts and other developments in California trial courts were routinely reported in publications, such as Death Penalty UPDATE, CACJ's Forum, the National Association of Criminal Defense Lawyers' The Champion, CPDA's California Defender (beginning in 1985), and others. These publications were circulated and routinely relied upon by counsel representing capitally charged individuals.

10. In the mid 1980s, and in particular in and around 1986, several years of

[1] In the early 1980s, soon after the current death penalty statute was enacted, defense attorneys successfully avoided the imposition of the death penalty in cases involving extremely aggravating facts. *See, e.g.*, *People v. Freddie White*, Alameda County Superior Court Nos. 68512, 68513 (LWOP sentence imposed on September 12, 1980, following convictions for three separate killings); *People v. Buono*, Los Angeles Superior Court No. A354231 (LWOP sentence imposed on January 9, 1984, following convictions for nine murders with related kidnapping and sexual assault charges).

successful trials results helped define an attorney's responsibilities and the community's expectations of performance. These cases, the experiences of the attorneys who tried them, and state and federal court decisions defining and explaining the scope of potentially relevant evidence in a penalty phase proceeding further refined and described the prevailing standard of care. Several cases demonstrate that success in avoiding the imposition of the death penalty, despite the aggravating nature of the murder or murders, hinged upon counsel's development and presentation of mitigating evidence. For example, in 1984 in *People v. Martin Trillo*, Sacramento County Case No. 61425, Mr. Trillo was sentenced to LWOP after trial counsel presented evidence of Mr. Trillo's psychiatric difficulties, despite his having been convicted of killing two women during separate burglary attempts. In *People v. Brandon Tholmer*, Los Angeles Case No. A396284, a jury returned an LWOP verdict on August 8, 1986, after having convicted Mr. Tholmer of murdering four elderly women. The jury considered Mr. Tholmer's low intelligence and troubled background in reaching this verdict. In *People v. Henry Pope*, Sacramento Superior Court Case No. 73056, the jury returned an LWOP verdict on January 14, 1988, after convicting him of murdering a Sacramento couple. Evidence presented in mitigation included Mr. Pope's history of deprivation in Mississippi and his reputation as a respected and productive person among his peers. In 1985, the judge in *People v. Bennie Lee Polecat*, Tulare County Superior Court No. 21533, modified the jury's verdict of death, stating "[t]he evidence was clear that the defendant's mental capacity was substantially impaired by reason of chronic mental disease and at about the time of the murder, the defendant was showing signs of acute psychosis…. Although not amounting to a legal defense to his crime, such impairment is clearly a factor in mitigation." On October 1985, a jury returned a LWOP verdict for convicted double murderer Thomas Marston based on the mitigation presented about Mr. Marston's life. These and other cases established not only trial counsel's obligation to investigate fully the client's background, character, and functioning, but also that such investigation could result in a sentence less than death.[2]

[2] These anecdotal accounts were further confirmed by statistics maintained and published by the OSPD. Between 1997 and 1989, district attorneys throughout California filed one or

11. Based on my experience, the declarations and deposition provided to me by counsel accurately describe and explain the prevailing standard of practice of attorneys representing individuals capitally charged in California in 1986. The prevailing standard of care required attorneys, in broad terms, to conduct a thorough investigation into the client's life, his or her life history, including investigating the defendant's parents and their histories, and to investigate, develop, and present available evidence of mental illness and dysfunction through lay and expert witnesses and documents. More specifically, it was, and continues to be, the attorney's responsibility to guide the investigation and educate him or herself as well as the guilt and penalty investigators about the relevance and import of information sought and discovered, as well as informing the investigator about the types or themes of information that might be relevant. It was also the attorney's responsibility to focus or redirect the investigators, when appropriate, to areas of mitigation evidence revealed by discovery provided by the District Attorney or uncovered during the defense's own investigation and to do so continually throughout the course of the investigation.

12. In the mid 1980s, defense attorneys in the death penalty community knew, or reasonably should have known, that evidence regarding abuses a client suffered, including physical, emotional and sexual abuse, neglect, deprivation, suicidality, odd behavior, and psychological developmental delays constituted admissible, relevant mitigation. Other mitigation themes that counsel practicing in California did or should have investigated, developed, and presented in the penalty phase of a capital trial included familial history of mental illness, and evidence of non-aggression and future positive adjustment to prison.

13. It was customary for capital defense attorneys to consult with and present the testimony of appropriate experts, including psychiatrists and psychologists, to help explain the significance and relevance of the client's behavior throughout his or her life and around the time of the crime. Similarly, it was the prevailing standard of care to provide experts with relevant documents, seek their opinion on the significance of the information contained therein,

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more special circumstance allegations in an average of 278 cases each year. Of those cases, however, only an average of 26 death sentences were imposed annually.

and introduce those documents as substantive evidence to corroborate testimony and as independent evidence that the jury could consider. Trial counsel also was obligated to ensure that the retained experts understood their roles in the case, and the definitions of applicable legal standards, particularly if the experts were asked to testify about "mitigating" factors – an unfamiliar legal definition to many experts at that time – and to prepare the expert for the direct examination and possible areas of cross-examination. Similarly, trial counsel was required to ensure that experts had sufficient time to prepare for testifying.

14. With respect to the selection of witnesses to call to testify in the penalty phase, capital defense attorneys practicing in 1986 should have, in keeping with applicable prevailing performance standards, selected and presented credible witnesses who could provide admissible testimony consistent with or supportive of the relevant mitigation themes. The importance of finding, interviewing, and presenting witnesses supportive of the themes at issue was particularly critical when the themes involved sensitive issues and exposed patterns of abusive and destructive practices within a family system, because it was well known and understood at the time that both the client and the client's family most often would not disclose the family secrets. Finally, trial counsel was obligated to present a coherent and comprehensive argument to the jury, underscoring the salient mitigating themes and explaining the jury's consideration of those themes within the context of the jury instructions.

The foregoing is true and correct and executed under penalty of perjury under the laws of the United States and the State of California on December 2, 2009.

Quin Denvir

QUIN DENVIR

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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORINIA, SOUTHERN DIVISION

ERNEST DEWAYNE JONES, Petitioner, v. VINCENT CULLEN, Warden of California State Prison at San Quentin, Respondent.	Case No. CV-09-2158-CJC DEATH PENALTY CASE

EXHIBITS IN SUPPORT OF MOTION FOR AN EVIDENTARY HEARING VOLUME 1

EXHIBIT F
DECLARATION OF DAVID BALDUS

DECLARATION OF DAVID C. BALDUS

I, David C. Baldus, declare as follows:

1. I am the Joseph B. Tye Professor at the University of Iowa College of Law. A copy of my curriculum vita is attached to this declaration as Appendix A.

2. I obtained a B.A. from Dartmouth College in 1957, a M.A. in Political Science from the University of Pittsburgh in 1962, and a L.L.B. and L.L.M. from Yale Law School in 1964 and 1969 respectively.

3. Since 1969, I have been employed at the University of Iowa College of Law as an Associate Professor (1969-1971), Professor (1972-1983), and the Joseph B. Tye Professor (1983-present). During my academic career, I have taught courses on criminal law, federal criminal law, capital punishment, and statistical methods for lawyers.

4. From 1988 until 1991, I served as a Special Master to the New Jersey Supreme Court. Pursuant to that appointment I developed a factually based system of proportionality review and prepared for the Court a proportionality review report for the Court. *See* Death Penalty Proportionality Review Project Final Report to the New Jersey Supreme Court (September 24, 1991) Proportionality Review of Death Sentences: The View of the Special Master, 5 Chance 18-27 (Summer 1993) (with George Woodworth).

5. I have studied and applied statistical methods to a variety of legal settings for more than thirty years. I am the author of Statistical Proof of Discrimination (1980) (with James Cole) and Equal Justice and the Death Penalty: A Legal and Empirical Analysis (1990) (with George Woodworth and Charles A. Pulaski Jr.). I have authored numerous research papers on death penalty sentencing, including Quantitative Methods for Judging the Comparative Excessiveness of Death Sentences in The Use/Nonuse/Misuses Of Applied Social Science Research In The Court: Conference Proceedings, 83-94 (Michael Saks and Charles Baron eds. 1980); Race Discrimination In America's Capital Punishment System Since *Furman v. Georgia* (1972): The Evidence Of Race Disparities And The Record Of Our Courts And Legislatures In Addressing The Issue, Report To American Bar Association, Section Of Individual Rights And Responsibilities (July 25, 1997) (with George Woodworth); and Arbitrariness and

Discrimination in the Administration of the Death Penalty: A Legal and Empirical Analysis of the Nebraska Experience (1973-1999), 81 Neb. L. Rev. 486 (2002) (with George Woodworth, Catherine Grosso, and Aaron Christ).

6. I have qualified as an expert witness and testified in state and federal court proceedings, including *McCleskey v. Kemp*, Case No. CIV C81-2434A (N.D. Ga.).

INTRODUCTION

7. On November 1, 2009, December 1, 2009, February 18, 2010, and September 15, 2010, I executed declarations concerning the findings of an empirical study of 27,453 California homicide cases with a date of offense between January 1, 1978, and June 30, 2002, that resulted in a first- or second-degree murder or voluntary manslaughter conviction. Since the filing of the previous declarations, I have reviewed and classified cases recently provided by the California Department of Corrections and Rehabilitation and cases in which subsequent information has been obtained to permit final decisions. In addition, I have verified the accuracy of my findings with respect to the cases used for my opinions in the previous declarations. This declaration thus reports additional and corrected findings of the study based on a stratified sample of 1,900 cases drawn from the 27,453 case universe.

8. The purpose of the study is two-fold. The first purpose is to evaluate the scope of death eligibility under California law following the decision in *Furman v. Georgia*, 408 U.S. 238 (1972). The second purpose is to evaluate capital charging and sentencing practices in post-*Furman* California death-eligible cases.

9. With regard to death eligibility in post-*Furman* California, my colleague Professor George Woodworth and I documented the rates of death eligibility under post-*Furman* California law among several categories of legally relevant homicide cases. This study also evaluated the death eligibility of each case in the sample under pre-*Furman* Georgia law. This information enabled us to document the extent to which post-*Furman* California law has narrowed the rate of death eligibility in homicide cases from the rate of death eligibility that existed under pre-*Furman* Georgia law. We also compared post-*Furman* California death-eligibility rates with post-*Furman* death-eligibility rates in other states. Finally, we compared

the narrowing produced by post-*Furman* California law with the narrowing of death eligibility produced by post-*Furman* statutes in other states.

10. With regard to the second purpose, Professor Woodworth and I examined the rates at which death-eligible post-*Furman* California cases are capitally charged and result in a death sentence. In that analysis, we compared post-*Furman* California death sentencing rates to the death sentencing rates in pre-*Furman* Georgia death-eligible cases. In addition, we compared post-*Furman* California capital charging and sentencing rates with comparable rates in other American death sentencing jurisdictions for which comparable data are available.

METHODOLOGY

The Research Team And Responsibilities

11. The research design and sample for this study were produced by Professor Woodworth, Richard Newell, and me. Richard Newell is an experienced data management specialist with many years of experience managing comparable databases. Professor Woodworth produced the statistical procedures used to estimate death-eligibility narrowing rates and the charging and sentencing outcomes in the universe of cases in this study. Robin Glenn, an experienced lawyer with substantial experience as a supervisor in comparable empirical studies of death penalty systems, and I oversaw the data coding and cleaning process. The coding of the data collection instrument for the cases in the sample was conducted by thirteen University of Iowa law students and eight recent University of Iowa law graduates.[1] Professor Woodworth and I produced the substantive statistical findings reported herein. The curriculum vitae of Professor Woodworth, Richard Newell, and Robin Glenn are attached to this declaration as Appendices B-D.

The Universe And Sample

12. Because we seek to assess the narrowing effect of California's post-*Furman* law

[1] The Iowa law students are Sadad Ali, Peter D'Angelo, John Magana, Jacob Natwick, Fangzhou Ping, Thomas Farrens, Folke Simons, Erin Snider, Jason Stoddard, James Vaglio, Porntiwa Wijitgomen, Fei Yu, and Weiyan Zhang. The recent law graduates are Rebecca Bowman, Edward Broders, Theresa Dvorak, David Franker, Luke Hannan, Beth Moffett, Amanda Stahle, and Kristen Stoll.

among all willful homicide cases and relevant subgroups of those cases, we define our universe as all defendants convicted of first-degree murder (M1), second-degree murder (M2), and voluntary manslaughter (VM). The basis for defining this universe empirically was a machine readable database maintained by the California Department of Corrections and Rehabilitation (CDCR). This database includes information on 27,453 cases with a date of offense between January 1, 1978, and June 30, 2002, classified by crime of conviction as follows: 32% M1, 29% M2, and 39% VM. For each case, the CDCR database includes information on the date of offense, crime of conviction, county of prosecution, county court case number, CDCR case number, date of conviction, and the gender and age of the defendant.

13. Our 6.9% (1,900/27,453) sample was determined by available time and resources and considerations of statistical validity. Using the CDCR database, we stratified the sample on three dimensions in order to produce a more representative sample of the cases than would have been produced by a random sampling method. The first dimension, the crime of conviction, provides proportionate representation for the M1, M2, and VM conviction cases (three levels). The second dimension is the population density per square mile of the county of prosecution.[2] We designed this dimension with four levels to obtain a representative sample of smaller and more rural counties. Our goal was 25% of the sample from Los Angeles (which accounts for 42% of the cases in the universe), and 25% of the sample from each of the three other groups of counties ranked in terms of population density.[3] Third, we stratified the sample on the basis of

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[2] The data source was County Population Per Square Mile: 2000 - Department of Finance, California Statistical Abstract, Sec. A, Table A-1 (county land square miles), Sec. B, Table B-3 (county population) (2001).

[3] The counties in the four population density levels from low (1) to high (4) density are as follows. Level 1 has 41 counties with a population density per square mile of fewer than 200 people (Alpine, Amador, Butte, Calaveras, Colusa, Del Norte, El Dorado, Fresno, Glenn, Humboldt, Imperial, Inyo, Kern, Kings, Lake, Lassen, Madera, Mariposa, Mendocino, Merced, Modoc, Mono, Monterey, Napa, Nevada, Placer, Plumas, San Benito, San Bernardino, San Luis Obispo, Santa Barbara, Shasta, Sierra, Siskiyou, Sutter, Tehama, Trinity, Tulare, Tuolumne, Yolo, and Yuba). Level 2 has nine counties with a population per square mile larger than 200 and smaller than 700 (Marin, Riverside, San Diego, San Joaquin, Santa Cruz, Solano, Sonoma, Stanislaus, and Ventura). Level 3 has seven counties with a population per square mile between 700 and 3400 people (Alameda, Contra Costa, Orange, Sacramento, San Francisco, San Mateo, and Santa Clara). Level 4 is Los Angeles.

four time periods that would enable us to over-represent in the sample cases from the *Carlos* Window,[4] during which time Jerry Frye and Troy Ashmus were sentenced to death (four levels).[5] Our goal was a sample with 57% of the cases from this time period.

14. Based on the information we gathered for each case in the universe, we developed a stratified random sample of cases consisting of 48 strata.[6] Within each stratum, we identified the sequence in which we would request case information from the state.[7] For each stratum, we weighted the cases in the sample on the basis of the ratio of the number of cases in the universe and the sample. For example, if a stratum contained 100 cases in the universe and 20 cases in the sample, the weight for each case in the sample from that stratum would be 5.0 (100/20).

Sources Of Data For The Individual Homicide Cases In The Sample

15. Our primary source of information on each case was the probation report prepared by the county probation officer with jurisdiction over the case. California law calls for the preparation of a probation report in each homicide regardless of the crime of conviction and sentence. The purpose of the report is to justify the probation officer's recommendation on the appropriateness of probation as a sentencing alternative in the case.

16. One limitation of the probation reports is that they are often prepared pre-trial so that the ultimate crime of conviction may not be noted in the report. When that occurred, we

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[4] The *Carlos* Window refers to the time period that was governed by the California Supreme Court's decision in *Carlos v. Superior Court*, 35 Cal. 3d 131 (1983). In *Carlos*, decided on December 12, 1983, the California Supreme Court held that the robbery felony-murder special circumstance (Cal. Penal Code. § 190.2(a)(17)(i)) required the state to prove that the defendant had the intent to kill or to aid in a killing. In *People v. Anderson*, 43 Cal. 3d 1104 (1987), decided on October 13, 1987, the California Supreme Court overruled *Carlos*, holding that intent to kill is not required to find a felony-murder special circumstance for a person who is the actual killer. Thus, "*Carlos* applies only to murder committed between December 12, 1983, the date on which *Carlos* was decided, and October 13, 1987, the date on which it was overruled." *People v. Musselwhite*, 17 Cal. 4th 1216, 1265 (1998) (citations omitted).

[5] The four time periods are: a. (01/01/78 – 12/11/83), b. (12/12/83 – 10/13/87) (the *Carlos* Window), c. (10/14/87 – 12/31/92), and d. (01/01/93 – 6/30/02).

[6] The stratum count is the product of 3 (offense categories) x 4 (county population density categories) x 4 (time periods) = 48 strata.

[7] The state was directed by the federal district courts in Mr. Frye's and Mr. Ashmus's habeas corpus proceedings to produce (1) the database used to construct the stratified random sample, and (2) probation reports for the cases that we identified as part of the sample.

consulted the crime of conviction reported in the CDCR database. On other occasions, the probation report contained insufficient "procedural" information because it failed to report the crime charged and/or the basis of the conviction (by guilt trial verdict or guilty plea), information that may be essential to assess the death eligibility of a case.[8] A number of probation reports also included insufficient "substantive" information about the facts of the crime to support a valid assessment of its death eligibility. Missing procedural or substantive information occurred in 16% of the cases for which we received a probation report from the state.

17. When either of these information insufficiency situations occurred, we provisionally removed the case from the sample and sought a cure for the insufficiency by requesting counsel from the California Habeas Corpus Resource Center (HCRC) to consult the trial and appellate court records in the case and report the missing information if it was available.[9] When the HCRC was able to provide us with documents containing the information needed about a case, it was coded accordingly and the case was returned to the active sample of cases.

18. As noted above, the state's obligation to provide probation reports was defined by court orders.[10] There were substantial delays in the state's production of these reports, which has delayed our review and coding of the homicide cases. On October 9, 2009, counsel for Mr. Frye requested from the state replacement probation reports for the information insufficient cases that the HCRC staff had been unable to cure as of that time. As of the submission of this amended

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[8] For example, when a defendant is charged with California Penal Code section 187 murder generally and is convicted of M2, a coder needs to know if the basis of the decision was a guilt trial conviction or a guilty plea in order to apply our controlling fact finding rule of interpretation (CFF). If it were a guilt trial decision the CFF rule would authoritatively classify the case as factually M2 and not death eligible. However, if the conviction was based on a guilty plea, the prosecutor's decision to accept that plea would not foreclose a coder's classification of factual M1 liability and the factual presence of a special circumstance because a prosecutor's decision to accept a plea bargain is not a controlling finding of fact. *See infra* para. 25-26 for a discussion of the controlling fact finding rule and the role that procedural information plays in its application.

[9] The HCRC cured the insufficiency in 106 cases, thus reducing the percentage of cases with missing information to 11%.

[10] Note 7, *supra*, describes the basis of the state's obligation to provide us with probation reports for use in the conduct of this study.

declaration, we have received some of the requested probation reports.

19. The probation reports are also limited in the information they can provide because some of the requested reports were not produced by the state or contained no usable information. The specific reasons for these shortfalls are listed in the note below.[11] When we encountered these situations, we requested a probation report for a substitute case that was selected in random order from the sampling lists.[12]

The Coding Process For Individual Cases

The data collection instrument

20. Each case was coded into the data collection instrument (DCI) attached to this declaration as Appendix E. A "thumbnail" sketch of each case was created during the coding process, which enhanced the process of reviewing the original coding decisions. The coders and data cleaners also had the probation reports available. The information in the probation reports provided the basis for all of the final coding decisions in this project unless an information insufficiency was present and we obtained additional information from the HCRC. We also consulted appellate judicial opinions when applicable.

21. The DCI consists of four substantive sections following a three-part introduction. Part IV documents charging and sentencing decisions in the case under the post-*Furman* law applicable on the date of the offense. If the case was capitally charged, this part of the DCI documents any special circumstances alleged, found, or rejected. It also documents sentencing outcomes reported in the probation report.

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[11] 1. The probation report produced by the state was not a homicide conviction. 2. The probation report produced by the state reported the facts of a conviction for involuntary manslaughter or less. 3. The probation report relates to the defendant named in the sample but the crime of the defendant reported in the report is not in the sample. 4. The requested probation report was not produced by the state or it is unusable because it was substantially incomplete. 5. The probation report produced by the state was illegible or unusable because of incomplete or missing pages.

[12] The information insufficiency problem in these situations differs from the shortfall of procedural and substantive information discussed in para. 16, *supra*, in that we either had no probation report at all for the case in the sample or the severity of the missing information problem (e.g., illegible) was beyond the capacity of the HCRC to cure with its supplemental information sources.

22. The balance of the DCI focuses on assessments of the death eligibility of the case under (a) pre-*Furman* Georgia law, and (b) post-*Furman Carlos* Window California law and 2008 California law.[13]

23. **The coding protocol.** The HCRC provided a detailed summary of the law concerning the elements of murder liability under pre-*Furman* Georgia law and M1 liability and special circumstances under post-*Furman* California law. When legal issues arose under the terms of the coding protocol, Ms. Glenn and I certified legal questions to HCRC counsel to which they would reply in writing. These memoranda were then added to the coding protocol.

24. **The standards used to identify factual M1 status in the cases and the factual presence of special circumstances in the cases.** We applied two core principles of interpretation in this research to assess the factual death eligibility of each case.

25. **The controlling fact finding rule.** The first principle is the "controlling fact finding" rule (CFF). Its purpose is to narrowly limit the coders' discretion to override authoritative fact findings of juries and judges in particular cases.[14] The rule holds first that if an authoritative fact finder (judge or jury) with responsibility for finding a defendant liable for M1 convicts the defendant of less than M1 (i.e., M2 or VM), that finding is considered to be a CFF and the coder will code the case at the reduced level of homicidal liability in the absence of overwhelming evidence of jury nullification. The rule also holds that an authoritative fact finding of M1 liability or a M1 guilty plea is a CFF, and the case will be coded at that level of liability. The same rule applies with respect to allegations and findings of the presence or absence of special circumstances in the case and defendant admissions of their presence.

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[13] Part V of the DCI focuses on the factual presence of special circumstances in M1 conviction cases that were not capitally charged. Part VI of the DCI focuses on the factual presence of M1 liability and special circumstances in the case in the absence of a fact finder's M2 or VM decision that would foreclose a determination that the case is factually M1 under the controlling fact finding rule described in paragraph 25 below. Part VII summarizes the coder's judgments of the death eligibility of the case under each of the three legal regimes.

[14] David Baldus, George Woodworth, David Zuckerman, Neil Alan Weiner & Catherine M. Grosso, Empirical Studies of Race and Geographic Discrimination in the Administration of the Death Penalty: A Primer on the Key Methodological Issues in The Future of America's Death Penalty An Agenda For the Next Generation of Capital Punishment Research 153, 164-65 (C. Lanier, W. Bowers, and J. Acker eds., 2009) (explaining the rationale of the CFF rule).

26. In this research, prosecutors are not viewed as controlling fact finders in the same way as jurors and judges in guilt trials. For this reason, the CFF does not apply when a defendant is charged with less than M1 or when a M1 charge is reduced by the prosecutor to a lesser charge. The CFF rule also does not apply when the prosecutor does not allege a special circumstance that is factually present in the case or when a special circumstance is alleged but withdrawn by the prosecutor before trial. When any of these situations occurs, a prosecutorial decision not to charge M1 or a special circumstance or a prosecutorial decision to withdraw a M1 charge or a special circumstance allegation does not limit a coder's discretion to find factual M1 liability or a special circumstance if either or both is factually present in the case. The same rule applies when a prosecutor reduces the charge or withdraws a special circumstance.

27. **The legal sufficiency rule.** The second core principle of interpretation applies when the factual M1 status of a case or the presence or absence of a special circumstance in the case is not determined by a CFF. In these situations, the issue is not what the coder believes would be the "correct" factual determination given the conflicting evidence in the case. Nor is the test a coder's assessment of how a reasonable juror would decide the factual issues in the case.

28. Rather the test, known as the "legal sufficiency" standard, is whether a California appellate court would affirm a jury M1 conviction in the case or a jury's finding of the presence of a special circumstance in the case if a jury had made either of those findings and the finding was challenged on appeal for a lack of sufficient evidence. In our application of this principle, exculpatory evidence offered by the defendant (as reported in the probation report) is given no weight, but incriminating evidence offered by the defendant is credited.

29. In their application of the legal sufficiency test, coders relied on three forms of authority to support their judgments that the facts in a case did or did not satisfy the "legal sufficiency" test. The strongest level of authority was a factually comparable case in which a jury or trial court's M1 or special circumstance finding of fact was sustained or reversed by a California appellate court when challenged with a claim of evidentiary insufficiency. The second level of authority was a factually comparable case in this study in which a fact finder

returned a finding of fact on M1 liability or the presence of a special circumstance that was not disturbed on appeal. The third level of authority was the coding protocol described in paragraph 23 above.

30. **Exceptions to the CFF rule**. A CFF may not apply when the relevant law to be applied to a case was different under *Carlos* Window California law than it was under 2008 California law or vice versa. For example, assume that in a case involving a drive-by shooting, which implicates the special circumstance contained in California Penal Code section 190.2(a)(21),[15] a jury applying 2008 law found the special circumstance present. This CFF decision would control the coder's discretion in her coding of the case under 2008 law. However, because that special circumstance was not extant during the *Carlos* Window, the jury's section 190.2(a)(21) decision under 2008 law would not control the coder's classification under *Carlos* Window law. Similarly, if under *Carlos* Window law, a jury rejected a robbery special circumstance (section 190.2(a)(17)(A)) for lack of proof of intent to kill, which was required under *Carlos* Window law for all defendants, that decision would not affect the coder's classification of the robbery special circumstance case under 2008 law, which does not require proof of intent to kill to establish it as to actual killers.[16]

31. A "jury nullification" exception to the controlling fact finding rule arises when a general California Penal Code section 187 or M1 charge results in a M2 or VM jury or bench conviction and the evidence of M1 liability is "overwhelming."[17] The same rule applies to a special circumstance rejected by a fact finder[18] in the face of overwhelming evidence that the

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[15] Unless otherwise identified, all further statutory references are to the California Penal Code.

[16] A related issue arises when there are no relevant fact findings in the case and the applicable law differs between *Carlos* Window law and 2008 law. Consider, for example, a drive-by shooting case prosecuted under 2008 law in which the special circumstance contained in section 190.2(a)(21) was not alleged and the prosecutor accepted a M2 guilty plea. In that situation, the coder could find both M1 liability and the drive-by shooting special circumstance factually present under 2008 law but not under *Carlos* Window law because the SC21 special circumstance was not extant under *Carlos* Window law.

[17] The DCI code for this situation is Question (Q) 62 = 2.

[18] In addition, when all of the special circumstances alleged in a M1 liability case are rejected by a fact finder, the case may be classified as factually death eligible if another special

special circumstance is present in the case.

32. **Measuring death eligibility in individual cases**. We measured the death eligibility of each case under three legal regimes – pre-*Furman* Georgia law, *Carlos* Window California law, and 2008 California law. Each of these bottom-line variables is coded "1" for clearly present, "0" for clearly not present, and "2" for a close call. Close call classifications arise when a M1 liability or special circumstance classification is not determined by a controlling finding of fact and the circumstances of the offense are sufficiently well understood to support coding. A close call relates to the legal issue of whether the facts in the cases satisfy the legal sufficiency test.[19] As noted above,[20] that test poses the question of whether, on the facts of the case, an appellate court would sustain a jury verdict finding M1 liability and a special circumstance present in the case. As noted above, there are three forms of authority on this issue.[21] When we were uncertain how an appellate court would rule on a finding of the presence of M1 liability or a special circumstance in the case, we coded it a close call.

33. These distinctions produced two measures of death eligibility – a conservative measure that limited death eligibility to "clearly present" classifications and a liberal measure that classified a case as death eligible if that status was clearly present or a close call. In the presentation of our findings, we note these distinctions and report both the conservative and liberal estimates.

34. **Measuring the comparative expansion and narrowing of death-eligibility rates between different legal regimes**. An important purpose of this project involves comparisons of death-eligibility rates among different jurisdictions and within individual jurisdictions under different legal regimes. We made the following comparisons of death-eligibility rates:

a. within California (a) Pre-*Furman* versus *Carlos* Window and 2008

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circumstance not alleged by the state is factually present in the case.

[19] *See supra* para. 27-29.

[20] *See supra* para. 28.

[21] *See supra* para. 29.

rates, and (b) *Carlos* Window versus 2008 rates, and

b. among states, e.g., California *Carlos* Window and 2008 rates versus the rates in all other death penalty states.

35. In these analyses we focus on the comparative "expansion" and "narrowing" of death-eligibility rates between and within these jurisdictions. For this purpose, we measure expansion and narrowing effects in two ways. The first is the arithmetic difference between two death-eligibility rates, e.g., a 20% rate of death-eligibility pre-*Furman* versus a 10% post-*Furman* rate represents a 10-percentage point "absolute" disparity in the two rates. The second measure is the "percentage" of expansion or narrowing of death eligibility between the two groups, which we characterize as expansion and narrowing rates. For example, if within a jurisdiction, the pre-*Furman* death-eligibility rate was 30% compared to a 20% rate in the post-*Furman* period, the absolute difference in the two rates would be 10 percentage points (30%-20%). The proportionate narrowing rate, would be 33% (10%/30%) – the 10-percentage point absolute disparity in the two rates divided by the pre-*Furman* rate of 30%. Similarly if the death-eligibility rate expanded under two different legal regimes, say from 20% to 30%, the rate of expansion would be 50% (the 10-percentage point difference between the two legal regimes divided by the 20% rate for the first legal regime). If the rate rose from 20% to 50% the expansion rate would be 150% (the 30-percentage point disparity divided by the 20% rate for the first legal regime).

36. The precision of our estimates of rates and the expansion and narrowing of those rates is expressed in terms of a "95% confidence interval" around the estimated death-eligibility rate or the estimated expansion or narrowing rate, as the case may be. For example, for the 33% percent narrowing rate noted above, the 95% confidence interval will depend on the size of the sample of cases on which the estimate is based. A 95% confidence interval of 30% to 36% for a 33% narrowing rate provides us a 95% level of confidence that the narrowing rate in the universe of cases implicated in the analysis is between 30% and 36%.

DEATH-ELIGIBILITY RATES IN CALIFORNIA AND OTHER STATES

California Death-Eligibility Rates Under *Carlos* Window And 2008 California Law

37. This section presents rates of death eligibility in post-*Furman* California cases

under *Carlos* Window and 2008 California law. Table 1 presents death-eligibility rates for all cases and broken down by the crime of conviction. Part I, Column B, Row 4 indicates that the rate of death eligibility for all cases under *Carlos* Window law was 55%, while the comparable rate under 2008 law in Column D is 59%, which represents a 7% (4/55) rate of expansion.[22] This expansion under 2008 law is principally explained by the large number of cases in the system that implicate the drive-by shooting (section 190.2(a)(21)) and street gang murder (section 190.2(a)(22)) special circumstances, which were adopted after the *Carlos* Window.[23]

38. Part I of Table 1 also breaks down the death-eligibility rates by the crime of conviction in Rows 1-3. Row 1 documents for the M1 conviction cases a 91% rate under *Carlos* Window law in Column B and a 95% rate under 2008 law in Column D, which represents a 4% (4/91) expansion of death eligibility. The death-eligibility rates reported in Rows 2 and 3 are lower for M2 and VM conviction cases. For the M2 cases, the documented rates in Row 2 of Part I are 33% under *Carlos* Window law and 38% under 2008 law, which represents a 15% (5/33) death-eligibility expansion under 2008 law. For the VM cases the respective rates documented in Row 3 are 41% under *Carlos* Window law and 46% under 2008 law, which represents a 12% (5/41) expansion.

39. Of particular interest are death-eligibility rates among cases that are factually M1, as distinguished from the smaller number of cases that resulted in M1 convictions.[24] Part II of Table 1 documents those results. It reports an 80% rate for cases that are factually M1 under *Carlos* Window law (Row 1) and an 86% rate for cases that are factually M1 under 2008 law (Row 2), which represents a 7.5% (6/80) expansion of the rate under 2008 law.

Comparisons of Death Eligibility Rates Under Post-*Furman* California Law and Pre-*Furman* Georgia Law

40. In this section and in Table 2 we compare the rate of death eligibility of the post-

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[22] These rates are based on our conservative death-eligibility estimates. The rates based on the liberal estimates are reported in a footnote in Table 1.

[23] March 27, 1996, and March 8, 2000, respectively.

[24] Part I, Column B, Row 1 documents the death-eligibility rate in 8,711 M1 convictions while Part II, Rows 1 and 2 document death-eligibility rates among almost 19,000 factual M1 cases.

TABLE 1

DEATH-ELIGIBILITY RATES BY CRIME OF CONVICTION (PART I) AND AMONG ALL FACTUAL FIRST-DEGREE MURDERS (PART II) UNDER CALIFORNIA *CARLOS* WINDOW AND 2008 LAW: 1978-2002

Part I: Death-Eligibility Rates by Crime of Conviction[1]

A **Crime of Conviction**	B **Carlos Window Law**	C **95% Confidence Interval for Col. B Estimate**	D **2008 Law**	E **95% Confidence Interval for Col. D Estimate**
1. First-Degree Murder (M1)	91% (7,918/8,711)	88%, 94%	95% (8,238/8,711)	92%, 97%
2. Second- Degree Murder (M2)	33% (2,642/7,900)	27%, 40%	38% (3,022/7,900)	32%, 45%
3. Voluntary Manslaughter (VM)	41% (4,453/10,842)	35%, 47%	46% (5,038/10,842)	41%, 52%
4. All Cases	55% (15,013/27,453)	52%, 58%	59% (16,298/27,453)	56%, 62%

Part II. Death-Eligibility Rates Among Factual M1 Cases[2]

A	B **Death-Eligibility Rate**	C **95% Confidence Interval for Col. B Estimate**
1. Percentage of factual M1 cases under *Carlos* Window law that are death eligible under *Carlos* Window law	80% (15,013/18,737)	77%, 83%
2. Percentage of factual M1 cases under 2008 law that are death eligible under 2008 law	86% (16,298/18,982)	83%, 89%

[1]When death-eligibility rates are estimated with our liberal measure of death eligibility, the Column B and D rates for Rows 1 - 4 are: Row 1 – 91% and 95%; Row 2 –34% and 38%; Row 3 -- 42% and 47%, and Row 4 -- 55% and 60%.

[2]When the death-eligibility rates are estimated with our liberal measure of death eligibility, the Column B estimates are 81% for Row 1 and 86% for Row 2.

Furman California cases under post-*Furman* California law with their rate of death eligibility under pre-*Furman* Georgia law. Part I of Table 2 presents the narrowing rates under *Carlos* Window California law, first for all cases and then broken down by the crime of conviction. Part I, Column A, Row 4 presents the results for all cases in the sample, while Rows 1-3 report separate results for M1, M2, and VM convictions.

41. Part I, Column E, Row 4 of Table 2 reports a 40% narrowing rate under *Carlos* Window California law for all cases. When the focus shifts to the three different crimes of conviction, Column E reports respective narrowing rates of 9% for the M1 cases, 67% for the M2 cases, and 47% for the VM cases.[25]

42. Part II reports similar findings under 2008 law. Column E reports narrowing rates of 5% for the M1 cases and 62% and 40% respectively, for the M2 and VM cases. The overall narrowing rate reported in Row 4 for all cases under 2008 law in Column E is 35%.[26]

Post-*Furman* Death Eligibility and Death-Eligibility Narrowing Rates in Other States

43. Rates of death eligibility under the capital punishment laws in other states reported in Table 3 shed important light on the breadth of California's post-*Furman* statute. Part I of the Table first presents death-eligibility rates in two states, New Jersey and Maryland, where death eligibility is principally defined by the Model Penal Code's aggravating circumstances that have been commonly used in American death sentencing jurisdictions. For both New Jersey and Maryland, we have empirical assessments of death-eligibility rates for first- and second-degree murder convictions. The methodology used to make those assessments in New Jersey[27] and

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[25] Column E of Parts I and II of Table 2 report the narrowing rates estimated with our conservative death-eligibility measure. Note 1 of Table 2 reports that the narrowing rates based on our liberal death-eligibility measure for Part I, Column E are as follows: Row 1 – 9%; Row 2 – 66%; Row 3 – 46%; and Row 4 – 40%.

[26] Note 2 of Table 2 reports that the death-eligibility narrowing rates based on our liberal death-eligibility measure for Part II of Table 2 Column E are as follows: Row 1 – 5%; Row 2 – 62%; Row 3 – 39%; and Row 4 – 35%.

[27] When I was the New Jersey Supreme Court's Special Master for Proportionality Review (1988-1991), Professor Woodworth and I with substantial assistance from the staff of the New Jersey Supreme Court conducted an empirical study of the operation of the New Jersey death penalty system from 1983 through 1991 based on the methodology of our Georgia research.

The staff of the court screened probation reports for death eligibility under my

TABLE 2

FACTUAL DEATH-ELIGIBILITY NARROWING AMONG CALIFORNIA POST-*FURMAN* M1, M2, AND VM CONVICTION CASES UNDER POST-*FURMAN* CALIFORNIA LAW COMPARED TO PRE-*FURMAN* GEORGIA LAW, BROKEN DOWN BY CRIME OF CONVICTION: 1978 - 2002

Part I: *CARLOS* WINDOW (CW) LAW[1]

A	B	C	D	E	F
Crime of Conviction	**Pre-*Furman* (PF) Death-Eligibility Rate**	***Carlos* Window (CW) Death-Eligibility Rate**	**Absolute Disparity (Col. B – Col. C)**	**Narrowing Rate (Col. D/Col. B)**	**95% Confidence Interval for Col E. Estimate**
l. First-Degree Murder (M1) (n = 8,711)	100%	91%	9 pts.	9%	6%, 12%
2. Second-Degree Murder (M2) (n = 7,900)	99%	33%	66 pts.	67%	60%, 73%
3. Voluntary Manslaughter (VM) (n = 10,842)	77%	41%	36 pts.	47%	40%, 53%
4. All Cases (n = 27,453)	91%	55%	36 pts.	40%	36%, 43%

Part II: CALIFORNIA LAW -- JANUARY 1, 2008[2]

A	B	C	D	E	F
Crime of Conviction	**Pre-*Furman* (PF) Death-Eligibility Rate**	**2008 Law Death-Eligibility Rate**	**Absolute Disparity (Col. B – Col. C)**	**Narrowing Rate (Col. D/Col. B)**	**95% Confidence Interval for Col E. Estimate**
l. First-Degree Murder (M1) (n = 8,711)	100%	95%	5 pts.	5%	3%, 8%
2. Second-Degree Murder (M2) (n = 7,900)	99%	38%	61 pts.	62%	55%, 68%
3. Voluntary Manslaughter (VM) (n = 10,842)	77%	46%	31 pts.	40%	33%, 46%
4. All Cases (n = 27,453)	91%	59%	32 pts.	35%	31%, 38%

[1]When the narrowing rates are based on our liberal measure of death eligibility, the narrowing rates in Column E are as follows: Row 1 – 9%; Row 2 – 66%; Row 3 – 46%, and Row 4 – 40%.

[2]When the narrowing rates are based on our liberal measure of death eligibility, the narrowing rates in Column E are as follows: Row 1 – 5%; Row 2 –62%; Row 3 – 39% and Row 4 – 35%.

Maryland[28] is similar to the methodology that we used for the California project.

44. Column A, Part I of Table 3 identifies the three comparison states while Column B lists the death-eligibility rates for each. Rows 1 and 2 of Column B indicate that the post-*Furman* death-eligibility rates for New Jersey and Maryland are identical at 21%. In contrast, Row 3a of Column B reports California death-eligibility rates of 64% under *Carlos* Window California law, which is 3.0 (64%/21%) times higher than the New Jersey and Maryland rates,

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supervision. My final report to the court, Death Penalty Proportionality Review Project: Final Report To The New Jersey Supreme Court 3-10 (September 24, 1991) [N.J. Rpt.] explains that the screening occurred in two steps. The first threshold screen excluded as clearly not death eligible juveniles, death by auto, acquittal in a murder trial and also non-penalty trial homicides that resulted in indictments for less than some form of murder or a conviction less serious than aggravated manslaughter. *Id.* at 2-4. Cases that resulted in simple manslaughter convictions (called passion-provocation or reckless manslaughter in New Jersey and voluntary or involuntary manslaughter elsewhere) were also excluded. The 1496 cases that survived this initial screen were "(a) pleas to murder [M1 or M2] felony murder, or aggravated manslaughter when the original charge was a form of murder, (b) jury convictions for murder and for felony murder when the indictment was for felony murder, and (c) capital murder convictions." This population of New Jersey cases is directly comparable to the M1 and M2 California conviction cases screened for death eligibility in our California research. With an enhanced database, the New Jersey proportionality review project subjected these cases to further analysis to assess their death eligibility. The test for "clear" death eligibility was whether the evidence was "overwhelming or strong." *Id*. at 8. The analysis determined that 16% (246/1496) of the cases screened were "clearly death eligible." *Id.* at 10.

I was succeeded by two special masters until New Jersey repealed capital punishment in 2007. The last special master, Judge David Baime, reported in 1999 that the court staff continued to follow the screening process established in 1988. David Baime, Report of the Special Master to the New Jersey Supreme Court 28 (April 28, 1999). He reports that as of early 1999, of "the 2104 cases that have been screened since the beginning of the proportionality review process, only 433 homicides have been classified as clearly death-eligible, approximately twenty-one percent." This represents a post-*Furman* death-eligibility rate among M1 and M2 convictions of 21% (433/2104) over 15 years. *See also Proportionality Review Project* 735 A.2d 528, 536 (N.J. 1999) (explaining and quoting from Judge Baime's 1999 report). In our discussion of death-eligibility rates in this report, we use the 21% rate for New Jersey between 1983 and 1999 reported by Judge Baime in 1999 because it is based on a larger sample than the 16% estimate reported by me for the 1983-1991 period.

[28] Professor Raymond Paternoster conducted a *McCleskey*-style study of death sentencing in Maryland between 1978 and 1999. Raymond Paternoster, Robert Brame, Sarah Bacon & Andrew Ditchfield, Justice by Geography and Race: The Administration of the Death Penalty in Maryland,1978-1999, 4 MARGINS: Maryland's L. J. On Race, Religion, Gender, and Class 1 (2004) [Maryland]. To obtain a data base of "death eligible" cases his research assistants screened "approximately 6000" first- and second-degree homicide convictions based on a substantial file of information maintained for each prisoner in the department of corrections. *Id.* at 15. Professor Paternoster provided me with the more precise number of cases screened that is reported in Table 2. They used the same screening procedures that we used in New Jersey and California.

TABLE 3

POST-*FURMAN* DEATH-ELIGIBILITY RATES IN OTHER STATES COMPARED TO DEATH-ELIGIBILITY RATES IN POST-*FURMAN* CALIFORNIA: 1978-2002

Part I: Death-Eligibility Rates in Maryland, New Jersey, and California among M1 and M2 Conviction Cases

A **State**	**B** **Death-Eligibility Rate**[3]	**C** **95% Confidence Interval for Death-Eligibility Rate in Col. B.**
1. New Jersey (1982-1999)[1]	21% (433/2,104)	NA[4]
2. Maryland (1978-1999)[2]	21% (1,311/6,150)	NA[4]
3. California (1978-2002)		
a. *Carlos* Window Law	64% (10,560/16,611)	60%, 67%
b. 2008 Law	68% (11,260/16,611)	64%, 71%

[1]David Baime, Report of the the New Jersey Supreme Court Proportionality Review Project 28 (April 28, 1999).
[2]Raymond Paternoster et al., Justice by Geography and Race: The Administration of the Death Penalty in Maryland, 1978-1999, 4 U. of Md. L.J. Race, Religion, Gender & Class (MARGINS) 1, 18 (2004).
[3]When the death-eligibility rates reported in Row 3 are estimated with our liberal measures of death eligibility, the rate in Column B, Row 3.a is 63% and the rate in 3.b is 68%.
[4]Not applicable (NA) because the rate reported in Column B is based on the universe of M1 or M2 convictions in the state.

Part II: Death-Eligibility Rates in Nebraska and California among M1, M2, and VM Conviction Cases

A **State**	**B** **Death-Eligibility Rate**[2]	**C** **95% Confidence Interval for Death-Eligibility Rate in Col. B.**
1. Nebraska (1973-1999)[1]	25% (175/689)	NA[3]
2. California (1978-2002)		
a. *Carlos* Window Law	55% (15,013/27,453)	(52%, 58%)
b. 2008 Law	59% (16,298/27,453)	(56%, 62%)

[1]David C. Baldus, George Woodworth, Catherine M. Grosso, & Aaron M. Christ, Arbitrariness and Discrimination in the Administration of the Death Penalty: A Legal and Empirical Analysis of the Nebraska Experience (1973-1999), 81 Neb. L. Rev. 486, 542 (2002).
[2]When the death-eligibility rates reported in Row 2 are estimated with our liberal measure of death eligibility, the rate in Column B, Row 2.a is 55% and the rate in 2.b. is 60%.
[3]Not applicable (NA) because the rate reported in Column B is based on the universe of M1, M2, and VM convictions in the state.

Part III: Death-Eligibility Rates for California, Nationwide, New Jersey, Maryland, and Nebraska Based on the Percent of Death-Eligible Homicides Among All Homicides Reported in the FBI Supplemental Homicide Reports (SHR) (1978-2003)[1]

A State	B Death-Eligibility Rate	C 95% Confidence Interval for Death Eligibility Rate in Col. B.
1. California	37.8%	(36%, 40%)
2. Nationwide[2]	23.8%	(23.0%, 24.6%)
3. New Jersey	25.5%	(24%, 27%)
4. Maryland	21.9%	(20%, 23%)
5. Nebraska	28.9%	(25%, 32%)

[1]Jeffrey Fagan, Franklin E. Zimring & Amanda Geller, Capital Punishment and Capital Murder: Market Share and the Deterrent Effects of the Death Penalty, 84 Tex. L. Rev. 1803, 1819 (2006). These findings are based on FBI, Supplemental Homicide Report (SHR) data, which documents all murder and non-negligent manslaughter reported to the FBI by state law enforcement officials. Professor Fagan and his colleagues generously shared their unpublished state by state findings for use in this declaration.

[2]*Id.* at 1819. The nationwide rates range from 37.8% (California) to 13.1% (Alabama). *See infra* Table 4, Part II.

and 68% under 2008 California law, which is 3.2 (68%/21%) times higher than the New Jersey and Maryland rates. Expressed in terms of expansion rates, the *Carlos* Window California law rate represents a 205% (43/21) expansion over the New Jersey and Maryland rates, while the 68% death-eligibility rate under 2008 California law represents a 224% (47/21) expansion over the New Jersey and Maryland rates.

45. The New Jersey and Maryland post-*Furman* death-eligibility rates can also be usefully compared with California in terms of their rates of death eligibility under pre-*Furman* law. Under New Jersey and Maryland pre-*Furman* law, all first-degree murder was death eligible.[29] The breadth of death eligibility in these states was greatly narrowed with post-*Furman* legislative requirements of one or more aggravating circumstances in M1 cases and the additional New Jersey legislative requirement limiting death eligibility to actual killers.[30] However, we cannot empirically quantify the rate of death eligibility of New Jersey's and Maryland's post-*Furman* cases under its pre-*Furman* statutes.

46. What we can determine with considerable certainty, however, is the rate of death eligibility of Maryland's and New Jersey's first and second degree post-*Furman* murder cases under pre-*Furman* Georgia law. That law classified common law murder as death-eligible murder, a classification that, with rare exceptions, would have embraced all M1 and M2 convictions under post-*Furman* Maryland and New Jersey law. It is fair to say that close to 100% of Maryland and New Jersey's post-*Furman* M1 and M2 conviction cases would have been death eligible under pre-*Furman* Georgia law.[31]

47. A conservative estimate, therefore, would put the rate of death eligibility of the

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[29] *See* Edward Devine, Marc Feldman, Lisa Giles-Klein, Cheryl A. Ingram, & Robert F. Williams, Special Project: The Constitutionality of the Death Penalty in New Jersey, 15 Rutgers L. J. 261, 270, 274 (1984); Roann Nichols, *Tichnell v. State* – Maryland's Death Penalty: The Need For Reform, 42 Md. L. Rev. 875 (1983).

[30] *State v. Bobby Lee Brown*, 138 N.J. 481, 509 (1994) (examining the history of New Jersey's "own conduct" requirement).

[31] This is exactly what we see in California. Table 2, Parts I and II, Column B document pre-*Furman* death-eligibility rates of 100% for M1 and 99% for M2 California convictions in our sample.

post-*Furman* Maryland and New Jersey cases under pre-*Furman* Georgia law at 95%. The 21% rate of post-*Furman* death eligibility in these two states suggests conservatively a 78% (74/95) narrowing of death eligibility compared to their death-eligibility status under pre-*Furman* Georgia law. The comparable California narrowing rate among M1 and M2 cases as a group is 36% under *Carlos* Window law and 32% under 2008 law,[32] which are respectively 54% (42/78) and 59% (46/78) lower narrowing rates than the New Jersey and Maryland rates.

48. Part II of Table 3 explores a post-*Furman* comparison between Nebraska (1973 - 1999) and California (1978 - 2002). Both of the death-eligibility rates reported in Column B are based on a screen for death eligibility of M1, M2, and VM cases in Nebraska that employed the same methodology that we used to screen California M1, M2, and VM cases for this project.[33] The reported death-eligibility rates are 25% for Nebraska compared to 55% for California during the *Carlos* Window and 59% under 2008 law.[34] Those two California rates are respectively 2.2 (55%/25%) and 2.4 (59%/25%) times higher than the Nebraska rate. Moreover, the California rates represent a 120% (30/25) expansion over the Nebraska rate under *Carlos* Window California law and a 136% (34/25) expansion under 2008 California law.

49. Part III of Table 3 reports death-eligibility rates nationwide and for the four states whose rates are reported in Parts I and II of Table 3. The research methodology used to produce the Column B estimates in Part III is different than the methodology used to produce the estimates reported in Parts I and II. Specifically, the Part III estimates were produced in an analysis of death eligibility in each state among all murder and non-negligent manslaughter cases reported to the FBI in Supplemental Homicide Reports (SHR) by state law enforcement

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[32] We estimated these narrowing rates in a replication of the analysis that produced the results reported in Table 2, Column E with all of the M1 and M2 cases combined for the procedure.

[33] The death-eligibility screen of the Nebraska cases was conducted under my supervision in connection with the identification of death eligible cases as the foundation for a study that Professor Woodworth and I conducted of the Nebraska death penalty system. David C. Baldus, George Woodworth, Catherine M. Grosso, and Aaron M. Christ, Arbitrariness and Discrimination in the Administration of the Death Penalty: A Legal and Empirical Analysis of the Nebraska Experience (1973-1999), 81 U. of Neb. L. Rev. 486, 542 tbl. 2 (2002).

[34] *See supra* Table 1, Part I, Row 4, Columns B and D.

authorities.[35]

50. Of particular note is the comparability of the results reported for New Jersey, Maryland, and Nebraska in Part III of Table 3, based on the SHR methodology, and the results reported for those states in Parts I and II, which are based on a screening of all M1, M2, and VM convictions, as the case may be. The estimated death-eligibility rates based on the two different methodologies (case screening method versus SHR method) are: New Jersey, 21% versus 25.5%; Maryland, 21% versus 21.9%; and Nebraska, 25% versus 28.9%. The comparability of these estimates enhances our confidence in the validity of both estimates for each state in Part III of Table 3. Their comparability also enhances our confidence in the validity of the SHR based death-eligibility estimates reported in Table 4 below for each American death penalty state.

51. Part I of Table 4 reports the estimated state death-eligibility rate for each death penalty state classified by region and state, while Part II of the table rank orders those states by their estimated death-eligibility rates. In Part I of Table 4 California is in Region 9 – Pacific States – where its rate of 37.8% is 35% (9.8/28) higher than its two neighbors Oregon and Washington, each at 28%. Part II of Table 4, which rank orders the states from low to high in terms of their estimated death-eligibility rates, places California at the top of the list with a death-eligibility rate of 37.8%.

52. In assessing the death-eligibility rates reported in Part III of Table 3 and in Table

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[35] Jeffrey Fagan, Franklin E. Zimring, & Amanda Geller, Capital Punishment and Capital Murder: Market Share and the Deterrent Effects of the Death Penalty, 84 Tex. L. Rev. 1803, 1816-17 (2006) describe their methodology as follows. "The SHR has the unique advantage of providing detailed, case-level information about the context and circumstances of each homicide event known to the police. This allows us to identify the presence of factors that map onto the statutory framework of the Texas murder statutes and more broadly onto the Model Penal Code aggravating factors." To generate a death-eligibility estimate for each state, the authors classified a murder or non-negligent homicide as death eligible if it included any of "the following elements that are part of the recurrent language of capital-eligible homicides across the states: (a) killings during the commission of robbery, burglary, rape or sexual assault, arson, and kidnapping; (b) killing of children below age six: (c) multiple-victim killings; (d) 'gangland' killing involving organized crime of street gangs; (e) institution killings where the offender was confined in a correctional or other governmental institution; (f) sniper killings… (g) killings in the course of drug business." They also defined a law enforcement officer victim as a qualifying aggravating factor. When the defendant's age was known cases were classified as not death eligible if the defendant was under 16 years of age at the time of the offense.

TABLE 4

Part I: Nationwide and State Death-Eligibility Rates Based on the Percentage of Death-Eligible Murders Among All Intentional Homicides (Murder and Non-Negligent Manslaughter) Broken Down by Region and State (1978-2003)[1]

	A Region/State	B Percentage of Homicides that are Death Eligible[1]	C 95% Confidence Interval for Estimate in Column B
1	National Average	23.8%	23.0%, 24.6%
2	Northeast		
	Connecticut	23.2	21%, 25%
	New Hampshire	31.9	26%, 38%
	New Jersey	25.5	24%, 27%
	New York	20.4	18%, 22%
	Pennsylvania	25.0	24%, 26%
3	East North Central		
	Illinois	28.9	27%, 31%
	Indiana	24.0	22%. 25%
	Ohio	22.0	21%, 23%
4	West North Central		
	Kansas	23.9	20%, 28%
	Missouri	22.4	21%, 24%
	Nebraska	28.9	25%, 32%
	South Dakota	27.4	21%, 34%
5	South Atlantic		
	Delaware	18.4	14%, 23%
	Florida	18.2	17%, 20%
	Georgia	20.3	18%, 22%
	Maryland	21.9	20%, 23%
	North Carolina	16.8	16%, 18%
	South Carolina	22.5	21%, 24%
	Virginia	20.6	20%, 22%
6	East South Central		
	Alabama	13.1	12%, 15%
	Kentucky	18.2	16%, 20%
	Mississippi	19.7	18%, 22%
	Tennessee	18.7	17%, 20%
7	West South Central		
	Arkansas	23.0	21%, 25%
	Louisiana	18.3	17%, 19%
	Oklahoma	28.3	25%, 32%
	Texas	21.7	20%, 23%
8	Mountain		
	Arizona	23.8	22%, 25%
	Colorado	26.1	24%, 28%
	Idaho	29.7	25%, 34%
	Montana	26.5	20%, 33%
	Nevada	22.7	21%, 24%
	New Mexico	22.9	21%, 25%
	Utah	30.0	27%, 33%
	Wyoming	26.9	22%, 32%
9	Pacific		
	California	37.8	36%, 40%
	Oregon	28.0	25%, 30%
	Washington	28.0	26%, 30%

[1]The estimates in Parts I and II of this table are based on the number of death-eligible homicides reported to the FBI using the Fagan-Geller-Zimring estimation procedure described *supra* note 35.

Part II: State Death-Eligibility Rates Rank Ordered From Low (Alabama) to High (California) (1978-2003)

A State	B Percent of Homicides that are Death Eligible	C 95% Confidence Interval for Estimate in Column B
Alabama	13.1	12%, 15%
North Carolina	16.8	16%, 18%
Florida	18.2	17%, 20%
Kentucky	18.2	16%, 20%
Louisiana	**18.3**	17%, 19%
Delaware	18.4	14%, 23%
Tennessee	18.7	17%, 20%
Mississippi	19.7	18%, 22%
Georgia	20.3	18%, 22%
New York	20.4	18%, 22%
Virginia	20.6	20%, 22%
Texas	21.7	20%, 23%
Maryland	21.9	20%, 23%
Ohio	22.0	21%, 23%
Missouri	**22.4**	21%, 24%
South Carolina	22.5	21%, 24%
Nevada	22.7	21%, 24%
New Mexico	22.9	21%, 25%
Arkansas	23.0	21%, 25%
Connecticut	23.2	21%, 25%
Arizona	23.8	22%, 25%
Kansas	23.9	20%, 28%
Indiana	24.0	22%, 25%
Pennsylvania	25.0	24%, 26%
New Jersey	**25.5**	24%, 27%
Colorado	26.1	24%, 28%
Montana	26.5	20%, 33%
Wyoming	26.9	22%, 32%
South Dakota	27.4	21%, 34%
Oregon	28.0	25%. 30%
Washington	28.0	26%, 30%
Oklahoma	28.3	25%, 32%
Nebraska	**28.9**	25%, 32%
Illinois	28.9	27%, 31%
Idaho	29.7	25%, 34%
Utah	30.0	27%, 33%
New Hampshire	31.9	26%, 38%
California	37.8	36%, 40%

4, it should be noted that the reported California estimate of a 37.8% death-eligibility rate underestimates the actual rate. The reason is that the SHR-based methodology on which the Table 3, Part III and Table 4 estimates are based reflects only a minor "lying in wait" type aggravating circumstance – "sniper killings," the only species of "lying in wait" that is included in the FBI's SHR database. The broad scope of California's lying-in-wait special circumstance (section 190.2(a) (15)) is simply not reflected in the SHR-based estimates of death eligibility. Professor Woodworth's declaration filed in this case documents in paragraph 9 on page 2 that after adjustment for the scope of California's lying in wait and criminal street gang special circumstances, a valid estimate of California's rate of death eligibility under the SHR data is 50.3% rather than the 37.8 rate reported in Part II of Table 4.

53. Against this background it is useful to consider California's death-eligibility rate vis-a-vis SHR based death-eligibility rates for the states identified in Part III of Table 3. Compared to the states listed in Rows 2-5, the California rate of death eligibility is 59% (14/23.8) higher than the nation as a whole, 48% (12.3/25.5) higher than New Jersey, 73% (15.9/21.9) higher than Maryland, and 31% (8.9/28.9) higher than Nebraska.

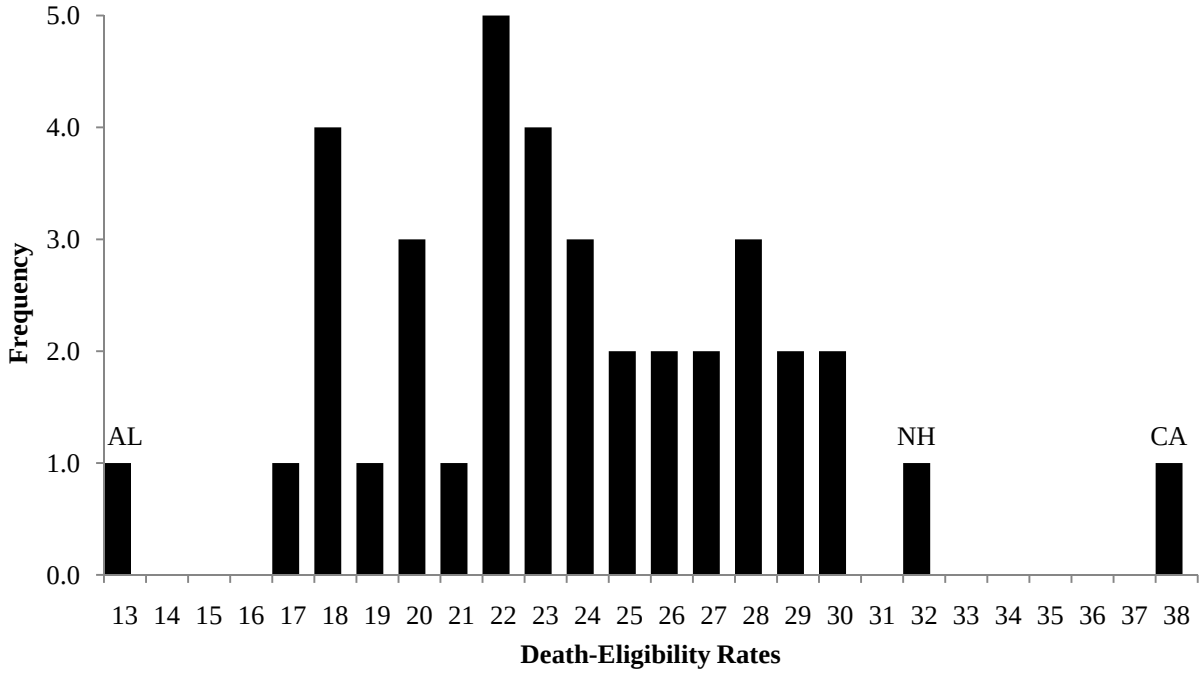
54. The data in Table 4 and Figure 1 document California's outlier status in four ways.[36] First, Part II of Table 4 demonstrates that compared to the states with the second and third highest death-eligibility rates, California's death-eligibility rate of 37.8% is 18% (5.9/31.9) higher than New Hampshire's and 26% (7.8/30) higher than Utah's. Second, all of the major death penalty states have substantially lower death-eligibility rates than California. In this regard, it is useful to compare California's rate with representative states listed in bold font in the four quartiles of states in Part II of Table 4. Compared to Louisiana, the median state in the first quartile of states with a death-eligibility rate of 18.3%, California's rate is 107% (19.5/18.3) higher and compared to Missouri, the median state in the second quartile of states with a death-eligibility rate of 22.4%, California's rate is 69% (15.4/22.4) higher. Compared to New Jersey,

[36] An outlier is defined as "an observation that lies outside the overall pattern of a distribution." Moore, D.S. and McCabe, G.P. Introduction to the Practice of Statistics (1999), http://mathworld.wolfram.com/Outlie.html.

FIGURE 1

THE DEATH-ELIGIBILITY RATES IN TABLE 4, PART B DISPLAYED IN A HISTOGRAM FROM ALABAMA WITH RATE 13 TO CALIFORNIA WITH RATE 38

(The height of each bar indicates the number of states sharing that death-eligibility rate)



the median state in the third quartile of states with a death-eligibility rate of 25.5%, California's rate is 48% (12.3/25.5) higher and compared to Nebraska the median state in the fourth quartile of states with a death-eligibility rate of 28.9%, California's rate is 31% (8.9/28.9) higher. Third, the data in Part II of Table 4 and Figure 1 indicate that the 5.9-percentage-point gap in death-eligibility rates between California and New Hampshire, California's closest near neighbor is 5 to 6 times larger than the gaps in rates between all of the other states in the second, third, and fourth quartiles of the distribution. Finally, the formal definition of "outlier" calls for a score of 38.5 to qualify as an outlier in the distribution presented in Figure 1.[37] Based on the data in Part II of Table 4, California's rate of 37.8 falls 0.7 of a percentage point short of that qualifying number, even without considering the effects of the limited lying-in-wait data in the SHR database.

CAPITAL CHARGING AND SENTENCING OUTCOMES AMONG FACTUALLY DEATH-ELIGIBLE POST-*FURMAN* CALIFORNIA MURDER CASES

55. Figure 2 and Table 5 document capital charging and sentencing outcomes among all factually death-eligible post-*Furman* cases. A factually death-eligible case involves the factual presence of first-degree murder (M1) liability and the factual presence of one or more California special circumstances under *Carlos* Window or 2008 California law as the case may be.[38] If the facts presented in the probation report for a case satisfy this test, the crime of conviction does not determine the factual death eligibility of the case.[39]

56. Figure 2 documents the flow of death-eligible cases through four decision points in the process. At stage 1, the prosecutor determines whether to charge the case capitally by

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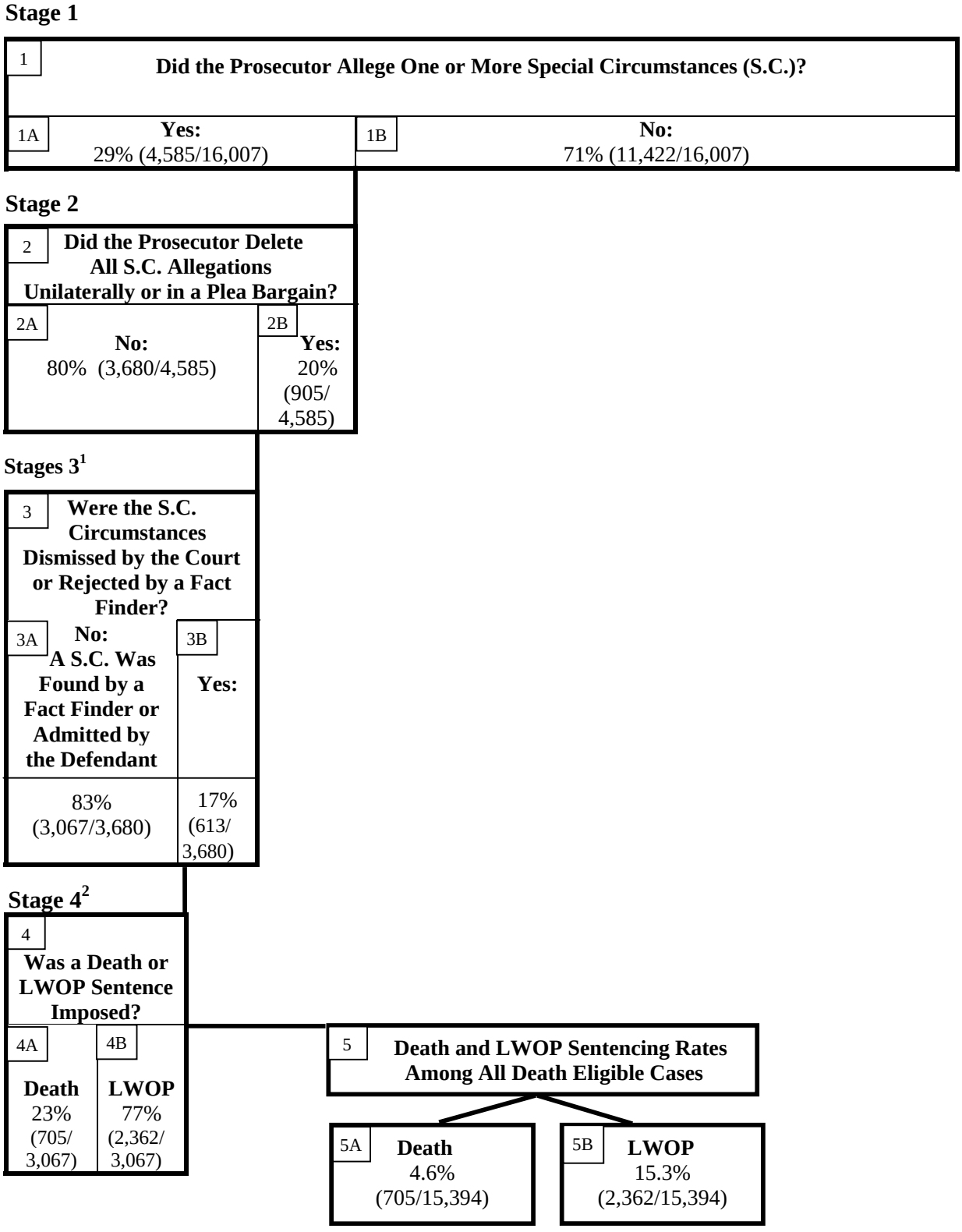
[37] In statistical parlance, the first quartile is the 25th percentile and the third quartile is the 75th percentile; they are, respectively, the median of the lower 50% and the upper 50% of the data. A convenient definition of an outlier is a point which falls more than 1.5 times the interquartile range above the third quartile or that far below the first quartile as the case may be. *Id.* In this case the interquartile range is 7 -- the difference between the 25th percentile of the death-eligibility rates, New York (20.4), and the 75th percentile of the death-eligibility rates, South Dakota (27.4).

[38] *See supra* para. 24-29 for a discussion of the methodology we used to classify cases as factually M1 and death eligible.

[39] *Id.*

FIGURE 2

CAPITAL CHARGING AND SENTENCING OUTCOMES AMONG CASES THAT WERE DEATH-ELIGIBLE UNDER *CARLOS* WINDOW LAW OR 2008 LAW: CALIFORNIA, 1978-2002



[1]At stage 3, special circumstances were found in a guilt trial or admitted by the defendant.

[2]At stage 4, a death or LWOP sentence was imposed after a penalty trial unless the prosecutor agreed to or the court imposed a term of years. The data suggest that approximately 9% of the cases with a special circumstance found or admitted by the defendant resulted in a term of years.

TABLE 5

CAPITAL CHARGING AND SENTENCING OUTCOMES IN DEATH-ELIGIBLE CASES 1978-2002 (COLUMNS B AND C), FROM 1/1/78 THROUGH THE *CARLOS* WINDOW (COLUMNS D AND E), AND FROM THE END OF THE *CARLOS* WINDOW THROUGH 6/6/02 (COLUMNS F AND G) [1]

A **Charging and Sentencing Outcome**	B **1978-2002 Outcome Rate**[2]	C **95% Confidence Interval for Col. B Estimate**	D **Outcome Rate Under *Carlos* Window Law From 1/1/78 Through the *Carlos* Window (10/13/87)**	E **95% Confidence Interval for Col. D Estimate**	F **Outcome Rate Under 2008 Law From the End of the *Carlos* Window (10/14/87) Through 6/6/02**	G **95% Confidence Interval for Col. F Estimate**
1. One or More Special Circumstances Alleged	29% (4,585/16,007)	25%, 32%	24% (1,480/6,181)	19%, 28%	32% (3,105/9,826)	26%, 37%
2. One or More Special Circumstances Found Among Those Alleged	67% (3,067/4,585)	59%, 74%	69% (1,027/1,480)	59%, 79%	66% (2,040/3,105)	56%, 76%
3. A LWOP Sentence Imposed	15.3% (2,362/15,394)	12%, 18%	10.1% (614/6,059)	7%, 13%	18.7% (1,748/9,335)	14%, 23%
4. A Death Sentence Imposed	4.6% (705/15,394)	3%, 6%	6.8% (412/6,059)	4%, 10%	3.1% (293/9,335)	1%, 5%

[1] The *Carlos* Window was (12/12/83 – 10/13/87) *supra* note 4. The time periods before and after the *Carlos* Window embraced in this table were (01/01/78 – 12/11/83) and (10/14/87– 6/30/02), respectively.

[2]The cases in this analysis include those reported in Column D, which were death eligible under *Carlos* Window law, and the cases reported in Column F, which were death eligible under 2008 law.

alleging one or more special circumstances, which occurred approximately 29% of the time. At stage 2, the prosecutor may delete the special circumstances unilaterally or as part of a plea bargain with the defendant, which occurs in approximately 20% of the cases in which special circumstances had been alleged. At stage 3, the court may dismiss the special circumstance allegations or the fact finder may reject them as not proved. These outcomes occurred in a relatively small percentage of the cases that advanced this far in the process. For cases in which a special circumstance is found present or admitted by the defendant, the prosecutor determines whether to advance the case to a penalty trial or to waive the death penalty in which event the court will impose a life-without-the-possibility-of-parole (LWOP) sentence or a term of years. While the number of penalty trials is unknown, the data document at stage 4 a distribution of sentencing outcomes with 23% (705/3,067) death sentences and 77% (2,362/3,067) LWOP sentences.[40] Box 5A at the foot of Figure 2 reports a 4.6% death sentencing rate among all death eligible cases and Box 5B reports a 15.3% LWOP sentencing rate among those cases.

57. Table 5 presents similar findings with contrasts between the early years of the post-*Furman* system (1/1/1978 through 10/12/1987) and more recent years (10/13/1987 through 6/30/2002). Column A of Table 5 identifies the charging and sentencing outcomes of interest and Column B reports the outcomes for the entire period of the study. Column D presents the rates through the *Carlos* Window, while Column F reports the results from the later post-*Carlos* Window period. Row 1, Column B, documents that between 1978 and 2002, special circumstances were alleged in 29% of the cases that were death eligible under the *Carlos* Window or 2008 California law. Columns D and F report that the rates were 24% and 32% respectively during the earlier and later periods. We also have collateral evidence on this

[40] The data also suggest that approximately 9% of the cases with a special circumstance found or admitted by the defendant resulted in a term of years, which may be imposed when it is agreed to by the prosecutor or imposed by the court. Although we were able to identify all cases in our sample in which the defendant was sentenced to death, we have less confidence in our ability to identify all cases in which the defendant was sentenced to LWOP because some probation reports omit this information and we did not have access to alternate sources identifying all defendants who have or could have been sentenced to LWOP.

outcome. A recent study[41] documents that between August 1977 and December 31, 1986, prosecutors sought death sentences in 58% (11/19) of the felony-murder cases prosecuted in San Joaquin County. This finding is comparable to the special circumstance filing rates documented in our statewide data for robbery felony-murder cases, with an average rate of 50% (2,598/5,227).[42]

58. Row 2, Column B of Table 5 documents that during 1978-2002 special circumstances were found to be present by the judge or jury or admitted by the defendant in 67% of the death-eligible cases in which they were alleged, while Columns D and F report that those rates were 69% and 66% respectively during the earlier and later periods.

59. The data indicate that the death penalty is waived in a large number of cases unilaterally or in plea bargains, in which event the case does not advance to a penalty trial. Unfortunately, our data do not squarely focus on the rate that death-eligible cases advance to a penalty trial.[43] However, we have a useful proxy measure for that outcome – the rate that one or more special circumstances were found by a jury or judge or admitted by the defendant in death-eligible cases. Our data document that a special circumstance was found by a jury or court or admitted by the defendant in 21% (3,354/16,007) of the cases in which a special circumstance could have been alleged and prosecuted. This measure overstates the rate that cases advance to a penalty trial because prosecutors often do not seek a death sentence after a special circumstance has been found true in the guilt trial and proceed solely to a LWOP or term-of-years sentence. (Our data suggest that approximately 9% of the cases with a special circumstance found or admitted by the defendant resulted in a term of years, rather than a death or a life-without-the-possibility of-parole sentence.) The measure does provide an upper limit of that rate, and our data suggest that many fewer than 21% of the death-eligible cases actually advanced to a penalty

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[41] Catherine Lee, Hispanics and the Death Penalty: Discriminatory Charging Practices in San Joaquin County, California, 35 J. of Crim. Just. 17, 21, tbl. 2 (2007).

[42] The rate of filing a special circumstance allegation in such cases was 40% (870/2,185) during and before the *Carlos* Window, and 56% (1,708/3,042) after the *Carlos* Window.

[43] Many of the probation reports used in this study were prepared before the guilt trial was conducted and, at best, the story typically ends with the guilt trial verdict.

trial. This rate is substantially lower than the rates at which prosecutors in other jurisdictions have traditionally advanced cases to a penalty trial,[44] although those rates appear to have declined within the last two decades.[45]

60. Row 3, Column B of Table 5 reports a 15.3% LWOP sentencing rate for the entire 1978-2002 period. Columns D and F indicate that the rate increased from 10.1% during the earlier period to 18.7% during the later period, a 85% (8.6/10.1) increase.

61. Row 4, Column B of Table 5 reports a death sentencing rate of 4.6% among all death-eligible cases in the universe. Columns D and E report rates of 6.8% for the earlier period and 3.1% for the later period, a difference that represents a 54% (3.7/6.8) decline in the death sentencing rate in the later period. When we limit the documentation of death sentencing rates to death sentences that were affirmed on appeals, the overall rate declines to 3.7%.[46]

62. Also of note is the death-sentencing rate among a subset of cases that is not

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[44] David C. Baldus, George Woodworth, & Charles A. Pulaski, Jr. Equal Justice And The Death Penalty: A Legal And Empirical Analysis 327, tbl. 56 (1990) [EJDP] (the rate in Georgia 1973-1980 was 32% (228/707)); David C. Baldus, George Woodworth, David Zuckerman, Neil Alan Weiner, & Barbara Broffitt, Racial Discrimination and the Death Penalty in the Post-*Furman* Era: An Empirical and Legal Overview, With Recent Findings From Philadelphia, 83 Cornell L. Rev. 1638, 1677, tbl.1 (1998) [Philadelphia] (the rate in Philadelphia County 1983-93 was 54% (384/707)); David C. Baldus, George Woodworth, Catherine M. Grosso, & Aaron M. Christ, Arbitrariness and Discrimination in the Administration of the Death Penalty: A Legal and Empirical Analysis of the Nebraska Experience (1973-1999), 81 U. of Neb. L. Rev. 486, 547 (2002) [Nebraska] (the rate in Nebraska 1973-99 was 48% (89/185)); Maryland, *supra* note 28 at 52, Fig.1 (the rate in Maryland 1978-99 was 14% (180/1311); N.J Rpt. *supra* note 27, Appendices and Tables, at tbl. 3 (the rate in New Jersey 1983-1991 was 54% (132/246).

[45] David C. Baldus, George Woodworth, & Catherine M. Grosso, Race and Proportionality Since *McCleskey v. Kemp* (1987): Different Actors with Mixed Strategies of Denial and Avoidance, 39 Col. H. Rights L. Rev.143, 168 (2007) (the rate at which New Jersey prosecutors advanced cases to a penalty trial declined "from a rate of 52% in the 1980s to a rate of 10% in the period from 1999-2004").

[46] This outcome measure distinguishes between death sentence cases in which the sentence was affirmed on appeal and cases in which the sentence or murder conviction was vacated because of trial court error that drew into question the legitimacy of the conviction or sentence. Examples include ineffective assistance of counsel and the vacation of special circumstance findings for want of evidentiary sufficiency. Of the 61 death sentenced cases in our sample, the death sentences of the following eight defendants were so classified: Sixto, Felipe Evanjelista, 48 Cal. 3d 1247, 1252 (1989); Hunter, Michael Wayne, 2005 WL 1377738; Turner, Thaddaeus Louis, 2009 WL 2394152; Marshall, Ryan Michael, 566 F. Supp. 2d 1053 (2008); Lucas, Larry Douglas, 33 Cal. 4th 682, 737 (2004); Duncan, Henry Earl, 528 F.3d 1222 (2008); Heard, James, Matthew, 31 Cal. 4th 946, 982 (2003), and Mayfield, Demetrie, 270 F. 3d 915 (2001).

identified in Table 5 – death-eligible cases that resulted in a M1 conviction at trial or by a guilty plea. The death-sentencing rate for death-eligible M1 conviction cases was 8.7% (705/8,111) with a (5%, 12%) 95% confidence interval. The death-sentencing rate for death-eligible M1 conviction cases in the *Carlos* Window is 9.4% (119/1,269) with a (6.5%, 12.2%) 95% confidence interval.

63. As noted above,[47] our data do not squarely focus on the advancement of cases to a penalty trial. As a result, we can only approximate the penalty trial death sentencing rate, with a proxy measure that computes the death sentencing rate among all cases in which jurors and judges found or the defendant admitted to one or more special circumstances being present in the case. The statewide rate for this measure is 21% (705/3,354). This figure clearly underestimates the actual penalty trial death-sentencing rate because it overstates the number of cases that advanced to a penalty trial. However, it does suggest a lower limit of that rate. In addition, estimates of this measure over time are of interest. During the early period from 1978 through the *Carlos* Window, the rate was 40% (412/1,035) while during the post-*Carlos* Window period the rate was 13% (293/2,319), which represents a 67% (27/40) decline in this rate between the two periods.[48]

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[47] *See supra* para. 59.

[48] These findings are consistent with three empirical studies of California penalty trials of which we are aware. The first is a pre-*Furman* study, which examined the outcomes of 238 unitary penalty trials between 1958 and 1966, documented a 43% (103/238) death sentencing rate. Special Issue, A Study of the California Penalty Trial in First-Degree-Murder Cases, 21 Stan. L. Rev. 1297, 1299 (1969). The second is a post-*Furman* study that documents between 1977 and 1984 a statewide penalty trial death sentencing rate of 29% (144/496). Stephen P. Klein & John E. Rolph, Relationship of Offender and Victim Race to Death Penalty Sentences in California, 32 Jurimetrics J. 33, 38, tbl. 1 (1991). The third study is a survey by the California State Public Defender's Office which reviewed capital charging and sentencing outcomes for a five year period from August 1977 to July 1983. It documents a 48% (148/309) penalty trial death sentencing rate. William J. Kopeny, Capital Punishment—Who Should Choose, 2 W. State U. Law Rev. 383, 388, n. 33 (1985).

The death sentencing rate estimated in our California data and the rates in these three studies are within the range of penalty trial death sentencing rates observed in many states. EJDP, *supra* note 44 at 327, tbl. 50 (the rate in Georgia 1973-1980 was 55% (140/253); David Baldus, When Symbols Clash: Reflection on The Future of The Comparative Proportionality Review of Death Sentences, 26 Seton Hall L. Rev. 1582, 1600, tbl. 4 (the rate in New Jersey 1983-95 was 29% (48/168); Philadelphia, *supra* note 44 at 1702 (the rate in Philadelphia County 1983-93 was 29% (110/384); Nebraska, *supra* note 44 at 545, fig. 2 (the rate in Nebraska 1978-99 was 15% (29/185)); Maryland, *supra* note 28 at 545, fig.1 (the rate in Maryland 1978-99 was

64. Of particular note is the death sentencing rate among death-eligible cases in which the prosecutor actively sought a death sentence by filing an allegation of one or more special circumstances. For the entire 1978-2002 period, that rate was 15% (705/4,585).

65. California's very low death sentencing rate among death-eligible cases is the product of decisions at the four stages in its capital charging and sentencing process outlined in Figure 2, which we can illustrate with a hypothetical that assumes a population of 100 death-eligible cases. First, prosecutors seek death sentences in only 29 of those cases (Stage 1), and dismiss those allegations before trial (Stage 2) in about 6 of those cases (20% of 29). For 77 of the hypothetical defendants, therefore, the risk of a death sentence is completely off the table before trial. For the remaining 23 defendants facing special circumstance allegations, 19 (81% of 23) may advance to a penalty trial after a fact finder finds one or more special circumstances present in the case or the defendant admits to a special circumstance (Stage 3). For these defendants, the penalty trial results in 4 (21% of 19) defendants being sentenced to death who contribute to the overall 4.6% risk of a death sentence being imposed among all death-eligible offenders that is documented in Row 4, Column B of Table 5 and at the foot of Figure 2 in Box 5A.

66. For this last point of decision we highlight again the trend of LWOP and death sentencing decision making. Table 5, Row 3, Columns D and F, document a 85% (8.6/10.1) increase in the LWOP sentencing rate between the early and later years. After the *Carlos* Window, the ratio of LWOP to death sentences increased to 6.0 to 1 (18.7/3.1%) from the 1.5 to 1 (10.1%/6.8%) ratio that existed during the *Carlos* Window and before.

67. The low California death sentencing rates documented in this study are consistent with the results of comparative studies which place California at the low end among death penalty states in terms of their death sentencing frequencies.[49] It is also useful to compare the

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6% (76/1311)).

[49] For example, in an extensive study of death sentences imposed per 1,000 homicides (1973-1995) only Maryland with a rate of 5 is lower than California with a rate of 8. The median rate is 18. John Blume, Theodor Eisenberg, and Martin T. Wells, Explaining Death Row's Population and Racial Composition, 1 J. of Empirical Legal Studies 165, 172, tbl. 1 (2004). In

average post-*Furman* California death sentencing rate of 4.6% with pre-*Furman* Georgia's 15% death sentencing rate among all death-eligible murder trial conviction cases. The results of the comparison can be expressed in two ways. First, the pre-*Furman* rate[50] of 15% exceeds the post-*Furman* California rate by a factor of 3.3 (15/4.6). Second, California's post-*Furman* death sentencing rate among all death-eligible cases is 69% (10.4/15) lower than the death sentencing rate in pre-*Furman* Georgia murder trial conviction cases.

CONCLUSIONS

68. This declaration reports the findings of an empirical study of 27,453 post-*Furman* California convictions for M1, M2, and VM cases with a date of offense between January 1978 and June 2002. The results are based on an analysis of a stratified random sample of 1,900 cases from the 27,453 case universe.

69. Our findings support three principal conclusions. First, the rate of death eligibility among California homicide cases is the highest in the nation by every measure. This result is a product of the number and breadth of special circumstances under California law. A major contribution to this over breadth is California's lying in wait (LIW) special circumstance. Under *Carlos* Window law (1978-2002), it was factually present in 29% (7,915/27,453) of California's M1, M2, and VM cases and it was the sole special circumstance present in 21% (5,843/27,453) of them.[51]

70. Second, the post-*Furman* narrowing rate of death eligibility in California

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another study of death sentencing rates per murder committed in each state from 1977 through 1999, California was ranked in the fourth quartile with a rate of 0.013 death sentences per murder, with the highest rate of 0.060 in Nevada and the lowest rate of 0.004 in Colorado. James S. Liebman, Jeffrey Fagan and Valerie West. 2000. A Broken System: Error Rates in Capital Cases, 1973-1995, New York: Columbia University, 87, fig. 17 http://www2.law.columbia.edu/instructionalservices/ liebman /liebman_final.pdf .

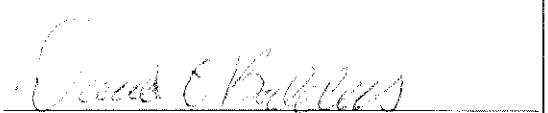
[50] *See* EJDP, *supra* note 44, at 85, tbl. 5 (reporting a 15% (44/293) rate among death eligible murder trial convictions in a study we conducted in 1982.)

[51] Under 2008 law, the lying-in-wait special circumstance was factually present in 29% (7,996/27,453) of all cases and it was the sole special circumstance present in 15% (4,239/27,453) of those cases. Under *Carlos* Window law, the lying–in-wait special circumstance was factually present in 23% (714/3,069) of all cases in which a special circumstance was found. The comparable number for the robbery felony-murder special circumstance was 55% (1,702/3,069).

compared to the rate of death eligibility under pre-*Furman* Georgia law is substantially lower than it has been in the vast majority of American death penalty states.

71. Third, in post-*Furman* California, prosecutors seek a death sentence and juries impose death sentences in only a small fraction of the death-eligible cases in which death sentences are authorized under post-*Furman* law. As a result, the post-*Furman* California death sentencing rate of 4.6% among all death-eligible cases is among the lowest in the nation and over two-thirds lower than the death sentencing rate in pre-*Furman* Georgia.

The foregoing is true and correct and executed under penalty of perjury under the laws of the United States and the State of California on November 18, 2010.



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APPENDIX A

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SYRACUSE UNIVERSITY COLLEGE OF LAW
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Special Master for the Proportionality Review of Death Sentences, 1988-91

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PENNSYLVANIA CONSTITUTIONAL CONVENTION
Delegate, 1967-68

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BOOKS AND MONOGRAPHS

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"Individual Rights and the Constitution: Issues and Trends in the Death Penalty," Controversy & The Constitution Conference, Ames, Iowa, February 12, 1987.

"Equal Justice in Proposed Federal Death-Sentencing Legislation: lessons from the states," Testimony before the United States Sentencing Commission, Hearing on the Commission's responsibility regarding promulgation of sentencing guidelines for federal capital offenses, Washington, D.C., February 17, 1987.

"Usable Knowledge from the Social Sciences: A Lawyer's Perspective," University of Nebraska College of Law, April 10, 1987.

"Equal Justice and the Death Penalty: Some Empirical Evidence," University of Nebraska College of Law, April 10, 1987.

"McCleskey v. Kemp: A methodological critique," Law and Society Association, Washington, D.C., June 12, 1987.

"Law and Statistics in Conflict: Reflections on McCleskey v. Kemp," University of Bristol (March 4, 1988), University of Durham (March 16, 1988), Hebrew University (April 17, 1988), University of Reading (May 6, 1988), University of Oxford (May 27, 1988).

"Arbitrariness and Discrimination in the Imposition of the Death Penalty," Testimony before Senate Judiciary Committee, Washington, D.C., October 2, 1989.

"Arbitrariness and Racial Discrimination in Post-Furman Death Sentencing: Implications for the Racial Justice Act and Proposed Federal Death-Penalty Legislation," Testimony before the Constitutional and Civil Rights Subcommittee, House Judiciary Committee, Washington, D.C., May 3, 1990.

"The Proportionality Review of Death Sentence: New Jersey's Options," New Jersey Bar Assembly, Headquarters, New Brunswick, New Jersey, April 23, 1992.

"Proportionality Review of Death Sentences: New Jersey's Options," Law and Society Association, Philadelphia, May 24, 1992.

"Regulating the Quantum of Damages for Personal Injuries through Enhanced Additur-Remittitur Review," Law and Society Association, Philadelphia, May 28, 1992.

"Proportionality Review of Death Sentences" & "Race Discrimination in the Use of the Death Penalty," University of Michigan Law School, January 1993.

"Reflections on the Reinstatement of the Death Penalty in Iowa," Public Lecture, Coe College, April 1993.

"Discretion and Disparity in the Administration of the Death Penalty" & "Racial and Ethnic Bias in the Criminal Law: Some Trends and Prospects," AALS Workshop on Criminal Law, Washington, D.C., October 29 & 30, 1993.

"Improving Judicial Oversight of Jury Damages Assessments: A Proposal for the Comparative Additur/Remittitur Review of Awards for non-pecuniary harms and punitive damages," Conference of Chief Justices, Williamsburg, Virginia, January 1993; Department of Pediatrics, University of Iowa Medical School, February, 1993; Conference on Civil Justice Reform, NYU Law School, October 1993.

"Racial Discrimination in Capital Sentencing: Reflections on its Inevitability and the Impossibility of its Prevention and Cure," Symposium on Racism in the Criminal Law, Washington and Lee Law School, March 11, 1994.

"Racial Discrimination in Mortgage Lending," Department of Housing and Urban Development, January 19, 1994.

"The Death Penalty Dialogue Between Law and Social Science," Keynote Address, Symposium, Capital Jury Project, Indiana Law School, February 24, 1995.

"Reflections on the Failure to Reinstate the Death Penalty in Iowa" & "Claims of Arbitrariness and Discrimination Under State Law; recent trends." Legal Defense Fund Annual Conference on the Death Penalty, Airlie House, Virginia, July 28 & 29, 1995.

"Statistical Approaches to Title VII Discrimination Claims" Defense Lawyers Association, Des Moines, September 1995.

"The Marshall Hypothesis Revisited," University of Pittsburgh Law School, October 1995.

"When Symbols Clash, Reflections of Proportionality Review, Death Sentences," Luncheon speaker, Death Penalty Conference, Seton Hall Law School, Nov. 2, 1995.

"Law As Symbol: explaining the uses of the death penalty in America," DePaul Law School, Chicago, January 1996; Northwestern Law School, March 1996.

"Post-McCleskey Discrimination Claims: Law, Proof and Possibilities," Plenary Session, Legal Defense Fund Annual Conference on the Death Penalty, Georgetown University, July 26, 1996.

"Preliminary Finding from the Pennsylvania Capital Charging and Sentencing Study" and "Law As Symbol," American Criminology Society, November 1996.

"The Death Penalty and How It Might Affect the Iowa Practitioner," Iowa Bar Association Criminal Law Seminar, Des Moines, March 21, 1997.

"Race Discrimination and the Death Penalty: Recent Findings from Philadelphia" Plenary Session, Legal Defense Fund Annual Conference on the Death Penalty, Airlie House, Virginia, July 1997; Death Penalty Symposium; Cornell Law School March 1998; American Society of Criminology, Washington D.C. November 1998.

"The Death Penalty for Iowa: What Would It Bring," testimony before the Iowa House Judiciary Committee, March 1998.

"Race Discrimination and the Proportionality Review of Death Sentences," Yale Law School, March 1998; St. John's Law School, March 1999.

"The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis," Research Club, University of Iowa, December 17, 1999; Center for Socio-Legal Studies, University of Iowa, January 21, 2000; "Race, Crime, and the Constitution Symposium," University of Pennsylvania Law School, January 29, 2000; Law Dept., Erlangen University, Erlangen, Germany, July 18, 2000.

"Race Discrimination in the Administration of the Death Penalty," Senate Judiciary Committee, Pennsylvania Legislature, Harrisburg, Pa., January 22, 2000; The Governor's Race and the Death Penalty Task Force, Tallahassee, Florida, March 30, 2000.

"Reflections on the Use of Capital Punishment in Europe and the United States," Political Science Dept., Erlangen University, Erlangen, Germany, July 17, 2000.

"Race Discrimination in the Administration of the Death Penalty: Current Concerns and Possible Strategies for Addressing the Issue During a Moratorium on Executions," ABA's Call to Action: A Moratorium on Executions, ABA Conference, Carter Center, Atlanta, Georgia, October 12, 2001.

"Race and Gender Disparities in the Administration of the Death Penalty: Recent Finding From Philadelphia and Legislative and Judicial Strategies to Reduce Race and Gender Effects," Pennsylvania Supreme Court Committee on Racial and Gender Bias in the Justice System, Philadelphia, Pa. December 6, 2000.

"Race Discrimination in the Administration of the Death Penalty," Death Penalty Symposium, NYU Law School, March 29, 2001.

"Reflections on the Use of the Death Penalty in Europe and the United States," Capital Punishment Symposium, Ohio State Law School, March 31, 2001.

"Arbitrariness and Discrimination in the Administration of the Death Penalty: the Nebraska Experience," Judiciary Committee, Nebraska Legislature, October 18, 2001; University of Nebraska Law School, February 22, 2002.

"Reflections on Comparative Proportionality Review" and "Race Discrimination and the Death Penalty: the post-1990 research," John Jay School of Criminal Justice, New York City, November 11, 2002.

"Proving Systemic Systemic Disparate Treatment in Capital Charging and Sentencing and in the Use of Peremptory Challenge" and "Understanding Equal Justice and the Death Penalty: the Role of Social Science," Yale Law School, New Haven, Conn., April 24, 2003.

"Race Discrimination and the Legitimacy of Capital Punishment: Reflections on the Interaction of Fact and Perception," DePaul Law Review Capital Punishment Symposium, Chicago Ill, Oct. 23, 2003.

"Excessiveness and Race Discrimination in the Military Death Penalty: Lessons from Civilian Courts Since *Furman v. Georgia* (1972)," Judicial Conference of the Court of Appeals For The Armed Forces, Columbus School of Law, Washington, D.C. May 19, 2004.

"Questions and Answers Concerning Evidence of Racial Disparities in the Administration of the Death Penalty," CLE Panel, NAACP Convention, Milwaukee, WI, July 11, 2005.

"Race Discrimination and the Administration of the Death Penalty: the experience of the United States Armed Forces: preliminary findings" University of Illinois Law School Seminar, April 15, 2006 and Harvard Law School conference on Race and the Death Penalty, May 5, 2006.

"Racial Discrimination in the Administration of the Death Penalty: the Maryland experience (1978-2000),"Maryland Summit on the Abolition of Capital Punishment, Baltimore Md., January 2007.

"Race and Proportionality since *McCleskey v. Kemp* (1987): different actors with mixed strategies of denial and avoidance," Columbia Law School and NAACP Symposium "Pursing Racial Fairness in the Administration of Justice: Twenty Years After *Mc McCleskey v. Kemp*, March 3, 2007; University of Miami Law School, Seminar, March 19, 2007; Georgia State University Law School, Atlanta, Conference on Race Discrimination and the Administration of the Criminal Justice System, October 4, 2007.

"The Story of *McCleskey v. Kemp*: Capital Punishment and the Legitimization of Racial Discrimination," University of Texas Law School, Symposium on Capital Punishment Stories, Foundation Press (2009), November 4, 2007.

"Evidence of the Inevitability and Ineradicability of Arbitrariness and Discrimination in the Administration of Capital Punishment in Maryland – Past, Present and Future," Testimony before the Maryland Capital Punishment Commission, Annapolis, Maryland, July 30, 2008.

Miscellaneous

Member: American Bar Association; American Law Institute; American Society of Criminology; Law and Society Association.

Board of Editors: Evaluation Quarterly (1976-79); Law & Policy Quarterly (1978-79); Law and Human Behavior (1984-); Psychology, Public Policy and Law (1994-).

Board of Trustees, Law and Society Association (1992-94).

Grant Recipient, N.S.F. Law and Social Science Program
1974-75--"Quantitative Proof of Discrimination."

Invited Participant, N.S.F. Sponsored Conference on the Use of Scientific Evidence in Judicial Proceedings, November 1977.

Invited Participant, ABA--AAAS Conference on Cross Education of Lawyers and Scientists, Airlie House, Virginia, May 1978.

Reporter, Roscoe Pound Am. Tr. Lawyers Foundation Conf. On Capital Punishment, Harvard University, June 1980.

Grant Recipient, National Institute of Justice, 1980-81, "The Impact of Procedural Reform on Capital Sentencing: the Georgia Experience."

Consultant, Delaware Supreme Court, April 1981 and South Dakota Supreme Court, November 1981, on the proportionality review of death sentences.

Member, Special Committee of the Association of the Bar of New York on Empirical Data in Legal Decision Making and the Judicial Management of Large Data Sets (1980-82).

Grant Recipient, NSF Law & Social Science Program. "A Longitudinal Study of Homicide Case Processing" (1983).

Consultant, National Center for State Courts project on the proportionality review of death sentences (1982-84).

Expert witness in McCleskey v. Kemp, 105 S.Ct. 1756 (1987), a capital case challenging the constitutionality of Georgia's capital sentence process.

Recipient, Law and Society Association's Harry Kalven Prize for Distinguished Scholarship in Law and Society (with G. Woodworth & C. Pulaski) for our capital punishment research (June 11, 1987).

Grant recipient, State Justice Institute, 1988-1992, "Judicial Management of Judicial Awards for Noneconomic and Punitive Damages" (with Dr. J. MacQueen & J. Gittler).

Special Master for Proportionality Review of Death Sentences for the New Jersey Supreme Court: 1988-91.

Member, AALS Committee on Curriculum and Research (1994-97).

Recipient, “Michael J. Brody Award for Faculty Excellence in Service to the University of Iowa”, October 1996.

Recipient, “Award For Faculty Excellence,” Board of Regents, State of Iowa, October 18, 2000.

Grant recipient, Nebraska Crime Commission, “The Disposition of Nebraska Homicide Cases (1973-1999)” (2000).

Grant recipient, JEHT Foundation, support for study of racial discrimination in the death penalty: the experience of the United States Armed Forces: 1984-2005 (October 2005).

Recipient, Harold Hughes Award, Iowans Against the Death Penalty (October 27, 2007) for advocacy and research used in opposition to the reintroduction of the death penalty in Iowa.

Member, AAUP, Iowa Chapter (1969-___), Member, Executive Board (1992- ___), Member Committee A (1985-__)

APPENDIX B

GEORGE WOODWORTH

CURRICULUM VITAE

February 25, 2009

Address:

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Personal Data:

Born: May 29, 1940, Oklahoma City, Oklahoma
Marital Status: Married with two children

Education:

B.A. Carleton College, Northfield, Minnesota, 1962
Ph.D. University of Minnesota, 1966

Employment:

Instructor, Department of Statistics, University of Minnesota, 1965-66.

Assistant Professor, Department of Statistics, Stanford University, 1966-71.

Assistent (Visiting Assistant Professor), Department of Mathematical Statistics, Lund Institute of Technology, Lund, Sweden, 1970-71 (on leave from Stanford).

Associate Professor, Department of Statistics, The University of Iowa, Iowa City, Iowa, 1971-1996.

Associate Director, Director (1973-1980), Acting Director (1982-3), Adviser (1984-present): University of Iowa Statistical Consulting Center.

Associate Professor, Department of Preventive Medicine, Division of Biostatistics, University of Iowa, 1990-1996.

Professor, Department of Statistics and Actuarial Science, University of Iowa, 1996-.

Professor, Department of Preventive Medicine, Division of Biostatistics, University of Iowa 1996- .

Research Interests:

Bayesian Inference and Pedagogy

Smooth Bayesian Inference

Bayesian Experimental Design

Applications of Statistics in Biomedical Science, Behavioral Science, and Law and Justice

Multivariate Analysis and Discrete Multivariate Analysis

Dissertations Supervised:

Stanford University Ph.D.:

1. Reading, James (1970). "A Multiple Comparison Procedure for Classifying All Pairs out of k Means as Close or Distant".
2. Withers, Christopher Stroude (1971). "Power and Efficiency of a Class of Goodness of Fit Tests."
3. Rogers, Warren (1971). "Exact Null Distributions and Asymptotic Expansions for Rank Test Statistics."

University of Iowa, Ph.D.:

4. Huang, Yih-Min (1974). "Statistical Methods for Analyzing the Effect of Work-Group Size Upon Performance."
5. Scott, Robert C. (1975). "Smear and Sweep: a Method of Forming Indices for Use in Testing in Non-Linear Systems."
6. Hoffman, Lorrie Lawrence (1981). "Missing Data in Growth Curves."
7. Patterson, David Austin (1984). "Three-Population Partial Discrimination."
8. Mori, Motomi (1989). "Analysis of Incomplete Longitudinal Data in the Presence of Informative Right Censoring." (Biostatistics, joint with Robert Woolson)
9. Galbiati-Riesco, Jorge Mauricio (1990). "Estimation of Choice Models Under Endogenous/Exogenous Stratification."
10. Shin, Mi-Young (1993). "Consistent Covariance Estimation for Stratified Prospective and Case-Control Logistic Regression."
11. Lian, Ie-Bin (1993). "The Impact of Variable Selection Procedures on Inference for a Forced-in Variable in Linear and Logistic Regression."
12. Nunez Anton, Vicente A. (1993). "Analysis of Longitudinal Data with Unequally Spaced Observations and Time Dependent Correlated Errors."
13. Bosch, Ronald J. (1993). "Quantile Regression with Smoothing Splines."
14. Samawi, Hani Michel (1994). "Power Estimation for Two-Sample Tests Using Importance and Antithetic Resampling." (Biostatistics, joint with Jon Lemke)
15. Chen, Hungta (1995). "Analysis of Irregularly Spaced Longitudinal Data Using a Kernel Smoothing Approach." (Biostatistics)
16. Nichols, Sara (2000). "Logistic Ridge Regression." (Biostatistics)
17. Dehkordi, Farideh Hosseini (2001). "Smoothness Priors for Longitudinal Covariance Functions." (Biostatistics)
18. Meyers, Troy (2002) "Frequentist properties of credible intervals."
19. Zhao, Lili, (2006) "Bayesian decision-theoretic group sequential analysis with survival endpoints in Phase II clinical trials."
20. Chakravarty, Subhashish (2007) "Bayesian surface smoothing under anisotropy."

University of Iowa, MS:

19. Juang , Chifei (1993). "A Comparison of Ordinary Least Squares and Missing Information Estimates for Incomplete Block Data."
20. Wu, Chia-Chen (1993). "Time Series Methods in the Analysis of Automatically Recorded Behavioral Data."
21. Peng, Ying (1995). "A Comparison of Chi-Square and Normal Confidence Intervals for Variance Components Estimated by Maximum Likelihood."
22. Wu, Li-Wei (1996). "CART Analysis of the Georgia Charging and Sentencing Study."
23. Meyers,Troy (2000) "Bias Correction for Single-Subject Information Transfer in Audiological Testing."

Publications

Refereed Publications (Law review articles are reviewed and edited by law students):

1. Savage, I.R., Sobel, M., Woodworth, G.G. (1966), "Fine Structure of the Ordering of Probabilities of Rank Orders in the Two Sample Case," *Annals of Mathematical Statistics,* 37, 98-112.
2. Basu, A.P., Woodworth, G.G. (1967), "A Note on Nonparametric Tests for Scale," *Annals of Mathematical Statistics,* 38, 274-277.
3. Rizvi, M.M., Sobel, M., Woodworth, G.G. (1968), "Non-parametric Ranking Procedures for Comparison with a Control," *Annals of Mathematical Statistics,* 39, 2075-2093.
4. Woodworth, G.G. (1970), "Large Deviations, Bahadur Efficiency of Linear Rank Statistics," *Annals of Mathematical Statistics,* 41, 251-183.
5. Rizvi, M.H., Woodworth, G.G. (1970), "On Selection Procedures Based on Ranks: Counterexamples Concerning Least Favorable Configurations," *Annals of Mathematical Statistics,* 41, 1942-1951.
6. Woodworth, G.G. (1976), "t for Two: Preposterior Analysis for Two Decision Makers: Interval Estimates for the Mean," *The American Statistician,* 30, 168-171.
7. Hay, J.G., Wilson, B.D., Dapena, J., Woodworth, G.G. (1977), "A Computational Technique to Determine the Angular Momentum of a Human Body," *J. Biomechanics,* 10, 269-277.
8. Woodworth, G.G. (1979), "Bayesian Full Rank MANOVA/MANCOVA: An Intermediate Exposition with Interactive Computer Examples," *Journal of Educational Statistics,* 4(4), 357-404.
9. Baldus, DC., Pulaski, C.A., Woodworth, G.G., Kyle, F. (1980), "Identifying Comparatively Excessive Sentences of Death: A Quantitative Approach," *Stanford Law Review,* 33(1),1-74.
10. Louviere, J.J., Henley, D.H., Woodworth, G.G., Meyer, J.R., Levin, I. P., Stoner, J.W., Curry, D., Anderson D.A. (1981), "Laboratory Simulation vs. Revealed Preference Methods for Estimating Travel Demand Models: An Empirical Comparison," *Transportation Research Record,* 797, 42-50.
11. Baldus, D.C., Pulaski, C.A., Woodworth, G.G. (1983), "Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience," *The Journal of Criminal Law and Criminology,* 74(3), 661-753.

12. Louviere, J.J., Woodworth, G.G. (1983), "Design and Analysis of Simulated Consumer Choice of Allocation Experiments: An Approach Based on Aggregate Data," *Journal of Marketing Research*, XX, 350-367.

13. Baldus, D.C., Pulaski, C.A., Woodworth, G.G. (1986), "Monitoring and Evaluating Contemporary Death Sentencing Systems: Lessons from Georgia," *U.C. Davis Law Review*, 18(4), 1375-1407.

14. Baldus, D.C., Pulaski, C.A., Woodworth, G.G. (1986), "Arbitrariness and Discrimination in the Administration of the Death Penalty: A Challenge to State Supreme Courts," *Stetson Law Review*, XV(2), 133-261.

15. Bober, T., Putnam, C.A., Woodworth, G.G. (1987), "Factors Influencing the Angular Velocity of a Human Limb Segment," *Journal of Biomechanics*, 20(5), 511-521.

16. Gantz, B.J., Tyler, R.S., Knutson, J.F., Woodworth, G.G., Abbas, P., McCabe, B.F., Hinrichs, J., Tye-Murray, N., Lansing, C., Kuk, F., Brown, C. (1988), "Evaluation of Five Different Cochlear Implant Designs: Audiologic Assessment and Predictors of Performance," *Laryngoscope*, 98(10), 1100-6.

17. Tye-Murray, N., Woodworth, G.G. (1989), "The Influence of Final Syllable Position on the Vowel and Word Duration of Deaf Talkers," *Journal of the Acoustical Society of America*, 85, 313-321.

18. Baker, R.G., Van Nest, J., Woodworth, G.G. (1989), "Dissimilarity Coefficients for Fossil Pollen Spectra from Iowa and Western Illinois During the Last 30,000 Years," *Palynology*, 13, 63-77.

19. Shymansky, J.A., Hedges, L.V., Woodworth, G.G. (1990), "A Reassessment of the Effects of 60's Science Curricula on Student Performance," *Journal of Research in Science Teaching*, 27(2), 127-144.

20. Tye-Murray, N., Purdy, S., Woodworth, G.G., Tyler, R.S. (1990), "Effect of Repair Strategies on Visual Identification of Sentences," *Journal of Speech and Hearing Disorders*, 55, 621-627.

21. Cadoret, R.C., Troughton, E.P., Bagford, J.A., Woodworth, G.G. (1990), "Genetic and Environmental Factors in Adoptee Antisocial Personality," *European Archives of Psychiatry and Neurological Sciences*, 239(4), 231-240.

22. Chakraborty, G., Woodworth, G.G., Gaeth, G.J., Ettenson, R. (1991), "Screening for Interactions Between Design Factors and Demographics in Choice-Based Conjoint," *Journal of Business Research*, 23(3), 219-238.

23. Kochar, S.C., Woodworth, G.G. (1991). "Rank order Probabilities for the Dispersion Problem," *Statistics & Probability Letters*, 14(4), 203-208.

24. Knutson, J.F., Hinrichs, J.V., Tyler, R.S., Gantz, B.J., Schartz, H.A., Woodworth, G.G. (1991), "Psychological Predictors of Audiological Outcomes of Multichannel Cochlear Implants: Preliminary Findings," *Annals of Otology, Rhinology & Laryngology*, 100(10), 817-822.

25. Knutson, J.F., Schartz, H.A., Gantz, B.J., Tyler, R.S., Hinrichs, J.V., Woodworth, G.G. (1991), "Psychological Change Following 18 Months of Cochlear Implant Use," *Annals of Otology, Rhinology & Laryngology*, 100(11), 877-882.

26. Kirby, R.F., Woodworth, C.H., Woodworth G.G., Johnson, A.K. (1991), "Beta-2 Adrenoceptor Mediated Vasodilation: Role in Cardiovascular Responses to Acute Stressors in Spontaneously Hypertensive Rats," *Clin. and Exper. Hypertension.- Part A, Theory and Practice*, 13(5), 1059-1068.

27. Tye-Murray, N., Tyler, R.S., Woodworth, G.G., Gantz, B.J. (1992), "Performance over Time with a Nucleus or Ineraid Cochlear Implant," *Ear and Hearing*, 13, 200-209.

28. Tye-Murray, N., Purdy, S.C., Woodworth, G.G. (1992), "Reported Use of Communication Strategies by SHHH Members: Client, Talker, and Situational Variables," *Journal of Speech & Hearing Research*, 35(3), 708-717.

29. Mori, M., Woodworth, G.G., Woolson, R.F. (1992), "Application of Empirical Bayes Inference to Estimation of Rate of Change in the Presence of Informative Right Censoring," *Statistics in Medicine*, 11, 621-631.

30. Shymansky, J.A., Woodworth, G.G., Norman, O., Dunkhase, J., Matthews, C., Liu, C.T. (1993), "A Study of Changes in Middle School Teachers' Understanding of Selected Ideas in Science as a Function of an In-Service Program Focusing on Student Preconceptions," *J. Res. in Science Teaching*, 30, 737-755.

31. Wallace, R.B., Ross, J.E., Huston, J.C., Kundel, C., Woodworth, G.G. (1993), "Iowa FICSIT Trial: The Feasibility of Elderly Wearing a Hip Joint Protective Garment to Reduce Hip Fractures," *J. Am. Geriatr. Soc.*, 41(3), 338-340.

32. Gantz, B.J., Woodworth, G.G., Knutson, J. F., Abbas, P.J., Tyler, R.S. (1993), "Multivariate Predictors of Success with Cochlear Implants," *Advances in Oto-Rhino-Laryngology*, 48, 153-67.

33. Mori, M., Woolson, R.F., Woodworth, G.G. (1994), "Slope Estimation in the Presence of Informative Right Censoring: Modeling the Number of Observations as a Geometric Random Variable," *Biometrics*, 50(1), 39-50.

34. Nunez-Anton, V., Woodworth, G.G. (1994), "Analysis of Longitudinal Data with Unequally Spaced Observations and Time Dependent Correlated Errors," *Biometrics*, 50(2), 445-456.

35. Baldus, D.C., Woodworth, G.G., Pulaski, C.A. (1994), "Reflections on the Inevitability of Racial Discrimination in Capital Sentencing and the Impossibility of Its Prevention, Detection, and Correction," *Washington and Lee Law Review*, 51(2), 359-430.

36. Cutrona, C.E., Cadoret, R.J., Suhr, J.A., Richards, C.C., Troughton, E. Schutte, K., Woodworth, G. G. (1994), "Interpersonal Variables in the Prediction of Alcoholism Among Adoptees: Evidence for Gene-Environment Interactions," *Comprehensive Psychiatry*, 35(3), 171-9.

37. De Fillippo, C.L., Lansing, C.R., Elfenbein, J.L., Kallaus-Gay, A., Woodworth, G.G. (1994), "Adjusting Tracking Rates for Text Difficulty via the Cloze Technique," *Journal of the American Academy of Audiology*, 5(6), 366-78

38. Gantz, B.J., Tyler, R.S., Woodworth, G.G., Tye-Murray, N. Fryauf-Bertschy, H. (1994), "Results of Multichannel Cochlear Implants in Congenital and Acquired Prelingually Deafened Children: Five Year Follow-Up," *Am. J. Otol.*, 15 (Supplement 2), 1-7.

39. Cadoret, R.J., Troughton, E., Woodworth, G.G. (1994), "Evidence of Heterogeneity of Genetic Effect in Iowa Adoption Studies," *Annals of the New York Academy of Sciences*, 708, 59-71.

40. Bosch, R., Ye, Y., Woodworth, G.G. (1995), "An Interior Point Quadratic Programming Algorithm Useful for Quantile Regression with Smoothing Splines," *Computational Statistics and Data Analysis*, 19, 613-613.

41. Cadoret, R.J., Yates, W.R., Troughton, E., Woodworth, G.G., Stuart, M.A. (1995), "Adoption Study Demonstrating Two Genetic Pathways to Drug Abuse," *Archives of General Psychiatry*, 52(1), 42-52.

42. Tye-Murray, N., Spencer, L., Woodworth, G.G. (1995), "Acquisition of Speech by Children who have Prolonged Cochlear Implant Experience," *Journal of Speech & Hearing Research*, 38(2), 327-37.

43. Cadoret, R.J., Yates, W.R., Troughton, E., Woodworth, G.G., Stewart, M.A. (1995), "Genetic-Environmental Interaction in the Genesis of Aggressivity and Conduct Disorders," *Archives of General Psychiatry*, 52(11), 916-924.

44. Tyler, R.S., Lowder, M.W., Parkinson, A.J., Woodworth, G.G., Gantz, B.J. (1995), "Performance of Adult Ineraid and Nucleus Cochlear Implant Patients after 3.5 Years of Use," *Audiology*, 34(3), 135-144.

45. Baldus, D, MacQueen, JC, and Woodworth GG. (1995) "Improving Judicial Oversight of Jury Damages Assessments: A Proposal for the Comparative Additur/Remittitur Review of Awards for Nonpecuniary Harms and Punitive Damages," with John C. MacQueen and George Woodworth, 80 Iowa Law Review 1109 (1995), 159 pages.

46. Parkinson, A.J., Tyler, R.S., Woodworth, G.G., Lowder, M., Gantz, B.J., (1996) "A Within-Subject Comparison of Adult Patients Using the Nucleus F0F1F2 and F0F1F2B3B4B5 Speech Processing Strategies," *Journal of Speech & Hearing Research*, Volume 39, 261-277.

47. Baldus, D., MacQueen, J.C., Woodworth, G.G., (1996) "Improving Judicial Oversight of Jury Damages Assessments: A Proposal for the Comparative Additur/Remittitur Review of Awards for Nonpecuniary Harms and Punitive Damages," *Iowa Law Review*, (80) 1109-1267.

48. Cadoret, Remi J., Yates, William R., Troughton, E., Woodworth, G.G. (1996) "An Adoption Study of Drug Abuse/Dependency in Females," *Comprehensive Psychiatry*, Vol. 37, No. 2, 88-94.

49. Tripp-Reimer, T., Woodworth, G.G., McCloskey, J.C., Bulechek, G. (1996), "The Dimensional Structure of Nursing Intervention," *Nursing Research* 45(1) 10-17.

50. Tyler RS. Fryauf-Bertschy H. Gantz BJ. Kelsay DM. Woodworth GG. (1997) "Speech perception in prelingually implanted children after four years," *Advances in Oto-Rhino-Laryngology*. 52:187-92.

51. Tyler RS, Gantz BJ, Woodworth GG, Fryauf-Bertschy H, and Kelsay DM. (1997) "Performance of 2- and 3-year-old children and prediction of 4-year from 1-year performance. *American Journal of Otology*. 18(6 Suppl):S157-9, 1997.

52. Miller CA, Abbas PJ, Rubinstein JT, Robinson BK, Matsuoka AJ, and Woodworth G. (1998) "Electrically evoked compound action potentials of guinea pig and cat: responses to monopolar, monophasic stimulation." *Hearing Research*. 119(1-2):142-54, 1998 May.

53. Knutson JF, Murray KT, Husarek S, Westerhouse K, Woodworth G, Gantz BJ, and Tyler RS. (1998) "Psychological change over 54 months of cochlear implant use." *Ear & Hearing*, 19(3):191-201, 1998.

54. Gfeller K, Knutson JF, Woodworth G, Witt S, and DeBus B. (1998) "Timbral recognition and appraisal by adult cochlear implant users and normal-hearing adults." J*ournal of the American Academy of Audiology*, 9(1):1-19, 1998.

55. Baldus D, Woodworth G, Zuckerman D, Weiner NA, Broffitt B. (1998) "Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview with Recent Findings from Philadelphia," Cornell Law Review, 88:6, 1998.

56. Green GE. Scott DA. McDonald JM. Woodworth GG. Sheffield VC. Smith RJ. Carrier rates in the midwestern United States for GJB2 mutations causing inherited deafness. JAMA. 281(23):2211-6, 1999 Jun 16.

57. Gantz BJ. Rubinstein JT. Gidley P. Woodworth GG. Surgical management of Bell's palsy. Laryngoscope. 109(8):1177-88, 1999 Aug

58. Featherstone KA. Bloomfield JR. Lang AJ. Miller-Meeks MJ. Woodworth G. Steinert RF. Driving simulation study: bilateral array multifocal versus bilateral AMO monofocal intraocular lenses. Journal of Cataract & Refractive Surgery. 25(9):1254-62, 1999 Sep.

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60. Tyler RS. Teagle HF. Kelsay DM. Gantz BJ. Woodworth GG. Parkinson AJ. Speech perception by prelingually deaf children after six years of Cochlear implant use: effects of age at implantation. *Annals of Otology, Rhinology, & Laryngology - Supplement. 185:82-4, 2000 Dec.*

61. Ballard KJ. Robin DA. Woodworth G. Zimba LD. Age-related changes in motor control during articulator visuomotor tracking. *Journal of Speech Language & Hearing Research. 44(4):763-77, 2001 Aug.*

62. Gfeller K. Witt S. Woodworth G. Mehr MA. Knutson J. Effects of frequency, instrumental family, and cochlear implant type on timbre recognition and appraisal. *Annals of Otology, Rhinology & Laryngology. 111(4):349-56, 2002 Apr.*

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64. Weiler JM. Quinn SA. Woodworth GG. Brown DD. Layton TA. Maves KK. Does heparin prophylaxis prevent exacerbations of hereditary angioedema?. *Journal of Allergy & Clinical Immunology. 109(6):995-1000, 2002 Jun.*

65. Berkowitz RB. Woodworth GG. Lutz C. Weiler K. Weiler J. Moss M. Meeves S. Onset of action, efficacy, and safety of fexofenadine 60 mg/pseudoephedrine 120 mg versus placebo in the Atlanta allergen exposure unit. *Annals of Allergy, Asthma, & Immunology. 89(1):38-45, 2002 Jul.*

66. Baldus, D, Woodworth GG, Grosso, C., Christ, M. (2002) "Arbitrariness and Discrimination in the Administration of the Death Penalty: A Legal and Empirical Analysis of the Nebraska Experience (1973-1999)," with George Woodworth, Catherine M. Grosso, and Aaron M. Christ, 81 *Nebraska Law Review* 486 (2002), 271 pages.

67. Baldus, D, and Woodworth GG. (2003) "Race Discrimination in the Administration of the Death Penalty: An Overview of the Empirical Evidence with Special Emphasis on the Post-1990 Research," with George Woodworth, 39 *Criminal Law Bulletin* 194 (2003), 33 pages.

68. Kadane, J. and Woodworth G.G. (2004) "Hierarchical Models for Employment Decisions," *Journal of Business and Economic Statistics*, 1 April 2004, vol. 22, no. 2, pp. 182-193(12).

69. Woodworth, G.G. and Kadane, J.B. (2004) "Expert testimony supporting post-sentence civil incarceration of violent sexual offenders." *Law Probablity and Risk*, 2004 3: 221-241.

70. Baldus, D. and Woodworth, G.G., "Race Discrimination and the Legitimacy of Capital Punishment: Reflections on the Interaction of Fact and Perception," 53 *DePaul Law Review* 1411 (2004).

71. Weiler K. Christ AM. Woodworth GG. Weiler RL. Weiler JM. "Quality of patient-reported outcome data captured using paper and interactive voice response diaries in an allergic

rhinitis study: is electronic data capture really better?. *Annals of Allergy, Asthma, & Immunology*. 92(3):335-9, 2004 Mar.

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73. Woodworth, G.G. and Kadane, J. "Age and Time-Varying Proportional Hazards Model for Employment Discrimination," *Annals of Applied Statistics*, 2009 accepted pending revisions.

74. Zhao, L and Woodworth, G.G. "Bayesian decision sequential analysis with survival endpoint in phase II clinical trials," *Stat Med*, 2009, Feb 18.

Books, Chapters:

75. Bober, T., Hay, J.G., Woodworth, G.G. (1979), "Muscle Pre-Stretch and Performance," in *Science in Athletics*, eds. Juris Terauds and George G. Dales, Del Mar CA: Academic Publishers, pp. 155-166.

76. Hay, J.G., Dapena, J., Wilson, B.D., Andrews, J.G., Woodworth, G.G. (1979), "An Analysis of Joint Contributions to the Performance of a Gross Motor Skill," in *International Series on Biomechanics, Vol. 2B, Biomechanics VI-B*, eds. Erling Asmussen and Kuert Jorgensen, Baltimore: University Park Press, pp. 64-70.

77. Hay, J.G., Vaughan, C.L., Woodworth, G.G. (1980). "Technique and Performance: Identifying the Limiting Factors," in *Biomechanics VII-B*, eds. Adam Morecki, Kazimerz Fidelus, Krzysztof Kedzior, Andrzej Wit, Baltimore: University Park Press, pp. 511-520.

78. Woodworth, G.G. (1980). "Numerical Evaluation of Preposterior Expectations in the Two-Parameter Normal Model, with an Application to Preposterior Consensus Analysis," in *Bayesian Analysis in Econometrics and Statistics*, ed. Arnold Zellner, Amsterdam: North-Holland Publishing Co., pp. 133-140.

79. Hodges, L.V., Shymansky, J.A., Woodworth, G.G. (1989), *Modern Methods of Meta-Analysis: an NSTA Handbook*, Washington, D.C.: National Science Teachers Association.

80. Baldus, D.C., Woodworth, G.G., Pulaski, C.A. (1990), *Equal Justice and the Death Penalty: A Legal and Empirical Analysis*, Boston: Northeastern University Press.

81. Baldus, D., Pulaski, C., Woodworth GG (1992) "Law and Statutes in Conflict: Reflections on McCleskey v. Kemp," in Handbook of Psychology and Law, edited by Dorothy K. Kagehiro and William S. Laufer. New York: Springer-Verlag, 1992.

82. Baldus, D., Pulaski, C., Woodworth GG (1992) "Race Discrimination and the Death Penalty," with Charles J. Pulaski, Jr. and George Woodworth, in The Oxford Companion to the Supreme Court of the United States. New York: Oxford University Press, 1992, p 705-7.

83. Woodworth, G.G. (1994). "Managing Meta-Analytic Databases," in *The Handbook of Research Synthesis*, eds. Harris Cooper and Larry V. Hedges, New York: Russell Sage Foundation, pp. 177-189.

84. Lovelace, D. Cryer, J., Woodworth, G.G. (1994), *Minitab Handbook to Accompany Statistics for Business Data Analysis and Modelling, 2nd edition*, Belmont, CA: Wadsworth Publishing Company.

85. Tye-Murray, N. Kirk, K.L., Woodworth, G.G. (1994). "Speaking with the Cochlear Implant Turned On and Turned Off," in *Datenknovertierung, Reproduktion und Drick*, eds. I.J. Hochmair-Desoyer and E.S. Hochmair, Wien, Manz, pp. 552-556.

86. Baldus, D. MacQueen, JC, Woodworth GG. (1996) "Additur/Remittitur Review: An Empirically Based Methodology for the Comparative Review of General Damages Awards for Pain, Suffering, and Loss of Enjoyment of Life," with John C. MacQueen and George Woodworth, in Reforming the Civil Justice System, edited by Larry Kramer. New York: New York University Press, 1996, p 386, 30 pages.

87. Baldus, D, and Woodworth, GG. (1998) "Race Discrimination and the Death Penalty: An Empirical and Legal Overview," with George Woodworth, in America's Experiment with Capital Punishment, edited by James C. Acker, Robert M. Bohm, and Charles S. Lanier. Durham, NC: Carolina Academic Press, 1998, page 385, 32 pages.

88. Woodworth, George G. *Biostatistic: A Bayesian Introduction.* New York: John Wiley and Sons, September, 2004.

Unrefereed Articles, Reviews.

89. Libby, D.L., Novick, M.R., Chen, J.A., Woodworth, G.G., Hamer, R.M. (1981), "The Computer-Assisted Data Analysis (CADA) Monitor," *The American Statistician*, 35(3), 165-166.

90. Woodworth, G.G. (1987), "STATMATE/PLUS, Version 1.2," *The American Statistician*, 41(3), 231-233.

91. Hoffmaster, D., Woodworth, G.G. (1987), "A FORTRAN Version of the Super Duper Pseudorandom Number Generator," *Science Software Quarterly*, 3(2), 100-102.

92. Baldus, D.C., Woodworth, G.G., Pulaski, C.A. (1987) "Death penalty in Georgia remains racially suspect," *Atlanta Journal and Constitution*, September 6, 1987.

93. Hawkins, D., Conaway, M., Hackl, P., Kovacevic, M., Sedransk, J., Woodworth, G.G., Bosch, R, Breen, C. (1989) "Report on Statistical Quality of Endocrine Society Journals," *Endocrinology*, 125(4), 1749-53.

94. Woodworth, G.G. (1989). "Statistics and the Death Penalty," *Stats. The Magazine for Students of Statistics*, 2, 9-12.

95. Baldus, D.C., Pulaski, C.A., Woodworth, G.G. (1989), "Reflections on 'Modern' Death Sentencing Systems," Book review, *Criminal Law Forum*, 1, 190-197.

96. Baldus, D., Woodworth, G.G. (1993). "Proportionality: The View of the Special Master," *Chance, New Directions for Statistics and Computers*, 6(3), 9-17.

97. "Race Discrimination in America's Capital Punishment System since Furman v. Georgia (1972): The Evidence of Race Disparities and the Record of Our Courts and Legislatures in Addressing the Issue," with George Woodworth, Report to the A.B.A. Section of Individual Rights and Responsibilities (1997), 19 pages.

98. Baldus**,** David C., George Woodworth**,** David Zuckerman, Neil Alan Weiner, and Barbara Broffitt (2001)**.** "The Use of Peremptory Challenges in Capital Murder Trials: A legal and Empirical Analysis," *University of Pennsylvania Journal of Constitutional Law*, February, 2001.

99. "Complement to Chapter 6. The WinBUGS Program," in *Bayesian Statistics: Principles, Models, and Applications, Second Edition*, by S. James Press, John Wiley and Sons, Inc., New York, 2002.

Convention Papers, other Oral Presentations:

100. Woodworth, G.G. (1983), "Analysis of a Y-Stratified Sample: The Georgia Charging and Sentencing Study," in *Proceedings of the Second Workshop on Law and Justice Statistics*, ed. Alan E. Gelfand, U.S. Department of Justice, Bureau of Justice Statistics, pp. 18-22.

101. Woodworth, G.G., Louviere, J.J. (1985), "Simplified Estimation of the MNL Choice Model using IRLS," Contributed talk at TIMS/ORSA Marketing Science Conference at Vanderbilt University.

102. Woodworth, G.G. (1985), "Recent Studies of Race- and Victim Effects in Capital Sentencing," *Proceedings of the Third Workshop on Law and Justice Statistics*, ed. G.G. Woodworth, U.S. Department of Justice, Bureau of Justice Statistics, pp. 55-58.

103. Woodworth, G.G., Louviere, J.J. (1988), "Nested Multinomial Logistic Choice Models Under Exogenous and Mixed Endogenous-Exogenous Stratification," *ASA Proceedings of the Business and Economics Statistics Section*, American Statistical Association, pp. 121-129.

104. Woodworth, G.G. (1989), "Trials of an Expert Witness," *ASA Proceedings of the Social Science Section*, American Statistical Association, pp. 143-146.

105. Kirby, R.F., Woodworth, C.H., Woodworth, G.G., Johnson A.K., (1989), "Differential Cardiovascular Effects of Footshock and Airpuff Stressors in Wistar-Kyoto and Spontaneously Hypertensive Rats," *Society for sNeuroscience Abstracts*, 15, 274.

106. Woodworth, C.H., Kirby, R.F., Woodworth, G.G., Johnson, A.K. (1989), "Spontaneously Hypertensive and Wistar-Kyoto Rats Show Behavioral Differences but Cardiovascular Similarities in Tactile Startle," *Society for Neuroscience Abstracts*, 15, 274.

107. Woodworth, G.G., Mah, Jeng, Breiter, D. "Bayesian Experimental Design of Sequential and Nonsequential Medical Device Trials. Contributed Talk, Joint Statistical Meeting 2005, Minneapolis, MN

Unpublished Reports:

108. Baldus, D.C., Woodworth, G.G., Pulaski C.A. (1989). "Procedural Reform Study," *Inter-University Consortium for Political and Social Research: Criminal Justice Archive.*

109. Baldus, D.C., Woodworth, G.G., Pulaski C.A. (1989). "Charging and Sentencing Study," *Inter-University Consortium for Political and Social Research: Criminal Justice Archive.*

Work in Process:

110. Woodworth, G.G., *Statistical Issues in Recent Re-Analyusis of Capital Charging and Sentencing Data*, read at John Jay College, February 21, 2007.

111. Woodworth, G.G., "Bayesian Experimental Design of Sequential Clinical Trials." To be submitted to *Statistics in Medicine*, 2009.

112. Woodworth, G.G., *Biostatistics II: Intermediate Bayesian Analysis*, Proposal accepted by John Wiley, December 2006, completion date May 1, 2009.

Professional Honors and Awards:

1987 Harry Kalven prize of the Law and Society Association (with David Baldus and Charles Pulaski).

1987 Iowa Educational Research and Evaluation Association, annual award "For Excellence in the Field of Educational Research and Evaluation for Best Educational Evaluation Study," (with Larry Hedges and James Shymansky).

1991 Gustavus Myers Center for the Study of Human Rights in the United States, selection of *Equal Justice and the Death Penalty* as an outstanding book on the subject of human rights (with David Baldus and Charles Pulaski).

1996 Elected Fellow of the American Statistical Association

Service Activities

Departmental Service:

University of Iowa Statistical Consulting Center:
Founder, Associate Director, Director (1973-1980)
Acting Director (1982-3)
Member of Steering Committee and Adviser (1984-present).

University Service:

Outside member of over thirty Ph.D. dissertation committees, 1973-present.

Woodworth, G.G., Lenth, R.V.L. (1982) "A Stratified Sampling Plan for Estimating Departmental and University-Wide Administration Effort."

University of Iowa, Basic Mathematics Committee, January 1983-84.

Statistics Advisor to the University of Iowa Journal of Corporation Law, 1984-85.

University of Iowa, Research Council, 1984-87, Chairman 1986-87.

University House Advisory Committee, 1986-87.

Chairman, Political Science Review Committee, 1988-89.

Interdisciplinary Ph.D. Program in Applied Mathematical Sciences, 1988-present.

University of Iowa, Judicial Commission, 1979-81, 1990-93.

University of Iowa, Liberal Arts Faculty Assembly, 1985-87, 1995-6.

Professional Service:

NAACP Legal Defense and Education Fund, 1980-3: Statistical Analysis of the Georgia Charging and Sentencing Study, Expert testimony in McCleskey vs. Zant (decided in the U.S. Supreme Court).

ASA Law and Justice Statistics Committee, 1982-1987: Member of two methodological review panels in Washington, DC. Organizer of two-day Workshop on Law and Justice Statistics, August 1985.

ASA Visiting Lecturer Program, 1984-1988.
1984 Invited talk at Culver-Stockton College
1986 Invited talk at Moorhead State University
1988 Invited talk at Grinnell College

Invited Participant, 1984, *Planning Session for Florida Capital Charging and Sentencing Study*, Florida Office of Public Defender, Richard H. Burr, Esq.

Editor, *Proceedings of the Third Workshop on Law and Justice Statistics*, American Statistical Association, 1985.

Invited Panelist, 1986 Law and Society Association Annual Meeting, Panel discussion of current state of capital sentencing research.

Invited Speaker, 1987 *Seminar-Workshop on Meta-Analysis in Research*, University of Puerto Rico, San Juan, Faculty of Education, Department of Graduate Studies.

Associate Editor, *Evaluation Review*, 1983-1986.

Baldus, D., Woodworth, G.G., Pulaski, C.A. (1989). Oral Testimony before the U.S. Senate Judiciary Committee (presented by D. Baldus).

Invited Participant, ASA Media Experts Program (1989).

Statistical Consultant to Special Master, David Baldus. State of New Jersey, Administrative Office of Courts -- Proportionality Review System. 1989-present.

ASA Law and Justice Statistics Committee, second appointment, 1993-95.

Baldus, D., Woodworth, G.G. (1993), "An Iowa Death Penalty System in the 1990's and Beyond: What Would it Bring?" Report submitted to the Senate Judiciary Committee, Iowa Legislature, February 24, 1993.

Baldus, D., MacQueen, J.C., Woodworth, G.G. (1993), "An Empirically-Based Methodology for Additur/Remittitur Review and Alternative Strategies for Rationalizing Jury Verdicts," Report prepared for the Research Conference on Civil Justice Reform in the 1990's.

Baldus, D.C., Woodworth G.G. (1995), "Proportionality Review and Capital Charging and Sentencing: A Proposal for a Pilot Study," Commonwealth of Pennsylvania, Administrative Office of Courts.

Session Chair, Joint Statistical Meeting, Minneapolis, 2005.

Session Discussant, 2006 FDA/Industry Statistics Workshop, Washington, DC, September 2006

Invited Speaker at a one-day conference on Race and Death Penalty Research, at John Jay College of Criminal Justice, CUNY, February 21, 2007.

Refereeing *(since 1980)***:**

1980: Journal of the American Statistical Association
1982: Journal of Educational Statistics
1983: Journal of Statistical Computation and Simulation
Annals of Mathematical Statistics
Evaluation Review (associate editor)
1984: Transportation Research
Law and Society Review
American Journal of Mathematical and Management Sciences
Journal of Educational Statistics
Evaluation Review (associate editor)
1985: Edited Proceedings of 3rd Workshop on Law and Justice Statistics
Evaluation Review (associate editor)
1986: Psychological Bulletin
National Science Foundation
Evaluation Review (associate editor)
1987: J. Amer. Statist. Assoc.

1988: Science *(ca. 1988)*
1990: Annals of Otology, Rhinology & Laryngology
American Speech-Language-Hearing Association
Macmillan Publishing Company
Survey Methodology Journal
1991: International Journal of Methods in Psychiatric Research
1993: Multivariate Behavioral Research
1994: International Journal of Methods in Psychiatric Research
1995: SIAM Review
Duxbury Press
Acta Applicandae Mathematicae
1996: American Journal of Speech-Language Pathology
1998: Duxbury Press
2001: John Wiley and Sons, Inc.
2002: Addison-Wesley
2004: J. Amer. Statist. Assoc.
2005 J. Amer. Statist. Assoc.

Extramural Consulting and Pro Bono Work:

American College Testing
Allergan
Beling Consultants, Moline IL
Bettendorf Iowa AEA
Coerr Environmental, Chapel Hill
Defender Association of Philadelphia
Death Penalty Information Center
Florida State Public Defender's Office
Gas Research Institute.
Hoechst Marion Roussel / Aventis
Guidant Corporation
HON Corporation
Legal Services Corporation of Iowa
Iowa State Attorney General's Office
Kaiser Aluminum
Electric Power Research Institute
NAACP Legal Defense and Education Fund
National Research Council
Supreme Court of Nebraska
Pittsburgh Plate Glass
Rhone-Poullenc
Stanford Law School
StarForms
Supreme Court of New Jersey
Vigertone Ag Products
Westinghouse Learning Corporation
WMT news department

Intramural Consulting:

I consult almost on a weekly basis with colleagues and students throughout the University, including at one time or another (but not limited to): Audiology, Biology, Exercise Physiology, Geology, Law, Marketing, Nursing, Otolaryngology, Physics, Psychology, Psychiatry, Science Education, the Iowa Driving Simulator, and the National Advanced Driving Simulator.

Expert testimony / depositions:

Robert R. Lang, Esq. (Legal Services Corporation of Iowa)
1982 Ruby vs. Deere (gender discrimination)
Mark R. Schuling, Iowa Assistant Attorney General.
1984 Burlington Northern Railroad Co. vs. Gerald D. Bair, Director (taxation)
Teresa Baustian (Iowa Asst. Atty. General - Civil Rights Division)
1988 Howard vs. Van Diest Supply Co. (age discrimination)
Walter Braud, Esq.
1988 Hollars et. al. vs. Deere & Co. et. al. (gender discrimination)
Mark W. Schwickerath, Esq.
1988 Schwickerath vs. Dome Pipeline, Inc. (effects of chemical spill)
Richard Burr, Esq.
1990 Selvage vs. State of Florida (capital sentencing)
Amanda Potterfield, Esq.
1990 Reed vs. Fox Pool Corporation (product liability)
1994 State of Iowa vs. Dalley (forensic identification via DNA)
Jerry Zimmerman, Esq.
1991 George Volk Case (age discrimination)
1993 Rasmussen vs. Rockwell (age discrimination)
1994 Hans vs. Courtaulds (age discrimination)
Thomas Diehl, Esq.
1992 State of Iowa vs. William Albert Harris (jury composition)
Diane Kutzko, Esq. (Iowa State Bar Association)
1995 Consultation on the validity of the Iowa bar exam.
John Allen, Esq.
1995 Buchholz vs. Rockwell (age discrimination)
Michael M. Lindeman, Esq.
1995 Beck vs. Koehring (age discrimination)
Timothy C. Boller, Esq.

1995 Larh vs. Koehring (age discrimination, see refereed publications, item 68)

Thomas C. Verhulst

1995 Carr vs. J.C. Penny (racial discrimination)

J. Nick Badgerow, Esq.

1995 Zapata et. al., vs. IBP, Inc. (racial/national origin discrimination)

David J. Goldstein, Esq., Faegre and Benson, Minneapolis

1999 Payless Cashways, Inc. Partners v. Payless Cashways (age discrimination)

Catherine Ankenbarndt, Deputy First Assistant Wisconsin State Public Defender

2001 Civil commitment hearing of Keith Rivas (Prediction of Sexual Recidivism)

Michael B. McDonald, Assistant Florida Public Defender

2001 Frye hearing in re Actuarial Prediction of Sexual Recidivisim (see refereed publications, item 69).

Greg Bal, Assistant Iowa Public Defender

2001 Civil commitment hearing of Lanny Taute (Prediction of Sexual Recidivism,

Harley C. Erbe, Esq. Walker Law Firm, Des Moines

2002 Campbell et al. v. Amana Company (Age Discrimination)

Texas State Counsel for Offenders, Huntsville, TX

2002 Daubert hearing in re Actuarial Prediction of Sexual Recidivisim

Michael H. Bloom, Assistant Wisconsin Public Defender

2002 Detention of Morris F. Clement, Forest County Case No. 00 CI 01 (Prediction of Sexual Recidivism)

Federal Court Division, Defender Association of Philadelphia, Capital Habeas Corpus Unit

2002 Petitioner Reginald Lewis (racial discrimination)

2006 Commonwealth v. Baker (jury composition)

Stephen Snyder, Esq., Grey Plant Mooty Mooty and Bennett.

2006-7 (with Jay Kadane)

APPENDIX C

Resume of Richard G. Newell
Principal Consulting Analysis
TOSCA, Inc.

2175 Westminster Circle
Coralville, Iowa 52241
Phone (319) 339-1641
E-Mail: rnewell@q.com

EXPERTISE Accounting, Consulting, project supervision, research, systems analysis, design, programming, testing, implementation and customer support.

HARDWARE IBM 1400 series, 360, 370, and later mainframes, RISC6000, System/3, System/32/34. Build and maintain IBM-compatible multi-media microcomputers.

SOFTWARE CLIPPER, BLINKER, XBASE, COBOL, FORTRAN IV, PL/I, RPG-II, SAS, WYLBUR, TSO, RJE, HASP, MVS, JCL, AIX, ORACLE FORMS 7.0, OS/2, DOS 6.2, WIN 3.1, WIN95, WIN98, WINXP, FTP, TELNET, OFFICE/97 & 2000

EDUCATION University of Iowa: B.B.A. with a major in Marketing. Graduated in Feb. 1963.
University of California at Berkeley: Graduate studies in Computer Science.

RESEARCH and STATISTICS SUPPORT

From December of 2000 to the present time: Principal Research Consultant at Tosca, Inc. under contract with Professor David Baldus at the University of Iowa Law School. Provider of consulting, data collection design, data entry supervision and quality control, database design and maintenance, research, and programming using SAS in support of several studies at the University of Iowa, City of Philadelphia, State of Nebraska, United States Military and others.

PC PROPRIETARY SOFTWARE and HARDWARE SUPPORT

06/91-08/01 Dr. Steven Price – Wrote and maintained Dental Billing System.

08/93-07/01 Dr. John Lennarson – Wrote and maintained Dental Billing System

03/06-08/01 Consulted and assisted in PC hardware purchase, installation & upgrades for several personal and professional clients.

EMPLOYMENT EXPERIENCE

09/86-02/00 Promoted to Consulting Staff Analyst (S21). Internal consultant, project leader and programmer. Provided the majority of the analysis, design, programming and user support for the following:

- ACT-internal: Programming and support for Budget & Finance accounting applications which included the following: Accounts Payable, Billing, Payroll, Job-Costing, and Inventory.
- ACT-resident: Proficiency Exams Program, Educational Opportunity System, Student Aid Systems.
- ACT Software packages. Responsible for all design, programming, and customer support for ASSET, a dBASE system used by over 700 Community Colleges nation-wide from 1989 through the present.

09/85 Promoted to Director of Systems Support (S21). Additional duties: Introduction and support of IBM personal computers. Supervised a staff of 13 people.

09/83 Promoted to Assistant Director of Systems Development (S20). Additional duties: Hiring, training, staff development. Supervised a staff of six people.

2175 Westminster Circle
Coralville, Iowa 52241
Phone (319) 339-1641
E-Mail: rnewell@q.com

06/81	Senior Systems Analyst (S19), American College Testing, 2255 North Dubuque Road, Iowa City, IA, 52243. Duties included consulting, analysis, design, programming & testing.
12/69 - 05/81	Self-employed. DBA Newell Computer Consulting, Inc. Consulting, design, analysis, programming, testing, hardware and software selection, for several clients in the San Francisco Bay area with an emphasis on accounting systems design, programming, and consulting.
09/68 - 11/69	Worked 20 hours per week as a Programmer/Analyst at U.C. Berkeley while attending graduate school. PL/1 & IBM OS
01/64 - 09/68	IBM Corp., Buffalo, New York. Systems Engineer and Marketing Representative. Attended more than 18 weeks of training in basic data processing design and computer programming. Assisted in the installation of punched card and computer systems at several customer sites. Transferred to IBM branch office in Oakland California in early 1968.

APPENDIX D

ROBERTA GLENN
78 Rick Drive
Florence, MA 01062
(413) 585 – 9439
rrglenn@earthlink.net

EXPERIENCE

HABEAS CORPUS RESOURCE CENTER, San Francisco
LEGAL RESEARCH CONSULTANT 2008 – present
Consulting on the design and methodology of an empirical study conducted in the State of California. Responsible for supervising researchers and coordinating overall document review, data collection and data cleaning.

FEDERAL PUBLIC DEFENDER, Middle District Of Pennsylvania
LEGAL RESEARCH CONSULTANT 2007 – present
Retained to conduct research on a variety of constitutional trial issues.

NEW JERSEYANS FOR ALTERNATIVES TO THE DEATH PENALTY, Trenton
LEGAL RESEARCH CONSULTANT 2006 – 2007
Conducted a review and analysis of New Jersey's 600 death eligible homicides using data collected by the New Jersey Administrative Office of the Courts. Drafted and presented a report to the New Jersey Death Penalty Study Commission on the question of whether a significant difference exists between the crimes of defendants selected for the punishment of death and those of defendants who receive life in prison. Testified before the Commission on October 11, 2006.

CAPITAL DEFENDER OFFICE, New York
RESEARCH DESIGN AND METHODOLOGY 2003 – 2005
Consulted on the design and methodology of an empirical study conducted in New York State and involving thousands of capital homicides. Coordinated the redesign of the data collection instrument. Drafted comprehensive instructions, research protocols, and training materials for researchers. Responsible for the design and conduct of training program for graduate students employed as researchers. Screened thousands of cases for possible inclusion in the study and coded data for analysis.

STATE OF CONNECTICUT
DIVISION OF PUBLIC DEFENDER SERVICES
SPECIAL PUBLIC DEFENDER 2001 – 2002
Reviewed and analyzed legal files and trial evidence for research study of racial bias in the application of the state's death penalty statute. Drafted case narratives and compiled reports. Contributed to the design of the data collection instrument, coding instructions and the analytical and research methodology.

New York State Bar: 2247229 California State Bar: 196549

GAP, INC., San Francisco
CONTRACT ATTORNEY 1998 – 2001
INTELLECTUAL PROPERTY DEPARTMENT
Negotiated and drafted agreements for personal services, marketing promotions, field advertising, product development, web services, on-line advertising, intellectual property buyouts, and licenses. Coordinated outside counsel advising the company on complex issues of advertising law, tax matters and international law.

FREELANCE JOURNALIST 1997 – 2001
Reported and wrote financial and business stories for Plan Sponsor, Advisors Resource and Global Custodian, nationally and internationally distributed magazines for employers, human resource and benefits executives, institutional investors and financial planners.

ACCENTURE, New York
WRITER; MARKETING AND RESEARCH 1999 - 2001
Conducted interviews with consultants and executives worldwide and produced industry research studies. Composed and edited marketing products and Internet articles for a multinational business consulting firm.

CAROLCO PICTURES, Los Angeles
MUSIC BUSINESS AFFAIRS 1991 - 1995
Negotiated and drafted composer, soundtrack distribution and licensing agreements. Managed music publishing catalog, collected revenue and negotiated co-publishing arrangements worldwide. Responsible for all employment, union issues and special payments inquiries. Supervised all areas of music production for feature films. Created and managed budgets in excess of $3 million. Produced scoring sessions and ensured timely delivery of required recordings.

SCHULTE ROTH & ZABEL, New York
TAX ASSOCIATE 1987 - 1990
Counseled major domestic and international corporations, partnerships and individuals in all aspects of tax planning. Responsible for analyzing and structuring corporate acquisitions and reorganizations, both foreign and domestic. Drafted tax disclosures in offering memoranda, tax opinions, indemnity agreements and letters to clients describing tax consequences of proposed transactions. Represented individual clients in both state and federal tax audit matters.

HONORABLE WILLIAM C. CONNER, Southern District of New York
LAW CLERK 1986 - 1987

EDUCATION

UNIVERSITY OF SAN FRANCISCO SCHOOL OF LAW
J.D., cum laude, 1986
McAuliffe Honor Society
American Jurisprudence Awards: Civil Procedure, Evidence

UNIVERSITY OF CALIFORNIA, BERKELEY
A.B., Political Economy, 1979
Advisory Committee, University Art Museum

APPENDIX E

CALIFORNIA PROJECT NUMBER: _____|_____|_____|_____|_____

CALIFORNIA HOMICIDE STUDY
DATA COLLECTION INSTRUMENT (DCI)

October 2, 2009

Defendant's Name: _____|_____|_____|_____|_____|_____|_____|_____|_____|_____|_____|_____|_____|_____|_____|_____|
Last

_____|_____|_____|_____|_____|_____|_____|_____|_____|_____|_____|_____|_____|_____|_____|_____| |____|
First MI

Coder Last Name:
_____|_____|_____|_____|_____|_____|_____|_____|_____|_____

Table of Contents

Introduction

Coder Note:
(a) This document has seven parts. All of the defendants in this study were convicted between 11/08/1978 and 6/30/2002. Pre-*Furman* law for this study is the Georgia law deemed unconstitutional by the United States Supreme Court law in *Furman v. Georgia* (1972). "*Carlos Window*" law refers to California law in effect between 12/12/1983 and 10/12/1987. "2008" law refers to California law in effect on January 1, 2008.

(b) If the instant/assigned case has a M1 conviction, code Sections I-V and VII. If the instant case has a M2 or VM conviction, code sections I-IV and VI-VII.

Part I includes a thumbnail sketch of the case with overview of Death-Eligibility Classifications and issues.

Part IA includes identifying information of the instant case from the CA Department of Corrections and Rehabilitation (DCR), which provides coders FYI information to compare for consistency with the information presented in the probation report for the case.

Part II addresses the sufficiency of the evidence in the instant case to support substantive coding of the death-eligibility of the case under three legal regimes.

Part III calls for coding of identifying information from the probation report in the instant case.

Part IV. This part describes charging and sentencing decision-making and outcomes in the instant case.

Part V assesses for cases with a first-degree murder conviction (M1) factual criminal liability and death-eligibility under: (1) pre-*Furman* law, (2) post-*Furman* law during the *Carlos* window (12/12/1983 – 10/13/1987),[1] and (3) January 1, 2008 law. Under pre-*Furman* law, all factual common law "murder" (CLM) cases were death-eligible, while death-eligibility for the law in place during the *Carlos* window and the law in place on January 1, 2008 requires factual M1 liability and the presence of one or more statutorily defined special circumstances.

Part VI presents a comparable analysis for cases that resulted in a second degree murder (M2) or voluntary manslaughter (VM) conviction.

Part VII summarizes the death-eligibility classifications of the case under the three legal systems.

With respect to homicide liability, the first question is whether the case is factually murder under pre-Furman law, which defines "death eligibility" under the first system. For the other two legal systems you must determine whether the case is factually M1 under CW and 2008 law, and then you must determine whether one or more special circumstances is factually present in the case under *Carlos* window law and 2008 law.

In Part IV, the focus is strictly on the charges, decisions, and outcomes on liability and special circumstances already determined in the instant case, without regard to the factual basis of the liability

[1] The Carlos Window (CW) ended on October 13, 1987, when the California Supreme Court decided *People v. Anderson*, 43 Cal.3d 1104 (1987).

decision and special circumstances. The approach is different in Parts V and VI where the focus is on factual <u>murder</u>- liability <u>(common law murder, pre-Furman and M1 in the CW and 2008)</u> and the factual presence of special circumstances regardless of the outcome of the case <u>under CW and 2008 law</u>. The one large exception to this approach in Parts V and VI is the controlling fact finding rule, which with a jury nullification exception, controls regardless of the facts of the case. Thus, to the extent that the homicide liability is not determined by a controlling fact finding, the test throughout this document is whether the facts are legally sufficient to support a factual finding of murder of M1 liability.[2] **The same "legal sufficiency" rule holds with respect to the presence of special circumstances under post-*Furman* law.**

<u>PAGE NUMBERS OF QUESTIONS USED IN CROSS REFERENCES ARE ON PAGE 55.</u>

Your judgments in Parts V and VI, therefore, will be informed by the controlling findings of fact of juries and judges and M1 guilty pleas of defendants reported in the probation report for the case.[3] In the absence of controlling findings of fact on liability and special circumstances, the question is whether the evidence is legally sufficient to support a finding of murder or M1 liability and the presence of special circumstances without regard to the actual conviction or whether special circumstances were found to be true or not true in the case.

When a case presents issues of law or fact that limit your ability to make the required classifications with confidence, note those issues with specificity in Part I Q.85. Your thumbnail narrative description of the case in Part I of this document should also highlight any legal and factual issues that you note in Part VII below.

Question (Q.) numbers are on the left side of the page in bold font. Your answers for each question should be entered by circling the appropriate answer on the right side of the page or by checking the appropriate answer when the questions and answers are presented in a table. If you identify legal issues in the case on which you believe we need legal advice from CA counsel, note them in Part I Q.86.

[2] The issue of "legal sufficiency" applicable throughout this DCI is whether in the appeal from an M1 finding of fact by a jury or court, the evidence in the "whole record" would convince a California appellate court that "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *People v. Sanchez*, 906 P.2d 1129, 1148 (Cal. Sup. Ct. 1996) (quoting *People v. Davis*, 41 Cal. Rptr.2d 826, 896 (Cal. Sup. Ct. 1995)). The issue is <u>not</u> whether the coder is convinced beyond a reasonable doubt that the element at issue exists.

[3] When a judicial opinion for the case is available it will be included in the file. Some cases also include trial court documents provided by counsel that fill in gaps on procedural aspects of the case that were not reported in the probation report for the case.

Part I. Thumbnail Sketch and Narrative Comments on Issues of Information Sufficiency Fact, and Law – a free standing document.

A. Introduction

The most important single task in coding the DCI is the preparation of a thumbnail sketch for the case with, when applicable, narrative comments on issues of fact, law, and information insufficiency. This is a free standing WORD document for each case that you will send separately or in groups via Hushmail to dicknewell@hush.com, with CC to davidbaldus@hushmail.com and lisaschomberg@hushmail.com or deliver to Lisa Lowenberg on a USB drive in a manila envelope according to the Narrative Protocol in the Coding Manual. **Whenever you send a Hushmail message to participants in the project, also send a regular email advising the recipient that a Hushmail message has also been sent to them.**

THE FORMAT FOR YOUR ANSWERS TO THESE PART I QUESTIONS IS PRESENTED IN THE LAST THREE PAGES OF THIS PART.

The thumbnail provides an overview of the facts, procedure, and death-eligibility status of the case. It is used by the investigators to identify coding errors and issues. It also provides us with the capacity to develop legal and factual issues for which we can obtain advice from counsel and a special advisory panel in CA. The thumbnails are our window on the world. They may be the only raw material from this study that the court will see. For all of these reasons, it is essential that coders bring utmost precision and consistency to their preparation of the thumbnails.

The thumbnails permit us to review quickly one another's coding. In the substantive analysis, the thumbnails enable us to define factually or procedurally similar cases for qualitative analysis. They also enable us to present qualitative analyses that are more accessible to judges and lawyers than the results of statistical analyses.

If the case does not qualify for substantive death-eligibility coding because of information insufficiency identified in Part II, indicate that fact at the outset of the thumbnail and further indicate in italics within the thumbnail what is missing and if the missing information is procedural indicate what is needed to support coding. Also indicate the reason in detail in an **INFORMATION INSUFFICIENCY** note (Q.81A) following the thumbnail sketch in your answer to this Part I.

B. Elements of the Thumbnail

For cases in which there is sufficient information to code the full DCI, these are the elements of the thumbnail and the order in which they should be presented:

1. Project number, e.g. 450;
2. Defendant's last name, first name, and middle initial;
3. Facts of the crime with the date, defendant's age, sex, and the acts bearing on homicide liability and the presence of special circumstances, e.g., "D, a 20-yr. old male, intentionally shot and killed the V in the course of an armed robbery." If the facts that implicate murder and M1 liability and the presence of special circumstances are not readily apparent, as they are in the just stated example, add the factual detail that will support your "death eligibility" classifications in para. 6 below. Include facts that cut in favor of and against a finding of the factual presence of murder and M1 liability and special circumstances. Be inclined to include more rather than less factual information that bears on the murder and M1 and S.C. issues. Do not

include the race or ethnicity of the defendant or victims in the thumbnail unless it implicates a M1 predicate of a special circumstance, which should also be put in context in the facts of the thumbnail. The abbreviations are listed in Section C below.

4. The charges and outcomes (trial or guilty plea) for the homicide and any contemporaneous offenses that implicate the M1 predicates and the presence of special circumstances, with CFF status on M1 and special circumstance findings indicated, e.g., "Charge: 187 murder, robbery (211), and SC 17A robbery; Bench [or Jury]: M1 (CFF), robbery (211); SC 17A robbery (CFF);" If reported in the probation report, indicate in parentheses the code section number of contemporaneous felony charges and convictions that implicate M1 liability. Include the abbreviated code section number of special circumstances charged with the factual basis of each SC indicated, e.g. SC 17A robbery. A common charge is murder generally under PC187. State that charge as "Charge: 187 murder."

5. Sentence, if known, e.g., "15 yrs.-life or LWOP"; Enter "Sent: Unk," if the sentence is unknown;

6. Death-eligibility (DE) status for pre-*Furman*, CW, and 2008 law. For each time period report the basis of your death eligibility classification.

   (a) For the pre-*Furman* period if there is a CFF on murder liability report "DE: PF- yes (murder -CFF)." If there is no CFF on murder liability, indicate the strength of the factual basis for M1 liability, e.g., "DE: PF-yes (clear murder status)," "DE: PF-close call (on murder status)," or "DE: PF-no (no murder status)" when M1 status is clearly not present factually. This would be the case when there is a VM CFF or there is no factual basis at all for a claim of murder factual status. If there is a close call on murder liability, explain the basis for the close call in Q. 85.

   (b) Under CW and 2008 law, use the approach to M1 liability illustrated below with reference to "M1" instead of murder. Also, apply the following approach to special circumstances (SC), which will report an abbreviated section number for the SC (the foil numbers following Q.53) and a brief factual description of relevant special circumstances. Identify all SC found or present in the case.

      (1) If there is an allegation of a SC and a finding or admission that it is present/true or not present/true, so indicate with a CFF designation, e.g. (SC17A-robbery-not present CFF), (SC17A-robbery-present CFF).
      (2) If there is no CFF on a SC, and no facts supporting the presence of a SC, report "(no SC present)." If the presence of the SC is a close call, report that fact, e.g., (close call SC15-lying in wait).
      (3) If the SC is clearly present, report e.g., (clear SC15-lying in wait). Explain all close calls in Q. 85.
      (4) If SC are alleged and found present or not present, also report SC that were present but not alleged. Report those "omitted" SC in the allegations charge section of the thumbnail, e.g. (SC 17A – robbery – present but not alleged.)

   (c) Here are some examples with both M1 liability and SC reported under CW and 2008 law:

      1. CW-yes: (clear M1 status) and (clear SC 17A-robbery);

      2. CW-no: (M1-CFF) and (SC 17A-robbery-not present CFF);

      3. CW-close call: (close call M1 status) and (clear SC 17A-robbery);

      4. 2008-no: (M1-CFF) and (no SC present);

5. 2008-no: (M1-CFF) and (SC 15-lying in wait-not present CFF);

6. 2008-yes: (M1-CFF) and (SC15-lying in wait-present CFF);

7. 2008-yes: (clear M1 status) and (clear SC17A-robbery);

8. CW-close call: (close call M1 status) and (clear SC17A-robbery);

9. CW-close call: (M1-CFF) and (close call SC17A-robbery);

(Note the colon following the CW and 2008 death eligibility classifications, which are followed by the two elements (M1 and SC) underlying those classifications)

(d) Thus, the death eligibility classifications at the end of the thumbnail might read as follows:

; DE: PF-yes (clear murder status); CW-yes: (clear M1 status) and (clear SC 17A- robbery); 2008-yes: (clear M1 status) and (clear SC 17A-robbery)

; DE: PF-no (no murder status); CW-no: (no M1 status) and (no SC present); 2008-no: (no M1 status) and (clear SC 17A-robbery)

(Note the semicolon between the death eligibility classifications for each time period.)

7. Coder last name: "Coder-Jones."

Please note that each major section (1-7 above) is followed by a semicolon and sub-categories are separated with colons and others with a small dash).

C. Abbreviations Used in the Thumbnail

Use in the thumbnail the abbreviations listed below. Omit periods unless specifically indicated.

CFF: controlling fact finding
Co-perp: co-perpetrator
Ct.: count (w/a period)
CW: *Carlos* Window
D: defendant
DE: death-eligible
FF: fact finder
M1: first degree murder
M2: second degree murder
NDV: Non-deceased victim
PF: pre-*Furman*
PR: Probation Report
Sent: sentence
Unk: unknown
V: victim
V1: the first victim

V2: the second victim
V3: the third victim
VM: voluntary manslaughter
Yr.: year (w/a period)

D. Thumbnail Examples
(Check each thumbnail you do against these models)

1. Here are thumbnail examples when the coder believes there is enough information in the file to support full coding.

   9737; Greenwood, George Gabriel; On 7/4/81, D, an 18-yr. old male, killed the V with a blow to the head with his fist and removed the V's wallet; Charge: 187 murder, robbery (211), and SC 17A robbery; Bench: M1 (CFF), robbery (211), and SC 17A robbery present (CFF); Sent: Unk; DE: PF-yes (murder-CFF), CW-yes: (M1-CFF) and (17A-robbery-present CFF); 2008-yes: (M1-CFF) and (17A-robbery-present CFF); Coder- Ali

   618; Alvarez, Ramon Blancas; On 11/11/84, D, a 22-yr. old male, shot V 4 times and killed the V for unknown reasons; Charge: 187 murder; Plea: VM (No CFF); Sent: Unk; DE: PF-no (no murder status); CW-no: (no M1 status) and (no SC present); 2008-no: (no M1 status) and (no SC present): Coder-Magana

   402; Alexander, Shelby Darlene; On 11/14/80, D, an 18-yr. old female, caused the death of her 19-month old child by physical abuse and maltreatment; Charge: 187 murder; Plea: VM (no CFF); Sent: Unk; DE: PF-no (no murder status); CW-no: (no M1 status) and (no SC present); 2008: (no M1 status) and (no SC present); Coder-Ping.

2. For cases with insufficient procedural information to support coding of the case (Q.30 = 0, Q.32 = 0, or Q.33 = 0), indicate with underline at the outset whether procedural or substantive information is missing, state as much as is known in the thumbnail but also indicate in Q81A exactly what is missing that impedes full coding, e.g., insufficient information to apply the CFF rule or to code the substance of the offense. If the case involves missing procedural information, indicate the county of prosecution and the local court case number to assist counsel in locating the missing procedural information. The following are examples illustrating insufficiency of procedural and substantive information:

   a. Insufficient procedural information; 9737; Greenwood, George Gabriel; On 7/4/81, D, an 18-year old male, killed the V with a blow to the head with his fist and removed the V's wallet; Charge: 187 murder, robbery (211) and SC 190.2 (a) (17A) (robbery); M2 conviction but the CFF is Unk. To apply the CFF, *coding requires information on whether the M2 conviction is based on a guilty plea or a trial court conviction*; Los Angeles County, Docket # 23-4587.

   b. Insufficient substantive information; 9738; Brown, Peter; On 7/4/81, D, an 18-yr. old male, killed the V; Charge: 187 murder; Plea: M2 *the probation report lacks sufficient information on the facts of the crime* to support substantive coding of the death-eligibility of the case, Los Angeles County, Docket #33-5481.

E. Instructions on Writing the Thumbnail

1. Indicate the penal code number of contemporaneous felonies if they are reported in the probation report or they are well known and involve no ambiguities, e.g., robbery (211). However, leave out the word "PC," which means penal code.

2. Indicate the abbreviated penal code number of SCs in both charge and conviction sections of the thumbnail with the factual basis of the SC in parentheses in the charging section, e.g., SC 17A robbery present (CFF). If the SC section number is not reported in the probation report, but if it is clear what SC applies, look it up and include the code foil number in the thumbnail. If there is any ambiguity about which SC applies, report only what is stated in the probation report.

3. A defendant cannot be convicted of 187 PC murder. However, it is often the charge. Murder convictions are for M1 or M2. The defendant may also be convicted of VM. Reporting a conviction as "187 murder" is not authorized.

4. Use the abbreviations, e.g. M1, M2, VM, etc that are included in the Section C above.

5. If a SC is factually clearly present (but not charged, found or stipulated to), include the facts of the SC in the factual section of the narrative summary. Also include in the allegation section the abbreviated section number and the factual basis of the SC and "but not alleged:, e.g. "SC17A Robbery present but not alleged." [This is a new Coding Rule.].

6. Put down sex of the victim in the thumbnail if it is known and not otherwise indicated. For example, "D killed his girlfriend" is enough to indicate the victim's sex.

7. Under pre-*Furman* law, murder liability establishes death-eligibility. Under CW and 2008 law, death-eligibility requires M1 liability and the factual presence of one or more special circumstances.

8. If a SC charge was dismissed, indicate how it was dismissed and by whom. For example, the "SC was dismissed as part of a plea bargain" or the "SC was dismissed by the court."

9. If the exact date of the offense is unknown, use "on or about" to indicate approximate date or "in March" if only the month is known, e.g. "On or about 8/10/85" or "In August 1985."

10. Do not use the term "co-defendant," instead use "co-perpetrator," the abbreviation of which is "Co-perp."

11. The term "victim" is only for deceased victims. Otherwise, use the term "non-deceased victims" (NDV). For example, "D beat V1 and V2 to death and wounded three NDV."

12. The CFF rule only applies to the grade of homicidal liability and SCs. It does not apply to other felonies and special allegations.

13. For all homicide and SC outcomes indicate the CFF status, e.g. M1 (CFF); M2 (no CFF); M2 (CFF/Unk), 190.2(a)(17A) (CFF). All findings that a SC is present or not present by a jury or judge are a CFF. A dismissal of a SC by a court for evidence insufficiency is also a CFF. However, a dismissal of a SC by a prosecutor as part of a plea bargain is not a CFF.

I. DCR Identifying Information

Template form for your answers to Part I. **You should have a copy of this template with the file name PPPP_THUMBNAIL_AND_NARRATIVE_RESPONSE.DOC." Open template file with Microsoft WORD and type in the information requested below. (See below for an example of the final product and a template you can adapt for your use.)**

1. Type The Thumbnail here:

2. If after typing the Thumbnail you believe there is insufficient evidence to support reliable coding advance to Part II (Information insufficiency) code Q.29 through Q.35, as applicable. At that point cease coding the DCI and under Q.81A identify with specificity the nature of the income insufficiency problem and what if anything can be done to cure it, e.g., obtain information on the decision maker in the case – jury, prosecutor, or judge. Where applicable, explain the problem in terms of the categories defined in Q.29, Q.31, Q.32, Q.34 and Q.35 in Part II. Also, note at the beginning of the thumbnail "Insufficient Procedural Information" or "Insufficient Substantive Information," as the case may be, as is illustrated in para. 2.a. and 2.b.

Save the DOC file by substituting the Project # for PPPP in the file name "PPPP_THUMBNAIL_AND_NARRATIVE_RESPONSE.DOC".

3. If you believe there is sufficient evidence to support reliable coding, CONTINUE entering information on this DCI form by answering questions, beginning with Q.16, as applicable. When you have completed Q.16 - Q.81 on the DCI form, resume answering the following questions in the template file, starting with question number 81A.

Page numbers for Q.75 – Q.88 are found in the 'Cross-reference of Questions and/or reference and Page numbers' at the end of the DCI.

Q.81A. Information insufficiency

Q.82. Murder and M1 liability differences under pre-*Furman*, CW, and 2008 law, i.e., if the answers to Q. 75[4], Q. 76[5], or Q. 79[6] differ, state the reason(s) for the coding differences.

Q.83. Special circumstances differences under CW and 2008 law, i.e., if the answers to Q. 77[7] and Q. 80[8] differ, state the reason(s) for the coding differences.

Q.84. Death-eligibility differences – If the answers to Q. 75[9], Q. 78[10] or Q. 81[11] differ, state the reason(s) for the coding differences.

Q.85. Ambiguities and close calls. Summarize and explain factual and legal ambiguities and issues and "close calls" that complicated and/or impeded coding and/or required "close call" classifications.

Q.86. Legal Issues. State legal issues on which you believe we need advice from CA counsel.

[4] Factual murder liability under pre-*Furman* law
[5] Factual M1 liability under CW law
[6] Factual M1 liability under 2008 law
[7] SC under CW law
[8] SC under 2008 law
[9] Pre-*Furman* death eligibility
[10] CW law death eligibility
[11] 2008 law death eligibility

I. DCR Identifying Information

Q.87 Special Circumstances not coded in the DCI. Use this section to list special circumstances that are factually present in VM or M2 cases in which the VM or M2 conviction is based on a CFF. Identify them in abbreviated form as noted in paragraph 6 above, e.g. (SC17A – Robbery present).

Q.88. Other Detail other facts or questions you believe require further consideration by the research director.

Q. 89 Date coding completed: 00/00/0000. See below for an example of a thumbnail sketch template.

4. When you have completed this Template save it by substituting the Project # for PPPP in the file name "PPPP_THUMBNAIL_AND_NARRITIVE_RESPONSE.DOC" and Hushmail it to dicknewell@hush.com, with CC to davidbaldus@hushmail.com and lisaschomberg@hushmail.com. The subject for your message should be CA Part I.

Coder's Name
Date

CA Homicide Study – U. of Iowa College of Law
"0252_THUMBNAIL_AND_NARRATIVE_RESPONSES.DOC"

1. Type The Thumbnail here:[12]

0252; Guy, Bad; On 8/8/12, D, a 27-yr. male killed V by dropping a giant anvil on his head from a high window. There was evidence that he had ordered the anvil from Acme Services, specializing in selling murder weapons. Many prior threats passed between the D and V, who had been feuding a long time. A small child in the apartment witnessed D practicing his aim with the anvil and muttering dark opinions of V; Charge: 187 murder; Plea: VM (no CFF); Sent: Unk; DE: PF-yes (clear murder status); CW-yes: (clear M1 status) and (clear SC-15 lying in wait); 2008-yes: (clear M1 status) and (clear SC-15 lying in wait); Coder-Glenn.

2. If after typing the Thumbnail you believe there is insufficient evidence to support reliable coding, follow the instructions in Part I of the DCI.

For Questions Q.81 through Q.86 below omit the question if the answer is "NONE".

Q.81A. Information insufficiency

Q.82. Murder and M1 Liability. Explain any differences in your coding of factual murder and M1 liability under pre-*Furmam* (Q.75), CW (Q.76), and 2008 (Q.79) law.

Q.83. Special Circumstances. Explain any differences in your coding of the factual presence of special circumstances under CW (Q.77) and 2008 (Q. 80) law.

Q.84. Death Eligibility. Explain any differences in your coding of the factual death eligibility of the case under pre-*Furman* (Q.75), CW (Q.78), and 2008 (Q.81) law.

Q.85. Ambiguities & Close Calls. Summarize and explain any factual and/or legal ambiguities and issues that complicated or impeded your coding and/or required "close call" classifications.

Q.86. Legal Issues. State any legal issues on which you believe we need advice from CA counsel.

There could be a question about whether an anvil is a deadly weapon, even though purchased at a purveyor of murder weapons.

[12] For the thumbnail's format, content, and abbreviations, consult the Coding Protocol, Part II, Section E, pp. 9-12.

I. DCR Identifying Information

Q. 87. Special Circumstances not coded in the DCI. Use this section to list special circumstances that are factually present in VM or M2 cases in which the VM or M2 conviction is based on a CFF. Identify them in abbreviated form as noted in paragraph 6 above, e.g. (SC17A – Robbery present).

Q. 88. Other. Detail other facts or questions you believe require further consideration by the research director.

NOTICE THAT THE INSTRUCTIONS YOU DON'T NEED HAVE BEEN DELETED, LEAVING ONLY THE MATERIAL THE RESEARCHERS NEED.

Bold your notes under Q.81A – Q.88. *ALSO, THE CASE NUMBER SHOULD ALWAYS HAVE 4 DIGITS!*

Part IA. CDCR Identifying Information.

Case Identifying Information and Status in the Study Obtained From the CA Department of Corrections and Rehabilitation (CDCR). This section requires no coding by the coder. Specifically a "cover sheet" for Q.1 through Q.15 and Q.21 through Q.28 will be printed for each case assigned to you. You should compare the data on this sheet to the CDCR identifying information and the identifying information reported for the case in the probation report. **If you find data that is different and inconsistent please write a comment on the cover sheet describing the difference and alert your coding supervisor.**

4. **CASE** – County court case number

6. CDC – California Department of Corrections and Rehabilitation case number

7. OFF_YR – Year of offense

8. OFNS_DT – Date of the offense

9. SEN_DT – Date of sentence in the case

10. TIME_4CW – The applicable law at the date of the offense
1 = Pre-*Carlos* window – 01/01/1978 – 12/11/1983
2 = *Carlos* window – 12/12/1983 – 10/12/1987
3 = Post-*Carlos* window (A) – 10/13/1987 – 12/31/1992
4 = Post-*Carlos* window (B) – 01/01/1993 – 06/30/2002

11. COUNTY_NAME – County of conviction (Abbreviation)

12. COUNTY_NUM – County of conviction (Number)

13. **SEX** – Defendant's gender
1 = Male
2 = Female

14. D_AGE – Defendant's age at time of the offense

15. CONVICT – Crime of conviction reported by the Department of Corrections and Rehabilitation
1 = M1
2 = M2
3 = VM
4 = Murder, but degree unspecified (e.g. PC 187)
9 = Unknown

I. Sample Information & Data Sources

21. Stratum location/number of the case in the final sample

22. The number of cases in the defendant's stratum in the final sample

23. Is the case in the pilot study sample randomly selected from the 27,928 case universe?
1 = Yes, in the original 119 case pilot sample, not replaced, and included in the 1820 case final sample
2 = Yes, although not included in the original sample it was added later to replace a deleted case
3 = No, not selected originally and not used as a replacement case in the pilot sample
4 = No, although originally selected for the pilot it was deleted from the pilot sample b/c of missing information
9 = Unknown

24. Is the case in the 1820 case final sample randomly selected from the 5,300 case candidate sample?
1= Yes, in the original 1820 case final sample and not replaced by a case from the pilot sample
2 = Yes originally but it was replaced by a case from the pilot sample
3 = Yes, although not included in the original final sample it was added later to replace a deleted case
4 = No, not selected originally and not used as a replacement case in the final sample
5 = No, although originally selected it was deleted from the final sample b/c of missing information
9 = Unknown

25. Was the case in the 5300 case candidate sample randomly selected from the 27,928 case universe?
1 = Yes, it is in both the 5300 candidate sample and the 1820 original final sample.
2 = Yes, it is in the 5300 case candidate sample but was not included in the original 1820 case final sample and was not used as a replacement in the final sample and/or the pilot sample.
3 = Yes, it was in the original 5300 case candidate sample but not in the original 1820 case final sample, and was used as a replacement in the final sample and/or the pilot sample.
4 = No, not originally selected for the candidate sample.
9 = Unknown

26. Probation Report Status
1 = Requested from the State
2 = Received in IA
3 = Not found by the State and the case was deleted from the sample and the case for want of a probation report or equivalent information such as a judicial opinion
4 = Not found by State and a substitute was produced by the State and received in IA
5 = Case was deleted from the study
9 = Status unknown

27. California Judicial Opinion (s)
1 = Search requested
2 = Search and none located
3 = Opinion located and added to the file
9 = Status unknown

28. COUNSEL_SUPP

1 = Procedural information requested of counsel
2 = Procedural information provided by counsel
3 = Request not fulfilled
8 = No missing information or request of counsel
9 = Unknown

Part II. Sufficiency of the Available Information to Support Substantive Coding

A. Introduction

1. Factual determinations based on controlling findings of fact.

The first question is whether there is sufficient procedural information in the file[13] to determine whether homicide liability and/or special circumstances in the instant case were determined by a controlling finding of fact.

A key distinction is the form of murder liability that is required to support death eligibility during the three periods of the study. Pre-*Furman* Georgia law deemed common law murder the sole basis for death eligibility, while CW and 2008 law required M1 liability and the presence of a special circumstance.

With one major exception, a M1 conviction in the instant case (by a guilty plea admission of the defendant or a M1 conviction in a bench or jury trial) is considered to have been determined by a controlling fact finding that is applied across all three legal regimes. However, this rule is valid only when the M1 predicate in the instant case was applicable to support murder pre-Furman and M1 for CW and 2008 law. For example, the assumption of relevance across all three legal regimes does not apply when the M1 conviction in the instant case is based on an M1 predicate that was not applicable under CW or pre-*Furman* law. Such an M1 conviction would be a CFF only under 2008 law and it would not be a CFF under pre-*Furman* or CW law. Moreover, if such an M1 predicate was not in effect for murder pre-*Furman* or for M1 during the CW, it has no relevance to that law and cannot be coded "factually present" under pre-*Furman* law or CW law, as the case may be. The same principle holds for an M1 predicate applied under CW law that was not in effect pre-*Furman*. Such an M1 predicate has no relevance to the coding of a pre-*Furman* case in the absence of another murder predicate under pre-*Furman* law.

This same principle applies when in the instant case a fact finder finds a special circumstance present or the defendant stipulates to its presence and SC found present or stipulated to in the instant case was not in effect during the CW. In that situation, the CFF for that SC applies only under 2008 law and has no relevance under CW law. For this reason it cannot be found factually present under CW law.

Because the applicability of M1 predicates and special circumstances in M1 conviction cases depends on the date of the offense and the law in place on that date, it is crucial in such cases (a) to determine the extent to which relevant M1 predicates and SC in the instant case were applicable under

[13] For this purpose, the file consists of information in the probation report, judicial opinions when available, and CA Dept. of Corrections and Rehabilitations data on the character of the homicide of conviction when the conviction information is not available in the probation report and there is no judicial opinion in the file with that information.

all three legal regimes, and (b) if they were not, to adjust accordingly your assessment of the extent to which a CFF in the instant case can be considered applicable during earlier legal regimes.

These issues of generalizability across the three legal regimes arise with respect to the following questions:

1. The applicability of the CFF rule for M1 and murder factual liability when there was an M1 conviction in the instant case is answered in Q.75, Q.76, and Q.79.

2. The applicability of the CFF rule for the factual presence or absence of SCs when a fact finder found a SC present or absent in the instant case is answered in Q.60-Q.61.

3. The applicability of the CFF rule for M2 and VM factual liability when there is a murder charge and a fact finder convicts the defendant guilty of M2 or VM in the instant case is answered in Q.62.

For M2 and VM convictions, a determination of whether liability is determined by a controlling fact finding requires three pieces of information: (1) the homicide charge (s) filed, (2) the homicide crime of conviction, and (3) the identity of the decision maker who determined the grade of homicide liability.

To determine whether the presence or absence of a special circumstance (SC) is determined by a controlling fact finding requires a SC allegation in a M1 or 187 PC Murder charge and three additional pieces of information: (1) whether the SC allegation was withdrawn by the state,[14] (2) whether it was stipulated to or admitted by the defendant,[15] and (3) if it was not withdrawn or admitted by the defendant, who and in what procedural context, determined the outcome of the allegation(s), e.g., accepted or rejected as true by a fact finder (in a bench or jury trial) or rejected by the court for insufficiency of the evidence supporting the SC.[16]

When the available procedural information is insufficient to determine whether or not M1 liability and special circumstances in the instant case are determined by a controlling finding of fact, we will seek from counsel the information needed to make that assessment.

---

[14] This is not a controlling fact finding.

[15] This is a controlling fact finding.

[16] These examples are controlling fact findings. There is a broad spectrum in the degree to which homicide liability and special circumstances are determined by controlling fact findings. At one extreme are cases that advance to a penalty trial following a jury finding of M1 liability and the presence of one or more special circumstances present in the case. In these cases all of the relevant facts including the defendant's death-eligibility are determined by a controlling finding of fact and the coder's job is limited to documenting the decision making process and the basis of the jury's decisions. Such cases call for no judgments by the coders of whether or not the case is factually M1 and whether or not a special circumstance is present in the case.

At the other extreme are cases charged with M2 or VM which result in a guilty plea by the defendant. In such cases there are no controlling fact findings and the task for the coder is to determine if the case was factually M1 and whether one or more special circumstances was factually present. There also are no controlling findings of fact on a SC when the case is charged with M2 or VM. In the absence of a controlling finding of fact on the presence or absence of SC, the coder needs to determine if the information reported in the probation report is sufficient to determine whether or not the SC(s) were present in the case, under the legal sufficiency standard in note 2 *supra*.

III. Information Sufficiency

2. Sufficiency of information to determine factual M1 liability and the presence of special circumstances that are not based on controlling findings of fact

When liability and special circumstances are not determined by controlling findings of fact, it is necessary to assess whether the information in the file is sufficient to determine the factual grade of homicide culpability in the case, and whether SC(s) are factually present. With respect to homicide liability, the coder's information sufficiency judgments are reported in Q.34 for M2 and VM cases. With respect to special circumstances, the coder's judgments are reported in Q.31 for M1 conviction and factual M1 cases and Q.35 for M2 and VM cases. When it is ultimately determined that a case lacks sufficient information to support reliable coding on either of these issues it will be deleted from the study and replaced with a substitute case randomly selected from the same sampling strata as the deleted case.

For all these factually present questions, the standard is the "legal sufficiency" test quoted in note 2, *supra*.

A. M1 Conviction Cases

Q.29-Q.31. If the case is a M1 conviction code Q.29-Q.31. (If the case is a M2 or VM conviction omit Q.29-Q.31 and proceed to Q.32.)

29. Is there sufficient information in the probation report to apply the controlling fact-finding (CFF) on the presence or absence of special circumstances, i.e., that (a) it applies and the CFF rule determines that a SC is or is not present in the case, or (b) that there is no CFF on the issue in the case and the question is whether a SC is factually present in the case? (circle ONE best answer)

Yes	1
No[17]	0

If the answer to Q.29 is No, terminate coding and explain in the **INFORMATION INSUFFICIENCY** comment following your thumbnail sketch why there is insufficient information to answer this question Yes.

30. If your answer to Q29 is Yes (i.e. there is sufficient information to apply the CFF), is the SC issue determined by a CFF? (circle ONE best answer)

Yes	1
No	0

31. If your answer to Q. 30 is No, does the probation report have sufficient information to determine the factual presence or absence of special circumstances in the case? (circle ONE best answer)

Yes	1
No	0

[17] This condition would exist when a SC is alleged and dismissed but it is unknown whether it was dismissed by the court for lack of evidence or the prosecutor in a plea bargain.

III. Information Sufficiency

If your answer to 31 = No terminate coding and explain in your **INFORMATION INSUFFICIENCY** comment following your thumbnail sketch exactly what is missing and why it impedes your ability to code this question = Yes.

B. M2 and VM conviction cases

Q32-Q35. If the case has a M2 or VM conviction code Q.32 – Q.35. If the case has an M1 conviction, omit Q.32-35 and proceed to the "Coder Direction" following Q.35.

32. Is there sufficient information in the probation report to apply the controlling fact-finding (CFF) on the issue of M1 factual liability, i.e., that (a) it applies and the CFF rule determines homicide liability or (b) that there is no CFF on liability in the case and the question is whether the case is factually murder or M1?
(circle ONE best answer)

Yes 1

No[18] 0

If your answer to Q32 = 0 (No), in your **INFORMATION INSUFFICIENCY** comment following your thumbnail sketch indicate exactly what information is missing and why it impedes your ability to code this question and determine if the case is death eligible under the three legal regimes.

33. Is there a controlling fact finding on the grade of homicide liability?
(circle ONE best answer)

Yes 1

No 0

Not Applicable b/c there is insufficient information to apply the CFF rule, i.e., Q. 32 = 0 (No) . . 8

Unknown 9

34. If your answer to Q.33 = No or Unknown, does the probation report have sufficient information to determine if the case is factually murder or M1 under the three legal regimes?
(circle ONE best answer)

Yes 1

No 0

Not Applicable b/c Q. 33 = 1 (Yes) 8

If Q. 34 = No, explain in your **INFORMATION INSUFFICIENCY** comment following your thumbnail sketch exactly what is missing and why it impedes your ability to code this question =1.

35. If your answer to Q. 34 = Yes, does the probation report have sufficient information to determine the presence or absence of special circumstances in the case? (circle ONE best answer)

Yes 1

No 0

Not Applicable 8

[18] This condition would exist, for example, it the homicide charge is 187 PC murder and the conviction is M2 but it is unknown if the conviction is based on a jury or bench trial verdict or a plea bargain.

If Q. 35 = No, explain in your **INFORMATION INSUFFICIENCY** comment following your thumbnail sketch, Q.81A, exactly what is missing and why it impedes your ability to code this question = Yes````.

(Questions 36 through 39 are reserved.)

Part III. Coder Entry of Identifying Information for the Instant Case[19]

16. The defendant's race as reported in the probation report:
(circle ONE best answer)

Black/African American	1
White/Caucasian	2
Asian American	3
Pacific Islander	4
Latino/Hispanic	5
Native American	6
Other	7
Unknown	9

(If there are more than three decedent victims, code the first three named in the Probation report.)

16A. Victim #1 Name

_____|_____|_____|_____|_____|_____|_____|_____|_____|_____|_____|_____|_____|_____|_____|_____|_____|
Last

_____|_____|_____|_____|_____|_____|_____|_____|_____|_____|_____|_____|_____|_____|_____|_____| |_____|
First MI

16B. Victim #2 Name

_____|_____|_____|_____|_____|_____|_____|_____|_____|_____|_____|_____|_____|_____|_____|_____|_____|
Last

_____|_____|_____|_____|_____|_____|_____|_____|_____|_____|_____|_____|_____|_____|_____|_____| |_____|
First MI

16C. Victim #3 Name

_____|_____|_____|_____|_____|_____|_____|_____|_____|_____|_____|_____|_____|_____|_____|_____|_____|
Last

_____|_____|_____|_____|_____|_____|_____|_____|_____|_____|_____|_____|_____|_____|_____|_____| |_____|
First MI

[19] Substantive coding for the instant case commences in this Part.

III. Coder Entry of Identifying Information

16D. Victim Race (circle ONE best answer for each victim)	**A** Vic1	**B** Vic2	**C** Vic3
Black/African American	1	1	1
White/Caucasian	2	2	2
Asian American	3	3	3
Pacific Islander	4	4	4
Latino/Hispanic	5	5	5
Native American	6	6	6
Other	7	7	7
Unknown	9	9	9

17. Defendant/victim relationship[20] (circle ONE best answer for victim#1)

Intimates	1
Other family	2
Friend/acquaintance/business relationships	3
Strangers	4
Potential antagonists in an urban youth-culture setting	5
Unknown	9

18. Defendant's role in crime as the actual killer or an aider/abettor (circle ONE best answer for victim#1)

Def. was the actual killer w/o no aiders/abettors	1
Def. was the actual killer with one or more aiders/abettors	2
Def. was an aider/abettor	3
Def. was the actual killer but unknown if he had aiders/abettors	4
Unknown if def. was the actual killer or an aider/abettor	9

[20] If the case involves multiple victims, code the one that best defines the salient features of the crime(s) resulting in the deaths(s) of the victims(s) for the purpose of identifying similarly situated cases.

III. Coder Entry of Identifying Information

19. Co-perpetrators in the homicide – Enter up to three with the most culpable crime of conviction, if known, i.e., M1, M2, VM. If unknown, enter those that appear to have the highest level of criminal culpability on the basis of mental culpability, the harm caused and responsibility for it and character such as prior record.

A. CO-PERP 1 Name

_____|_____|_____|_____|_____|_____|_____|_____|_____|_____|_____|_____|_____|_____|_____|_____|
Last

_____|_____|_____|_____|_____|_____|_____|_____|_____|_____|_____|_____|_____|_____|_____|_____| |_____|
First MI

Iowa Project number _____|_____|_____|_____|_____

B. CO-PERP 2 Name

_____|_____|_____|_____|_____|_____|_____|_____|_____|_____|_____|_____|_____|_____|_____|_____|
Last

_____|_____|_____|_____|_____|_____|_____|_____|_____|_____|_____|_____|_____|_____|_____|_____| |_____|
First MI

Iowa Project number _____|_____|_____|_____|_____

C. CO-PERP 3 Name

_____|_____|_____|_____|_____|_____|_____|_____|_____|_____|_____|_____|_____|_____|_____|_____|
Last

_____|_____|_____|_____|_____|_____|_____|_____|_____|_____|_____|_____|_____|_____|_____|_____| |_____|
First MI

Iowa Project number _____|_____|_____|_____|_____

20. Date of conviction as reported in the probation report:

(Enter Month, Day and Year if known. Otherwise, enter 99 for unknown Month and 99 for unknown Day. Enter 9999 for unknown year. Please enter 01-09 for months 1-9 and Days 1-9)

Month . . . . . _____|_____

Day . . . . . _____|_____

Year . . . . . _____ |_____|_____|_____

Part IV. Charges, Allegations, and Findings on Homicide Liability, Contemporaneous Offenses and the Presence or Absence of Special Circumstances in the Instant Case.

(The purpose of this section is to document charging and sentencing outcomes in the instant case. In this section, make no judgments about the factual basis of the grade of homicide liability determined in the case or the factual presence or absence of special circumstances. Confine your coding to the charges, allegations, and findings on liability and special circumstances in the defendant's case.)

A. Homicide charges and convictions (Q.40 & 41)[21]

40. Original Homicide Charge (circle ONE best answer)

First-Degree Murder 1

Second-Degree Murder 2

Voluntary manslaughter 3

Murder, but Degree Unspecified – PC 187 (Murder) 4

Unknown. 9

41. Homicide crime and degree for which the defendant was convicted: (circle ONE best answer)

First-Degree Murder 1

Second-Degree Murder 2

Voluntary manslaughter 3

Unknown. 9

(If multiple deceased victims, code the homicide with the highest grade homicide conviction; if the conviction for each is the same, code the first homicide count.)

[21] If the probation report does not report the homicide charge and/or conviction, consult the "Complaint" and "Information" in the case file (for the homicide charged) and the "Report-Indeterminate Sentence" and the "Abstract of Judgment" in the case file (for the homicide conviction).

IV. Instant Case Homicide Charge and Conviction

42. Was the **homicide** charge in Q.40 reduced at any time by the prosecutor prior to conviction by the defendant's guilty plea or a bench trial or jury verdict?
(circle ONE best answer)

Prosecutor reduced charge from a first degree murder or PC187 (murder) to second degree murder . . 1

Prosecutor reduced charge from first degree murder or PC187 (murder) to voluntary manslaughter . . 2

Prosecutor reduced charge from second degree murder to voluntary manslaughter 3

Other charge reduction 4

Prosecutor did not reduce charge 8

Unknown if charge reduced 9

43. Was the homicide charge in Q.40 reduced at any time by a court order dismissing an M1 or M2 charge made in the information, thus leaving the case to go to a bench or jury trial only on some lesser charge?
(circle ONE best answer)

Court reduced charge from first degree murder or murder with degree unspecified to voluntary manslaughter 1

Court reduced charge from second degree murder to voluntary manslaughter 2

Other charge reduction 3

Court reduced charge from first degree murder or murder with degree unspecified to second degree murder 4

Court did not reduce charge 8

Unknown if charge reduced 9

44. Procedural basis for the homicide conviction: (circle ONE best answer)

Guilty plea 1

Jury trial verdict 2

Bench trial judgment 3

Trial, but unknown if tried to bench or to jury 4

Basis for conviction unknown 9

IV. Instant Case Contemporaneous Felonies

Contemporaneous felony charges and convictions that implicate a M1 felony murder predicate or a felony murder special circumstance (Special Circumstance foils 17A – 17M) (Q.45A, B, C, D).

45A. Any Contemporaneous Felony Charges or Contemporaneous Felony Convictions?
(circle ONE best answer)

Yes 1

No 0

Unknown. 9

Coder notes:

If the answer to Q.45A is No (0) or Unknown (9), then skip Q.45B, Q.45C and Q.45D on the next page.

If the answer to Q.45A is Yes (1), then read and answer on next page below, questions Q45B, Q45C and Q45D:

Q.45B-Q45D BELOW ARE CODED ON THE NEXT PAGE:

45B. Contemporaneous Felony Charges or Allegations of crimes that are M1 predicates or implicate special circumstances that are potentially applicable in the case:

45C. Contemporaneous Felony Convictions:

45D. If any Q.45B = 1 and no conviction resulted code Q.45D to 66 or 67. If a conviction resulted, omit Q.45D.

66 – No conviction because prosecutor dropped charges unilaterally or in a plea bargain.

67 – No conviction because fact finder returned a not-guilty verdict/judgment on the charge, the court dismissed the charge, or the trial court outcome of the charge is unknown. If the outcome is unknown, note that fact in Q. 81 in the thumbnail as a form of information insufficiency.

Coder notes:
Code the answers to questions Q.45B, Q.45C, and Q.45D (66 or 67) by putting check marks, as applicable, in the table below:

Rules for coding these answers:

(a) Choices 1-13 are allowed for Q.45B and Q.45C as applicable.

(b) Check box 66 or 67 if the crime was charged but did not result in a conviction.

I If the charge results in a conviction leave 66 and 67 blank.

IV. Instant Case Contemporaneous Felonies

Foil Num	Contemporaneous Felony	Q.45B Charge	Q.45C Convict	Q.45D	
				66	67
01	Arson (451)				
02	Burglary in the first or second degree (459)				
03	Carjacking (215)				
04	Kidnapping (207, 209, or 209.5)				
05	Lewd act with a child under the age of 14 or dependent adult (288)				
06	Mayhem (203 and 205)				
07	Oral copulation (288a)				
08	Rape (261)				
09	Rape by instrument (289)				
10	Robbery (211 or 212.5)				
11	Sodomy (286)				
12	Torture (206)				
13	Train wrecking (219)				

IV. Instant Case Special Circumstances

Special circumstance (SC) allegations, findings, and sentencing outcomes.

Coder note:
If the homicide charge in the case is M2 or Voluntary Manslaughter i.e. Q.40 = 2 or 3, or the homicide charge is unknown, i.e., Q.40 = 9, then omit Q.47-Q.54.

47. Was one or more special circumstance(s) alleged in a M1 or 187 PC (murder) information/indictment? (circle ONE best answer)

Yes, one was alleged 1

Yes, two were alleged 2

Yes, three were alleged 3

Yes, four were alleged 4

Yes, five were alleged 5

Yes, six or more were alleged 6

No indication of a S.C. allegation w/a M1 or 187 PC charge 0

Coder note:
If Q.47 = 0 then omit Q.48-Q.54.

48. Was a special circumstance(s) allegation(s) deleted at any time by the prosecutor? (circle ONE best answer)

Yes, one or more SC alleged and all deleted 1

Yes, one or more SC alleged and one or more deleted but some were not deleted 2

SC allegation but unknown if one or more deleted 9

No, one or more alleged and none was deleted 0

49. Were any of the allegations of SC stricken by an order of the court at any time before or during the guilt trial or after verdict? (circle ONE best answer)

Yes, one or more SC alleged and all were struck 1

Yes, one or more SC alleged and one or more struck but some were not struck 2

SC allegation but unknown if one or more were struck 9

No, one or more alleged and none was struck 0

IV. Instant Case Special Circumstances

50. If there was a M1 guilty-plea or a M1 conviction at trial, was a special circumstance found to be true or not to be true by a fact-finder (judge or jury)? (circle ONE best answer)

Yes, one or more special circumstances found to be true/present by a fact-finder 1

Yes, one or more SC alleged but none was found to be true/present by a fact-finder, e.g. all were found not present or were dismissed by the court 2

No, one or more SC alleged but all dismissed by the prosecutor, e.g. in a plea bargain 3

Not applicable because no M1 guilty plea or trial conviction by a fact-finder 8

SC charged and M1 conviction or guilty plea but unknown if a fact-finder found a special circumstance to be true or not true 9

51. If the defendant pled guilty to M1, did the defendant also admit or stipulate to the truth of one or more SC(s)? (circle ONE best answer)

Yes, one or more special circumstances was admitted or stipulated to by the defendant 1

No, one or more SC alleged but the truth of none was admitted or stipulated to by the defendant 2

No because SC allegation was withdrawn before plea 4

Not applicable because no M1 plea by defendant 7

Unknown if there was a M1 guilty plea 9

Coder notes:
The answers for questions 52 and 53 are to be coded in the table directly following question 53. The table contains a row for the 22 special circumstances listed in the California Penal Code, Section 190.2 (a). There is also a final row in the table "99" to cover the situation in which SC are alleged but their identity in unknown.

For your answers, there is one column for Q.52 and five columns for Q.53.

52. Special Circumstance Allegation(s) in M1 Cases.

If one or more **Special Circumstances** was alleged (i.e. Q.47 = 1-6), code a **check mark** in the applicable **Q.52** column. In Q.53 code a check mark in the column that captures the outcome of each the **Special Circumstance** that were coded as alleged in the Q.52 Column. If no special circumstances were alleged, omit Q. 52 and Q. 53.

53. Specific Special Circumstances Outcomes in M1 Cases.

For each **Special Circumstance coded in Q. 53, code a check mark in one of the five Q.53 columns.**

IV. Instant Case Special Circumstances

You must check one of the five outcomes listed here:

1. **The SC was found to be true by a fact finder or stipulated to by the defendant.**
2. **The SC was REJECTED as not true by a fact finder.**
3. **The SC was withdrawn by the prosecutor.**
4. **The SC was struck by the court.**
5. **The outcome of the SC charge is UNKNOWN.**

A	B	C	D	E	F	G	H
Foil Num	**Penal Code Section 190.2(a). California Special Circumstances. Questions 52 and 53**	**Q.52**	**Q.53**				
			1	**2**	**3**	**4**	**5**
1	The murder was intentional and carried out for **financial gain**.						
2	The defendant was **convicted previously of murder in the first or second** degree. For the purpose of this paragraph, an offense committed in another jurisdiction, which if committed in California would be punishable as first or second degree murder, shall be deemed murder in the first or second degree.						
3	The defendant, in this proceeding, has been convicted of **more than one offense of murder** in the first or second degree.						
4	The murder was committed by means of a **destructive device, bomb, or explosive** planted, hidden, or concealed in any place, area, dwelling, building, or structure, and the defendant knew, or reasonably should have known, that his or her act or acts would create a great risk of death to one or more human beings.						
5	The murder was committed for the **purpose of avoiding or preventing a lawful arrest**, or perfecting or attempting to perfect, an escape from lawful custody.						
6	The murder was committed by means of a **destructive device, bomb, or explosive** that the defendant mailed or delivered, attempted to mail or deliver, or caused to be mailed or delivered, and the defendant knew, or reasonably should have known, that his or her act or acts would create a great risk of death to one or more human beings.						
7	The **victim was a peace officer**, as defined in Section 830.1, 830.2, 830.3, 830.31, *830.32*, *830.33*, *830.34*, 830.35, 830.36, *830.37*, 830.4, 830.5, 830.6, 830.10, 830.11, or 830.12, who, while engaged in the course of the performance of his or her duties, was intentionally killed, and the defendant knew, or reasonably should have known, that the victim was a peace officer engaged in the performance of his or her duties; or the victim was a peace officer, as defined in the above-enumerated sections, or a former peace officer under any of those sections, and was intentionally killed in retaliation for the performance of his or her official duties. **(Italicized language effective June 6, 1990)**						
8	The **victim was a federal law enforcement officer** or agent who, while engaged in the course of the performance of his or her duties, was intentionally killed, and the defendant knew, or reasonably should have known, that the victim was a federal law enforcement officer or agent engaged in the performance of his or her duties; or the victim was a federal law enforcement officer or agent, and was intentionally killed in retaliation for the performance of his or her official duties,						
9	The **victim was a firefighter**, as defined in Section 245.1, who, while engaged in the course of the performance of his or her duties, was intentionally killed, and the defendant knew, or reasonably should have known, that the victim was a firefighter engaged in the performance of his or her duties.						

IV. Instant Case Special Circumstances

You must check one of the five outcomes listed here:

1. **The SC was found to be true by a fact finder or stipulated to by the defendant.**
2. **The SC was REJECTED as not true by a fact finder.**
3. **The SC was withdrawn by the prosecutor.**
4. **The SC was struck by the court.**
5. **The outcome of the SC charge is UNKNOWN.**

A	B	C	D	E	F	G	H
Foil Num	**Penal Code Section 190.2(a). California Special Circumstances. Questions 52 and 53**	**Q.52**	**Q.53**				
			1	**2**	**3**	**4**	**5**
10	The **victim was a witness to a crime** who was intentionally killed **for the purpose of preventing his or her testimony** in any criminal *or juvenile* proceeding, and the killing was not committed during the commission or attempted commission of the crime to which he or she was a witness; or the victim was a witness to a crime and was intentionally killed in retaliation for his or her testimony in any criminal *or juvenile* proceeding. *As used in this paragraph, "juvenile proceeding" means a proceeding brought pursuant to Section 602 or 707 of the Welfare and Institutions Code*. **(Italicized language effective June 6, 1990)**.						
11	The **victim was a prosecutor or assistant prosecutor** or a former prosecutor or assistant prosecutor of any local or state prosecutor's office in this or any other state, or of a federal prosecutor's office, and the murder was *intentionally* carried out in retaliation for, or to prevent the performance of, the victim's official duties **(Italicized language effective June 6, 1990)**.						
12	The **victim was a judge or former judge** of any court of record in the local, state, or federal system in this or any other state, and the murder was *intentionally* carried out in retaliation for, or to prevent the performance of, the victim's official duties **(Italicized language effective June 6, 1990).**						
13	The **victim was an elected or appointed official** or former official of the federal government, or of any local or state government of this or any other state, and the killing was intentionally carried out in retaliation for, or to prevent the performance of, the victim's official duties.						
14	The murder was especially heinous, atrocious, or cruel, manifesting exceptional depravity. **[Held Unconstitutional in 1982; therefore it is not applicable during either the *Carlos* Window or in 2008.]**						
15	The defendant intentionally killed the victim *by means of* **lying in wait**. **(Italicized language effective March 8, 2000). Prior to March 8, 2000 (thus, during the *Carlos* Window period), the statutory language of the lying in wait special circumstance read as follows: "The defendant intentionally killed the victim while lying in wait."**						
16	The **victim was intentionally killed because** of his or her **race,** color, religion, nationality, or country of origin.						
17	**The murder was committed while the defendant was engaged in, or was an accomplice in, the commission of**, attempted commission of, **or the immediate flight after committing, or attempting to commit, the following** felonies:						
17A	**Robbery** in violation of Section 211 or *212.5*. **(Italicized language effective 1991 but additional language made no substantive change.)**						
17B	**Kidnapping** in violation of Section 207 or 209 *or 209.5*. **(Italicized language effective March 27, 1996.). [See Sub para. "M" below]**						
17C	**Rape** in violation of Section 261						
17D	**Sodomy** in violation of Section 286.						
17E	The performance of a **lewd or lascivious act** upon the person of a **child** under the age of 14 years in violation of Section 288.						

IV. Instant Case Special Circumstances

You must check one of the five outcomes listed here:

1. **The SC was found to be true by a fact finder or stipulated to by the defendant.**
2. **The SC was REJECTED as not true by a fact finder.**
3. **The SC was withdrawn by the prosecutor.**
4. **The SC was struck by the court.**
5. **The outcome of the SC charge is UNKNOWN.**

A	B	C	D	E	F	G	H
Foil Num	**Penal Code Section 190.2(a). California Special Circumstances. Questions 52 and 53**	**Q.52**	**Q.53**				
			1	**2**	**3**	**4**	**5**
17F	**Oral copulation** in violation of Section 288a.						
17G	**Burglary** in the first or second degree in violation of Section 460.						
17H	**Arson** in violation of subdivision (b) of Section 451.						
17I	**Train wrecking** in violation of Section 219.						
17J	**Mayhem** in violation of Section 203 (**Effective date June 6, 1990**).						
17K	**Rape by instrument** in violation of Section 289 (**Effective date June 6, 1990**).						
17L	**Carjacking**, as defined in Section 215 (**Effective date March 27, 1996**).						
17M	To prove the special circumstances of kidnapping in subparagraph (B), or arson in subparagraph (H), if there is a specific intent to kill [in this case], it is only required that there be proof of the elements of those felonies. If so established, those two special circumstances are proven even if the felony of kidnapping or arson is committed primarily or solely for the purpose of facilitating the murder." (**Effective date March 8, 2000**). **(underline and [bracket] emphasis added)**						
18	The murder was intentional and involved the **infliction of torture**. **Prior to June 6, 1990, (thus, during the *Carlos* Window period) the statutory language of this special circumstance also required that: "For the purpose of this section torture requires proof of the infliction of extreme physical pain no matter how long its duration."**						
19	The defendant intentionally killed the victim by the **administration of poison**.						
20	The **victim was a juror in any court** of record in the local, state, or federal system in this or any other state, and the murder was intentionally carried out in retaliation for, or to prevent the performance of, the victim's official duties. (**Effective date March 27, 1996**).						
21	The murder was intentional and perpetrated by means of **discharging a firearm from a motor vehicle**, intentionally at another person or persons outside the vehicle with the intent to inflict death. For purposes of this paragraph, "motor vehicle" means any vehicle as defined in Section 415 of the Vehicle Code. (**Effective date March 27, 1996**).						
22	The defendant intentionally killed the victim while the **defendant was an active participant in a criminal street gang**, as defined in subdivision (f) of Section 186.22, and the murder was carried out to further the activities of the criminal street gang. (**Effective date March 8, 2000).**						
99	One or more Special circumstances were alleged but the identity of the alleged SC is unknown.						

IV. Instant Case – Sentence Imposed

54. If a special circumstance was found by a fact finder in the guilt trial, did the case advance to a penalty trial? (circle ONE best answer)

Yes 1

No 2

Not applicable b/c no finding of a special circumstance 8

Unknown. 9

55. Most serious sentence imposed (circle ONE best answer)

Death (M1) 1

Life without parole (LWOP) (M1) 2

25 years to life (M1) 3

15 years to life (M2) 4

Term of years (VM) 5

Probation. 6

Other. 7

Unknown, e.g., none reported or no sentence had been imposed at the time the probation report was prepared 9

56. If Q.55 = 5, what is the maximum term in years. ___|___

88 = N/A b/c Q.55 not = 5

99 = Term of years but unknown if a maximum

The purpose of Parts V, VI, and VII is to assess the factual death-eligibility of the instant case under three legal regimes; pre-*Furman* law, *Carlos* Window law and 2008 law. A M1 conviction in the instant case is relevant across all three legal regimes only if it is a controlling fact finding (CFF) and the M1 predicate in the instant case is applicable in all three legal regimes. A fact finding or guilty plea/stipulation to the presence of a SC is also a controlling fact finding and applicable under CW and 2008 law if the same SC is applicable.

Part V. Factual Death-Eligibility Status of Cases with a M1 Conviction

If the case resulted in a M2 or VM conviction (Q.41 = 2 or 3), omit this Part V and proceed to Part VI.

Figure 1 at the end of this DCI presents an overview of the pathways/flow chart to nine outcomes (bolded) that determine whether or not a case is death-eligible under Carlos Window and 2008 law. The purpose of this section is to determine the factual death-eligibility status of cases with an M1 conviction. Part VI addresses the death-eligibility of the cases with second degree and voluntary manslaughter convictions.

All M1 convictions in the instant case, whether based on a guilty plea or a jury/court finding of M1 liability are based on a controlling finding of fact (CFF) for the time period in which murder was committed. For example a M1 conviction for a murder committed during the CW is clearly a factual M1 case under CW law. The issue is whether it is also factually murder under pre-*Furman* and M1 under 2008 law. In this regard, consult the text and list of murder and M1 predicates in Q. 63, Q. 64, and Q. 65.

Thus, if the M1 conviction in the instant case was decided under CW law, the first question would be whether the M1 predicate supporting that conviction was also a murder predicate under pre-*Furman* law. For this study a post-*Furman* M1 conviction will be deemed to be factually murder under pre-*Furman* law unless it is clear that the factual predicate for the M1 conviction was not applicable as a murder predicate under pre-*Furman* law.

The next question in this hypothetical would be whether the M1 predicate in the instant case is also applicable under 2008 law. Generally this is an easier question to answer because as the law has evolved over the three relevant time periods, new M1 predicates were added but none was repealed. Thus, a M1 conviction in the instant case under CW law will normally be factually M1 under 2008 law because the M1 predicate under CW law is generally applicable under 2008 law. The exception to this rule that the scope of some CW M1 predicates and special circumstances have contracted over time.

However, when the instant case involved a murder committed under 2008 law, it will be necessary to determine whether the M1 predicate supporting the conviction also existed under CW law.

V. M1 Conviction Cases

M1 Factual Liability Under Three Legal Regimes

M1 factual liability under pre-*Furman* law:

57. Given the M1 predicate(s) in the instant case, under the rule stated above on the generalizability of M1 controlling findings of fact, is the case factually murder under pre-*Furman* law?
(circle ONE best answer)

Clearly Yes b/c the M1 predicate supporting M1 liability in the instant case 1
was also applicable to murder under pre-*Furman* law

Clearly No b/c the M1 predicate supporting M1 liability in the instant case 0
was not applicable to murder under pre-*Furman* law

A close call. 2

(If Q.57 = 1, code Part VII Q.75 = 1; if Q.57 = 0 code Q.75 = 0; if Q.57 = 2 code Q.75 = 2 and explain the basis of the close call in Part I Q.85.

M1 factual liability under CW law:

58. Given the M1 predicate in the instant case, under the rule stated above on the generalizability of M1 controlling findings of fact, is the case factually M1 under CW law?
(circle ONE best answer)

Clearly Yes because (a) CW law applied to the instant case, or (b) the M1 predicate supporting 1
M1 liability in the instant was also applicable under CW law.

Clearly No because the M1 predicate supporting M1 liability in the instant case 0
was not applicable under CW law.

A close call. 2

(If Q.58 = 1, code Part VII Q.76 = 1; if Q.58 = 0 code Q.76 = 0; if Q.58 = 2 code Q.76 = 2 and explain the basis of the close call in Part 1 Q.85.

M1 factual liability under 2008 law:

59. Given the M1 predicate in the instant case, under the rule stated above on the generalizability of M1 controlling findings of fact, is the case factually M1 under 2008 law? (circle ONE best answer)

Clearly Yes b/c (a) 2008 law applied to the instant case, or (b) the M1 predicate supporting 1
M1 liability in the instant case was also applicable under 2008 law.

Clearly No b/c the M1 predicate supporting M1 liability in the instant case 0
was not applicable under 2008 law.

A close call. 2

(If Q.59 = 1, code Part VII Q.79 = 1; if Q.59 = 0 code Q.79 = 0; if Q.59 = 2 code Q.79 = 2 and explain the basis of the close call in Part I Q.85.)

The coder's next task in the M1 conviction cases is to assess the factual presence of a special circumstance (SC) in the case.

In that regard, the first question is whether the CFF applies to the SC issue. If the CFF applies, the case goes to Part I, Row A Box 1A (DE) or 1B (NDE) of the flow chart, depending on whether a special circumstance was found to be present or not present. (All box references refer to Figure 1 "Pathway to Death-eligibility Classifications under Carlos Window and 2008 law.")

If the CFF does not apply b/c there were no allegations and/or findings of fact on them, we assess in Row B of Figure 1 whether the facts in the case support the presence of one or more special circumstances, and determine whether the case goes to Box 2A (DE) or 2B (NDE) of the flow chart.)

60. Was the presence or absence of all special circumstances in the case determined by a controlling fact finding? (See Q.53**)**
(circle ONE best answer)

Yes, there was a controlling fact finding that **one or more SC were present in the case (i.e. Q53=1 for 1 or more rows)** 1

Yes, there was a controlling fact finding that **there were NO SC present in the case (i.e. Q.53=2 or 4 for all SC allegations)** 2

No, b/c none alleged or SC withdrawn by prosecutor in a plea bargain or outcome unknown **(i.e. Q.53=3 or 5 for all SC allegations)** 0

Q. 60, foil 1 is applicable but additional SC (clearly present) were not alleged…… …3

Q. 60, foil 2 is applicable but additional SC (clearly present) were not alleged…… …4

Coder notes:
If Q.60 = 1 or 2:

Advance to Q.60C-Q.61.
From there, advance to Part VII to complete your task.

If Q.60 = 0, 3, or 4 proceed to Q.60A, below:

The Factual Presence of a Special Circumstance (SC) If It Was Not Determined by a CFF.

(Code this section only if Q.60 = 0, which means the presence of a special circumstance under Q.60 is not determined by a CFF, i.e., the CFF rule does not apply b/c no SC allegations and/or SC finding of fact.)

Coder notes:
Answers for question 60A are to be coded in the table directly following. The table contains a row for the 22 special circumstances found in the California Penal Code, Section 190.2 (a). There are four columns which can be checked as noted.

60A. If the facts in the probation report indicate the factual presence of a **special circumstance** (SC) under either *Carlos* Window law or 2008 law, code a **check mark** in the **Q.60A** columns C-D for each that was alleged. If none was factually present omit this 60A.

Note that there are two choices under each of the columns named Carlos Window and 2008 Law. For either or both that apply, check the appropriate box: **"Clearly present" or "A close call."**

(Coder Note: Flagging Differences in SCs Under CW and 2008 law. The distinctions between SCs under CW and 2008 law for this question are flagged by the effective dates of amendments to the CW SCs with the changes noted in italics. All of the CW SCs remain in effect under 2008 law, although a number of them have been modified, with expansion and contractions of liability, which are indicted below. See for example, foil 10 below.)

A	B	C	D		E	F
Foil Num	**Penal Code Section 190.2(a). California Special Circumstances. Question 60.A**	**Carlos Window**			**2008 Law**	
		Clearly present	**A close call**		**Clearly present**	**A close call**
1	The murder was intentional and carried out for **financial gain**.					
2	The defendant was **convicted previously of murder in the first or second** degree. For the purpose of this paragraph, an offense committed in another jurisdiction, which if committed in California would be punishable as first or second degree murder, shall be deemed murder in the first or second degree.					
3	The defendant, in this proceeding, has been convicted of **more than one offense of murder** in the first or second degree.					
4	The murder was committed by means of a **destructive device, bomb, or explosive** planted, hidden, or concealed in any place, area, dwelling, building, or structure, and the defendant knew, or reasonably should have known, that his or her act or acts would create a great risk of death to one or more human beings.					
5	The murder was committed for the **purpose of avoiding or preventing a lawful arrest**, or perfecting or attempting to perfect, an escape from lawful custody.					
6	The murder was committed by means of a **destructive device, bomb, or explosive** that the defendant mailed or delivered, attempted to mail or deliver, or caused to be mailed or delivered, and the defendant knew, or reasonably should have known, that his or her act or acts would create a great risk of death to one or more human beings.					

A	B	C	D		E	F
Foil Num	**Penal Code Section 190.2(a). California Special Circumstances. Question 60.A**	**Carlos Window**			**2008 Law**	
		Clearly present	**A close call**		**Clearly present**	**A close call**
7	The **victim was a peace officer**, as defined in Section 830.1, 830.2, 830.3, 830.31, *830.32*, *830.33*, *830.34*, 830.35, 830.36, *830.37*, 830.4, 830.5, 830.6, 830.10, 830.11, or 830.12, who, while engaged in the course of the performance of his or her duties, was intentionally killed, and the defendant knew, or reasonably should have known, that the victim was a peace officer engaged in the performance of his or her duties; or the victim was a peace officer, as defined in the above-enumerated sections, or a former peace officer under any of those sections, and was intentionally killed in retaliation for the performance of his or her official duties. **(Italicized language effective June 6, 1990)**					
8	The **victim was a federal law enforcement officer** or agent who, while engaged in the course of the performance of his or her duties, was intentionally killed, and the defendant knew, or reasonably should have known, that the victim was a federal law enforcement officer or agent engaged in the performance of his or her duties; or the victim was a federal law enforcement officer or agent, and was intentionally killed in retaliation for the performance of his or her official duties.					
9	The **victim was a firefighter**, as defined in Section 245.1, who, while engaged in the course of the performance of his or her duties, was intentionally killed, and the defendant knew, or reasonably should have known, that the victim was a firefighter engaged in the performance of his or her duties.					
10	The **victim was a witness to a crime** who was intentionally killed **for the purpose of preventing his or her testimony** in any criminal *or juvenile* proceeding, and the killing was not committed during the commission or attempted commission of the crime to which he or she was a witness; or the victim was a witness to a crime and was intentionally killed in retaliation for his or her testimony in any criminal *or juvenile* proceeding. *As used in this paragraph, "juvenile proceeding" means a proceeding brought pursuant to Section 602 or 707 of the Welfare and Institutions Code*. **(Italicized language effective June 6, 1990)**.					
11	The **victim was a prosecutor or assistant prosecutor** or a former prosecutor or assistant prosecutor of any local or state prosecutor's office in this or any other state, or of a federal prosecutor's office, and the murder was *intentionally* carried out in retaliation for, or to prevent the performance of, the victim's official duties **(Italicized language effective June 6, 1990)**.					

A	B	C	D		E	F
Foil Num	**Penal Code Section 190.2(a). California Special Circumstances. Question 60.A**	**Carlos Window**			**2008 Law**	
		Clearly present	**A close call**		**Clearly present**	**A close call**
12	The **victim was a judge or former judge** of any court of record in the local, state, or federal system in this or any other state, and the murder was *intentionally* carried out in retaliation for, or to prevent the performance of, the victim's official duties **(Italicized language effective June 6, 1990).**					
13	The **victim was an elected or appointed official** or former official of the federal government, or of any local or state government of this or any other state, and the killing was intentionally carried out in retaliation for, or to prevent the performance of, the victim's official duties.					
14	Ommitted: former "heinous, atrocious, and cruel."					
15	The defendant intentionally killed the victim *by means of* **lying in wait**. (**Italicized language effective March 8, 2000**). **Prior to March 8, 2000 (thus, during the *Carlos* Window period), the statutory language of the lying in wait special circumstance read as follows: "The defendant intentionally killed the victim while lying in wait."**					
16	The **victim was intentionally killed because** of his or her **race,** color, religion, nationality, or country of origin.					
17	**The murder was committed while the defendant was engaged in, or was an accomplice in, the commission of, attempted commission of, or the immediate flight after committing, or attempting to commit, the following** felonies:					
17A	**Robbery** in violation of Section 211 or *212.5*. **(Italicized language effective 1991 but additional language made no substantive change.)**					
17B	**Kidnapping** in violation of Section 207 or 209 *or 209.5*. **(Italicized language effective March 27, 1996)**. [**Also consult subparagraph "17M" below]**					
17C	**Rape** in violation of Section 261					
17D	**Sodomy** in violation of Section 286.					
17E	The performance of a **lewd or lascivious act** upon the person of a **child** under the age of 14 years in violation of Section 288.					
17F	**Oral copulation** in violation of Section 288a.					
17G	**Burglary** in the first or second degree in violation of Section 460.					
17H	**Arson** in violation of subdivision (b) of Section 451 **(Prior to June 6, 1990, Penal Code section 190.2 referred to the arson provision contained in Section 447, but section 447 had been repealed in 1929.). [Also consult subparagraph "17M" below]**					
17I	**Train wrecking** in violation of Section 219.					

V. M1 Conviction Cases - Factual Presence of SC

A	B	C	D		E	F
Foil Num	**Penal Code Section 190.2(a). California Special Circumstances. Question 60.A**	**Carlos Window**			**2008 Law**	
		Clearly present	**A close call**		**Clearly present**	**A close call**
17J	**Mayhem** in violation of Section 203 (**Effective date June 6, 1990**).					
17K	**Rape by instrument** in violation of Section 289 (**Effective date June 6, 1990**).					
17L	**Carjacking**, as defined in Section 215 (**Effective date March 27, 1996**).					
17M	To prove the special circumstances of kidnapping in subparagraph (B), or arson in subparagraph (H), if there is a specific intent to kill [in this case], it is only required that there be proof of the elements of those felonies. If so established, those two special circumstances are proven even if the felony of kidnapping or arson is committed primarily or solely for the purpose of facilitating the murder." (**Effective date March 8, 2000**). **(underline and [bracket] emphasis added)**					
18	The murder was intentional and involved the **infliction of torture**. **Prior to June 6, 1990, (thus, during the *Carlos* Window period) the statutory language of this special circumstance also required that: "For the purpose of this section torture requires proof of the infliction of extreme physical pain no matter how long its duration.**					
19	The defendant intentionally killed the victim by the **administration of poison**.					
20	The **victim was a juror in any court** of record in the local, state, or federal system in this or any other state, and the murder was intentionally carried out in retaliation for, or to prevent the performance of, the victim's official duties. (**Effective date March 27, 1996**).					
21	The murder was intentional and perpetrated by means of **discharging a firearm from a motor vehicle**, intentionally at another person or persons outside the vehicle with the intent to inflict death. For purposes of this paragraph, "motor vehicle" means any vehicle as defined in Section 415 of the Vehicle Code. (**Effective date March 27, 1996**).					
22	The defendant intentionally killed the victim while the **defendant was an active participant in a criminal street gang**, as defined in subdivision (f) of Section 186.22, and the murder was carried out to further the activities of the criminal street gang. (**Effective date March 8, 2000).**					

(Special circumstances adopted after the end of the *Carlos* Window (10/13/87) are applicable only under 2008 law. If the crime in the instant case was committed after the termination of the *Carlos* window and a 2008 law special circumstance was present in the case, include that information in your answer to Q.60A.)

V. M1 Conviction Cases - Factual Presence of SC

Under CW law: (Q.75-Q.81 referred to below)

60B. If, in Q.60A, SC 17A through 17L was coded as present, did the defendant have the intent to kill the victim(s)? (circle ONE best answer)

Yes 1

No 2

Not applicable b/c SC17A-17L not present. 3

Unknown 9

Coder note: If a CFF is reported in Q.60 for a case with a date of offense that was post-CW, determine if the SC was in effect October 12, 1987, the last day within the CW. If the SC was in effect on that day, the CFF in the instant case will inform your answer to Q.60C. For an instant case with the date of offense before or during the CW, a CFF on a SC in the instant case is also a CFF under 2008 law because all SCs in effect before or during the CW law were also in effect under January 1, 2008 law, although post-CW some of the special circumstances have been expanded or limited as indicated in the foils of Q. 60A.

60C. Is a special circumstance factually present in the case under CW law? (circle ONE best answer)

Clearly Yes b/c Q.60 =1 and the SC found to be present in the instant case applied under 1
CW law, or Q.60 = 0 and the facts reported in the probation report are legally sufficient to support a determination of the factual presence of a special circumstance in the case under CW law.

Clearly No b/c Q.60 =2 and the SC found to be not present in the instant case applied 0
under CW law, or Q.60=0 and the facts reported in the probation report are not legally sufficient to support a determination of the factual presence of a special circumstance in the case under CW law.

A close call 2

(If Q.60C = 1, code in Part VII Q.77 = 1; if Q.60C = 0 code Q.77 = 0; Q.60C = 2 code Q.77 = 2 and explain the basis of the close call in Part I Q.85)

Under 2008 law

61. Is a special circumstance factually present in the case under 2008 law? (circle ONE best answer)

Clearly Yes b/c Q.60 =1 and the SC found to be present in the instant case applied under 1
2008 law, or Q.60 = 0 and the facts reported in the probation report are legally sufficient to support a determination of the factual presence of a special circumstance in the case under 2008 law.

Clearly No b/c Q.60 =2 and the SC found to be not present in the instant case applied 0
under CW law, or Q.60=0 and the facts reported in the probation report are not legally sufficient to support a determination of the factual presence of a special circumstance in the case under 2008 law.

A close call 2

(If Q.61 = 1, code in Part VII Q.80 = 1; if Q.61 = 0 code Q.80 = 0; Q.61 = 2 code Q.80 = 2 and explain the basis of the close call in Part I Q.85)

Part VI. Factual Death-eligibility Status of Cases with an M2 or VM Conviction. If the instant case has a M1 conviction, omit this section and go to Part VII.

Code this Part VI only if the case resulted in a M2 or VM conviction.

The purpose of this section is to determine the factual death-eligibility status of M2 and VM conviction cases under CW and 2008 law in Part II of Figure 1. The first question is whether M2 or VM liability in the case was determined by a CFF (Row A). If it was, and no Q. 62 exceptions apply, then the case goes to Box 3 (NDE) of the flow chart which ends the death-eligibility inquiry. If it was not, assess the factual liability of the case. If the case is factually M2 or VM, it goes to Boxes 4B and 4C where it is deemed not death-eligible which ends the inquiry. If it is factually M1 the case goes to Box 4A and the coder must next assess the case for the factual presence of SC depicted in Row C. Only when a case is factually M1 or a close call on the issue does it require a further coding of the factual presence of a special circumstance. If a special circumstance is coded as factually present, the case goes to Box 5A (DE) of the flow chart; otherwise, it goes to Box 5B (NDE). However, if the case appears to be clearly factually M2 or VM, note in Q. 87 any SCs that appear to be clearly present in the case.

Please note the distinction between the defendant's homicide "liability" and the defendant's "culpability level" as the terms are used herein. Liability refers to the grade of homicide (Murder or VM, pre-*Furman*, and M1, M2, or VM in CW and 2008). Unless liability was determined by a CFF, the grade of the homicide in the case is a factual question regardless of the crime of conviction. "Culpability level" refers to the most plausible factual basis for the defendant's liability as defined in Part A and Part B under Questions 63-65 below. For example, the most common culpability levels for M1 under CW and 2008 law are "willful, deliberate, and premeditated" killing (foil 1) and felony murder (foils 3A-3O). Unless the probation report or a judicial opinion states the basis for the conviction, which is rare, the coder will base his or her judgment of the defendant's level of culpability on the facts of the case and the coder's application to them of the legal sufficiency test cited in note 2.

A. Is the M2 or VM Liability in the Case Determined by a CFF?

(The CFF rule applies on liability only if there was an M1 or 187 PC murder charge that resulted in a M2 or VM conviction by a judge or jury or an M2 charge that resulted in a VM conviction by a judge or jury.)

62. Is the defendant's M2 or VM homicide liability in the instant case determined by a controlling fact finding?

(Circle ONE best answer)

Yes 1

No because the jury nullification exception in para. 1 below applies 2

Yes, although the CFF applies in the instant case, the CFF does not apply in all three periods because different murder or M1 predicates apply in different time periods per para 2 below 3

No 0

Unknown. 9

VI. M1 Factual Liability in M2 and VM Cases

Coder Note: If Q.62 = 1 (Yes), with two exceptions noted below, advance to Part VII and code Q.75 through Q.86 = 0.

1. **The first exception arises when there is overwhelming evidence of jury nullification underlying the M2 or VM verdict or bench trial judgment in the instant case. When this occurs code Q.62 =2.**

2. **The second exception concerns the generalizability of the CFF in the instant case to each of the three legal regimes for which you are coding. Specifically, determine on pages 39-41 the M1 predicates that were applicable on the date of the offense. You can assume that the fact finder in the instant case found none of the M1 predicates present in the case that were in effect on the date of the offense. However, if an M1 predicate <u>became effective after the date of the offense</u> and <u>it is factually present in the case</u>, code Q. 62 =3. For example, if the instant case involved a kidnapping (item 3G in table 'Q.64 & Q.65), that circumstance would have established M1 factual culpability under CW and 2008 law'). However, that M1 predicate would not have been applicable to the instant case if the date of the offense in the instant case was prior to June 6, 1990. Accordingly, it is appropriate to treat the M2 or VM conviction in the instant case as a CFF under pre-*Furman* and CW law but not under 2008 law. Moreover, depending on the strength of the evidence of the kidnapping in the probation report, it may support a coding of the factual presence of M1 under 2008 law because of the kidnapping in the instant case. When this occurs, as noted above, code Q.62 = 3.**

The differences in terms of murder liability may also run in a different direction. For example, if the case instant case resulted in an M2 conviction that may be a CFF under CW and 2008 law, but if the facts would have supported a finding of common law murder under pre-*Furman* GA law, it would be coded as factually murder under pre-*Furman* law. However, if the instant case involved a CFF voluntary manslaughter conviction, that would also control for the pre-*Furman* period because the applicable VM standard is comparable in pre-*Furman* and under CW and 2008 law.

<u>B. Is the Case Otherwise Factually Common Law Murder Under pre-*Furman*, or factually M1 under CW, and 2008 law? (note that pre-*Furman* GA law had no grades of murder, i.e., M1 and M2, as exist under California CW and 2008 law).</u>

Coder notes:

Answers for questions 63, 64, and 65 are to be coded in the <u>next</u> two tables directly following. The tables contain rows for culpability levels. The first (Q. 63) table is for pre-*Furman* law, which includes common law murder and voluntary manslaughter. The second table is for CW (Q. 64) and 2008 (Q. 65) law, which embrace M1, M2, and VM. Note that there are two choices under each of the columns for each time period. Check the appropriate box: **"Clearly present" or "A close call,"** as applicable for each column. Leave the box blank if neither is applicable.

1. If the answer to Q.62 is <u>0, 2, or 3</u>, code Q.63-Q.65 for the applicable level of factual homicide culpability listed in the table below that is supported by legally sufficient facts for the three relevant periods. Code all common law <u>murder</u> and M1 culpability levels that are plausible and consistent with the facts for each period. You may code one or more of those foils a "close call" if that is appropriate.

2. If the culpability level of the case is clearly VM for Q. 63, or clearly M2 or VM for the Q.64-Q.65 time periods, code the applicable foil(s), which includes <u>foil AA for pre-*Furman* law and</u> foils 17 and 18 under

CW and 2008 law, to that effect and leave the other foils blank for that time period.[22] If there is a close call on the presence of murder or M1 culpability vs. M2 or VM culpability in a given time period (a) code the applicable M2 or VM foils, as the case may be, a close call for that time period, and code the most applicable murder/M1 culpability level(s) as a close call. For example, if under *Carlos* Window law, it is a close call under foil 1 (willful, deliberate, and premeditated murder) and a close call for M2 (e.g., unpremeditated murder), code both foil 1and foil 17 as close calls for that period.

Q. 63 Table: Pre-*Furman* factual common law murder culpability level (all of the foils in this table are potential murder predicates under pre-*Furman* Georgia law):

A	B	C	D
Foil num	**Factual common law murder culpability levels under pre-*Furman* Law.**	**Q.63 Pre-Furman – GA Law**	
		Clearly present	**A close call**
I. Factual murder liability when the defendant is the actual killer			
A.	Express malice – deliberate intent to kill at the time the defendant made up his/her mind to shoot or strike the fatal blow without excuse, justification, or mitigation		
B	Implied malice – **mens rea** – an "unlawful act" in which the defendant acted with "reckless disregard of human life."		
C.	Implied malice – **manner** – deadly weapon used in a manner in which such a weapon is ordinarily used to kill		
Felony murder (D through K)			
D.	Robbery		
E.	Burglary		
F.	Rape		
G.	Assault with intent to rape		
H.	Sodomy		
I.	Seduction		
J.	Mayhem		
K.	Arson		
L.	**FOILS L THROUGH R ARE RESERVED FOR ADDITIONAL PROVISIONS**		
M.			

[22] The VM culpability level is described for pre-*Furman* law in the coding protocol for Q. 63 and the M2 and VM culpability levels for Q. 64 and Q. 65 are described in the notes following the Q.64 and Q.65 table below.

N.			
O.			
P.			
Q.			
R.			
II. Factual murder liability for non-actual killers			
S.	Principal in the second degree – actual or constructive presence at the scene of the crime		
T.	Aider and abettor - not present at the scene of the offense		
U.	Accomplice liability in a felony murder case		
V.	FOILS 11- 16 RESERVED FOR ADDITIONAL PROVISIONS		
W.			
X.			
Y.			
Z.			
AA.	VM culpability level*		

* For this question the culpability levels for VM is described FYI in the coding protocol for this question. If applicable check clearly present or a close call as the case may be.

Q. 64 & Q.65. M1 factual culpability level under CW and 2008 law.

Code all applicable culpability levels. Culpability levels that do not apply in the Carlos Window have been blocked off.

A	B	C	D		E	F
Foil num	**Factual M1 culpability levels under Carlos Window and 2008 Law.**	**Q.64**			**Q.65**	
		Carlos Window			**2008 Law**	
		Clearly present	**A close call**		**Clearly present**	**A close call**
I. Defendant as actual killer						
01	Willful, deliberate, and premeditated					
2A	Destructive device					
2B	An explosive					
2C	Knowing use of ammunition designed primarily to penetrate metal or armor (Effective date September 13, 1982).					
2D	Poison					
2E	Lying in wait					
2F	Torture					

VI. M1 Factual Liability in M2 and VM Cases

A	B	C	D		E	F
Foil num	**Factual M1 culpability levels under Carlos Window and 2008 Law.**	**Q.64**			**Q.65**	
		Carlos Window			**2008 Law**	
		Clearly present	**A close call**		**Clearly present**	**A close call**
2G	Discharging a firearm from a motor vehicle, intentionally at another person outside of the vehicle with the intent to inflict death (Effective date October 1, 1993).					
2H	A weapon of mass destruction (Effective date September 17, 2002).					
31	Arson (Penal Code Section 451)					
3B	Rape (Penal Code Section 261)					
3C	Carjacking (Penal Code Section 215) (Effective date October 1,1993)					
3D	Robbery (Penal Code Section 211)					
3E	Burglary (Penal Code Section 459)					
3F	Mayhem (Penal Code Section 203)					
3G	Kidnapping (Penal Code Section 207) (Effective date June 6, 1990).					
3H	Train wrecking (Penal Code Section 219) (Effective date June 6, 1990)					
3I	Torture (Penal Code Section 206) (Effective date January 1, 2000)					
3J	Sodomy (Penal Code Section 286) (Effective date June 6, 1990)					
3K	Lewd act with a child under 14 (Penal Code Section 288).					
3L	Oral copulation (Penal Code Section 288a) (Effective date June 6, 1990)					
3M	Penetration by foreign or unknown object (Penal Code Section 289) (Effective date June 6, 1990)					
3N	Lewd act with a child under 14 or a dependent person (Penal Code Section 288). (Effective date Jan 1, 1996.)					
II. Liability beyond actual killers: provokers and aiders and abettors						
08	Liability for provoking a third party (a victim, a bystander, or a police officer) to commit a homicide because the defendant or surviving co-participant provoked the third party to commit the homicide (M1, M2)					
09	The defendant (a) with knowledge of the actual killer's unlawful purpose, and (b) with the intent to facilitate or encourage commission of the homicide, (c) by act or advice aided, promoted, encouraged or instigated the commission of the homicide (M1, M2, or VM)					

10	Conspiracy Liability. The defendant, with specific intent, agreed with the actual killer and possibly others to commit a homicide and at least one co-conspirator committed an overt act for the purpose of accomplishing the homicide and a co-conspirator committed homicide (M1).					
11	First Degree Felony Murder Liability. The defendant intended to or did commit a Penal Code Section 189 enumerated felony (arson, rape carjacking, robbery, burglary, mayhem, kidnapping, etc.) or aided and abetted the commission of such a felony and a homicide occurred in the attempted commission or commission of the felony regardless of whether the killing was intentional, unintentional, or accidental (M1)					
12	First Degree Felony Murder Liability Based on Conspiring to Commit an Enumerated Felony. The defendant, with specific intent, agreed with the actual killer and possibly others to commit a Penal Code Section 189 enumerated felony (arson, rape carjacking, robbery, burglary, mayhem, kidnapping, etc.) and at least one co-conspirator committed an overt act for the purpose of accomplishing the felony, and a homicide occurred in the attempted commission or commission of the felony regardless of whether the killing was intentional, unintentional, or accidental (M1).					
15	Natural and Probable Consequences Liability. The defendant aided and abetted the actual killer in the commission of a non-homicidal crime for which the homicide was a natural and probable consequence (M1, M2).					
16	Natural and Probable Consequences Liability Based on Conspiracy. The defendant, with specific intent, agreed with the actual killer and possibly others to commit a non-homicidal crime for which the homicide was a natural and probable consequence and at least one co-conspirator committed an overt act for the purpose of accomplishing the felony (M1, M2)					
17	M2 culpability level*					
18	VM culpability level*					

*The culpability levels for M2 and VM are listed below for your information. They are not to be coded here.

(M2 and VM Culpability Levels Under *Carlos* Window (CW), and 2008 law. These definitions of M2 and VM culpability levels are presented for coder guidance in evaluating foils 17 and 18 in the preceding Tables for Q64 and Q.65. However, they are not to be coded in the Q64 and Q65 tables

Section A: Defendant culpability levels as the actual killer in the offense:

1. Unpremeditated murder with express malice (M2). Defendant intended to kill without deliberation and premeditation.

2. Unpremeditated murder with implied malice murder (M2): M2 liability does not require that the defendant intended to kill. It is established where death resulted from defendant's deliberate act with knowledge that the conduct presented a danger to human life and the defendant acted with a conscious disregard for human life.

3. Felony murder (M2). M2 liability is triggered when the death occurred as the direct casual result of an attempted commission, commission, or escape from the commission or an attempted commission of a felony inherently dangerous to human life (other than those listed for M1 felony murder liability). Liability is established if defendant had specific intent to commit the felony; intent to kill is not required. Examples of inherently dangerous felonies include:

6A = Furnishing poisonous substance.
6B = Reckless or malicious possession of destructive device.
6C = Willful or wanton disregard for safety of persons or property while attempting to elude peace officer.

6D = Willful discharge of firearm at inhabited dwelling.
6E = Willful discharge of firearm at occupied vehicle.
6F = Selling or manufacturing illegal drugs.
6G = Kidnapping (prior to June 6, 1990).
6H = Driving under the influence of drugs or alcohol.
6I = Other_____.

4. Voluntary manslaughter. Defendant had a mens rea that would otherwise support murder liability but the malice aforethought is negated because of:

7A = Provocation. The defendant acted "upon a sudden quarrel or heat of passion" based on legally adequate provocation by the victim that arouses great fear, anger or jealousy (Penal Code 192).

(1) However, M2 liability attaches if the provocation is inadequate or if sufficient time to cool elapsed between the provocation and the killing.

7B = Imperfect self-defense. The defendant acted upon the actual but unreasonable belief in the necessity to defend self/other against imminent peril to life or great bodily injury.

(During *Carlos* Window law VM liability under both the VM 7A and 7B prongs above required an intent to kill)

Section B: Defendant culpability levels as an aider/abettor in the offense:

1 = Second-Degree Felony Murder Liability Based on a Felony Inherently Dangerous to Human Life. The defendant had the specific intent to commit, encourage, or facilitate the underlying felony, and with knowledge of the actual killer's criminal purpose under Category 6 above and by act or advice intentionally aided or encouraged the actual killer (M2). As with actual killer defendants, intent to kill is not required.

2. = Second Degree Felony Murder Liability Based on Conspiring to Commit a Felony Inherently Dangerous to Human Life. The defendant, with specific intent, agreed with the actual killer and possibly others to commit a felony inherently dangerous to human life and at least one co-conspirator committed an overt act for the purpose of accomplishing the felony, and a homicide occurred in the attempted commission or commission of the felony regardless of whether killing was intentional, unintentional, or accidental (M2)

6. <u>FACTUAL Murder/M1 STATUS OF THE CASE</u>

<u>Under CW law:</u> (Q.75-Q.81)

66. Is the case factually M1 under *Carlos* Window law? (circle ONE best answer)

Clearly Yes b/c the facts reported in the probation report are legally sufficient to support a determination of factual M1status compared to M2 or VM 1

Clearly No b/c the facts reported in the probation report are not legally sufficient to support a determination of factual M1 status compared to M2 or VM. 0

A close call 2

VI. M1 Factual Liability in M2 and VM Cases

(If Q.66 = 1, code in Part VII Q.76 = 1; if Q.66 = 0 code Q.76 = 0; if Q.66 = 2, code Q.76 = 2 and explain the basis of the close call in Part I Q.85.)

Under pre-*Furman* law:

67. Is the factual murder/M1 status of the case different under pre-*Furman* law? (circle ONE best answer)

Yes, it is different b/c the relevant murder standard under pre-*Furman* law was different. 1
than the M1 standard under *Carlos* Window law.

No, it is the same b/c the relevant murder standard under pre-*Furman* law 2
is the same as the M1 standard under *Carlos* Window law.

68. Is the case factually murder under pre-*Furman* law? (circle ONE best answer)

Clearly Yes b/c the facts reported in the probation report are legally 1
sufficient to support a determination of factual murder status compared to VM.

Clearly No b/c the facts reported in the probation report are not legally 0
sufficient to support a determination of factual murder status compared to VM.

A close call 2

(If Q.68 = 1, code in Part VII Q.75 = 1; if Q.68 = 0 code Q.75 = 0; if Q.68 = 2, code Q.75 = 2 and explain the basis of the close call in Part 1 Q.85).

Under 2008 law:

69. Is the factual M1 status of the case different under 2008 law? (circle ONE best answer)

Yes, it is different b/c the relevant M1 standard is different under 2008 law 1
than it was under *Carlos* Window law.

No, it is the same b/c the relevant M1 standard is the same under 2008 law 2
as it was under *Carlos* Window law.

70. Is the case factually M1 under 2008 law? (circle ONE best answer)

Clearly Yes b/c the facts reported in the probation report are legally 1
sufficient to support a determination of factual M1 status compared to M2 or VM

Clearly No b/c the facts reported in the probation report are not legally 0
sufficient to support a determination of factual M1 status compared to M2 or VM.

A close call 2

(If Q.70 = 1, code in Part VII Q.79 = 1; if Q.70 = 0 code Q.79 = 0; if Q.70 = 2, code Q.79 = 2 and explain the basis of the close call in Part 1 Q.85.)

VI. Special Circumstances in M2 and VM Cases

7. <u>For M2 or VM conviction Cases That Are Factually M1 (clearly yes or a close call) Under CW or 2008 Law, Is a Special Circumstance Factually Present?</u>[23]

If the <u>instant</u> case is not factually M1 <u>under CW or 2008 law</u> (i.e., neither clearly yes nor a close call), omit this Section and go to Part VII.

(**Code only if the case is classified as factually M1 under CW or 2008 law in the Section B analysis above, i.e. Q.66 = 1 (clearly yes) or 2 (a close call) or Q.70 = 1(clearly yes) or 2 (a close call).**

(Special circumstances adopted after the end of the *Carlos* Window (10/13/87) are applicable only under 2008 law. If the crime in the case was committed after the termination of the *Carlos* window and a 2008 law special circumstance was present in the case, include that information in your answer to Q.73.)

Coder notes:
Answers for question 71 are to be coded in the table directly following Q.71. The table contains a row for the 22 special circumstances found in the California Penal Code, Section 190.2 (a). There are four columns which can be checked as noted.

71. If the facts in the probation report indicate the factual presence of a **special circumstance** under either *Carlos* Window law or 2008 law, code a **check mark** in the **Q.71** columns for each that was alleged. If none, don't check anything.

(Flagging Differences in SCs Under CW and 2008 Law. Unlike the culpability level distinctions between the three time periods in questions 63-65 that are flagged with italics and underlining, the distinctions between SCs under CW and 2008 law for this question are flagged by the effective dates of amendments with the changes noted in italics. See, for example, foil 10 below.)

Note that there are two choices under each of the columns named Carlos Window and 2008 Law. For either or both that apply, check the appropriate box: **"Clearly present" or "A close call"**:

A	B	C	D		E	F
Foil Num	**Penal Code Section 190.2(a). California Special Circumstances. Question 71**	**Carlos Window**			**2008 Law**	
		Clearly present	**A close call**		**Clearly present**	**A close call**
1	The murder was intentional and carried out for **financial gain**.					
2	The defendant was **convicted previously of murder in the first or second** degree. For the purpose of this paragraph, an offense committed in another jurisdiction, which if committed in California would be punishable as first or second degree murder, shall be deemed murder in the first or second degree.					
3	The defendant, in this proceeding, has been convicted of **more than one offense of murder** in the first or second degree.					

[23] The law is such that if a SC is applicable under CW law, it will also be applicable under 2008 law because no CW special circumstances have been deleted, although post-CW some of the CW special circumstances have been expanded or limited as indicated in the Q. 71 foils listed below. However, since CW a number of SC were adopted and are applicable only under 2008 law.

VI. Special Circumstances in M2 and VM Cases

A	B	C	D		E	F
Foil Num	**Penal Code Section 190.2(a). California Special Circumstances. Question 71**	**Carlos Window**			**2008 Law**	
		Clearly present	**A close call**		**Clearly present**	**A close call**
4	The murder was committed by means of a **destructive device, bomb**, or explosive planted, hidden, or concealed in any place, area, dwelling, building, or structure, and the defendant knew, or reasonably should have known, that his or her act or acts would create a great risk of death to one or more human beings.					
5	The murder was committed for the **purpose of avoiding or preventing a lawful arrest**, or perfecting or attempting to perfect, an escape from lawful custody.					
6	The murder was committed by means of a **destructive device, bomb**, or explosive that the defendant mailed or delivered, attempted to mail or deliver, or caused to be mailed or delivered, and the defendant knew, or reasonably should have known, that his or her act or acts would create a great risk of death to one or more human beings.					
7	The **victim was a peace officer**, as defined in Section 830.1, 830.2, 830.3, 830.31, *830.32*, *830.33*, *830.34*, 830.35, 830.36, *830.37*, 830.4, 830.5, 830.6, 830.10, 830.11, or 830.12, who, while engaged in the course of the performance of his or her duties, was intentionally killed, and the defendant knew, or reasonably should have known, that the victim was a peace officer engaged in the performance of his or her duties; or the victim was a peace officer, as defined in the above-enumerated sections, or a former peace officer under any of those sections, and was intentionally killed in retaliation for the performance of his or her official duties. **(Italicized language effective June 6, 1990)**					
8	The **victim was a federal law enforcement officer** or agent who, while engaged in the course of the performance of his or her duties, was intentionally killed, and the defendant knew, or reasonably should have known, that the victim was a federal law enforcement officer or agent engaged in the performance of his or her duties; or the victim was a federal law enforcement officer or agent, and was intentionally killed in retaliation for the performance of his or her official duties.					
9	The **victim was a firefighter**, as defined in Section 245.1, who, while engaged in the course of the performance of his or her duties, was intentionally killed, and the defendant knew, or reasonably should have known, that the victim was a firefighter engaged in the performance of his or her duties.					
10	The **victim was a witness to a crime** who was intentionally killed **for the purpose of preventing his or her testimony** in any criminal *or juvenile* proceeding, and the killing was not committed during the commission or attempted commission of the crime to which he or she was a witness; or the victim was a witness to a crime and was intentionally killed in retaliation for his or her testimony in any criminal *or juvenile* proceeding. *As used in this paragraph, "juvenile proceeding" means a proceeding brought pursuant to Section 602 or 707 of the Welfare and Institutions Code*. **(Italicized language effective June 6, 1990)**.					

VI. Special Circumstances in M2 and VM Cases

A	B	C	D		E	F
Foil Num	**Penal Code Section 190.2(a). California Special Circumstances. Question 71**	**Carlos Window**			**2008 Law**	
		Clearly present	**A close call**		**Clearly present**	**A close call**
11	The **victim was a prosecutor or assistant prosecutor** or a former prosecutor or assistant prosecutor of any local or state prosecutor's office in this or any other state, or of a federal prosecutor's office, and the murder was *intentionally* carried out in retaliation for, or to prevent the performance of, the victim's official duties **(Italicized language effective June 6, 1990)**.					
12	The **victim was a judge or former judge** of any court of record in the local, state, or federal system in this or any other state, and the murder was *intentionally* carried out in retaliation for, or to prevent the performance of, the victim's official duties **(Italicized language effective June 6, 1990).**					
13	The **victim was an elected or appointed official** or former official of the federal government, or of any local or state government of this or any other state, and the killing was intentionally carried out in retaliation for, or to prevent the performance of, the victim's official duties.					
14	Omitted: former "heinous, atrocious, and cruel"					
15	The defendant intentionally killed the victim *by means of* **lying in wait**. (**Italicized language effective March 8, 2000)**. **Prior to March 8, 2000 (thus, during the *Carlos* Window period), the statutory language of the lying in wait special circumstance read as follows: "The defendant intentionally killed the victim while lying in wait."**					
16	The **victim was intentionally killed because** of his or her **race,** color, religion, nationality, or country of origin.					
17	**The murder was committed while the defendant was engaged in, or was an accomplice in, the commission of**, **attempted commission of**, **or the immediate flight after committing, or attempting to commit, the following** felonies:					
17A	**Robbery** in violation of Section 211 or *212.5*. **(Italicized language effective 1991 but additional language made no substantive change.)**					
17B	**Kidnapping** in violation of Section 207 or 209 *or 209.5*. **(Italicized language effective March 27, 1996.** [**Also consult subparagraph "17M" below]**					
17C	**Rape** in violation of Section 261					
17D	**Sodomy** in violation of Section 286.					
17E	The performance of a **lewd or lascivious act** upon the person of a **child** under the age of 14 years in violation of Section 288.					
17F	**Oral copulation** in violation of Section 288a.					
17G	**Burglary** in the first or second degree in violation of Section 460.					
17H	**Arson** in violation of subdivision (b) of Section 451 **(Prior to June 6, 1990, Penal Code section 190.2 referred to the arson provision contained in Section 447, but section 447 had been repealed in 1929.). [Also consult subparagraph "17M" below.]**					
17I	**Train wrecking** in violation of Section 219.					

VI. Special Circumstances in M2 and VM Cases

A	B	C	D		E	F
Foil Num	**Penal Code Section 190.2(a). California Special Circumstances. Question 71**	**Carlos Window**			**2008 Law**	
		Clearly present	**A close call**		**Clearly present**	**A close call**
17J	**Mayhem** in violation of Section 203 (**Effective date June 6, 1990**).					
17K	**Rape by instrument** in violation of Section 289 (**Effective date June 6, 1990**).					
17L	**Carjacking**, as defined in Section 215 (**Effective date March 27, 1996**).					
17M	To prove the special circumstances of kidnapping in subparagraph (B), or arson in subparagraph (H), if there is a specific intent to kill [in this case], it is only required that there be proof of the elements of those felonies. If so established, those two special circumstances are proven even if the felony of kidnapping or arson is committed primarily or solely for the purpose of facilitating the murder." (**Effective date March 8, 2000**). **(underline and [bracket] emphasis added)**					
18	The murder was intentional and involved the **infliction of torture**. **Prior to June 6, 1990, (thus, during the *Carlos* Window period) the statutory language of this special circumstance also required that: "For the purpose of this section torture requires proof of the infliction of extreme physical pain no matter how long its duration.**					
19	The defendant intentionally killed the victim by the **administration of poison**.					
20	The **victim was a juror in any court** of record in the local, state, or federal system in this or any other state, and the murder was intentionally carried out in retaliation for, or to prevent the performance of, the victim's official duties. (**Effective date March 27, 1996**).					
21	The murder was intentional and perpetrated by means of **discharging a firearm from a motor vehicle**, intentionally at another person or persons outside the vehicle with the intent to inflict death. For purposes of this paragraph, "motor vehicle" means any vehicle as defined in Section 415 of the Vehicle Code. (**Effective date March 27, 1996**).					
22	The defendant intentionally killed the victim while the **defendant was an active participant in a criminal street gang**, as defined in subdivision (f) of Section 186.22, and the murder was carried out to further the activities of the criminal street gang. (**Effective date March 8, 2000).**					

VI. Special Circumstances in M2 and VM Cases

Under CW law:

72. Is a special circumstance factually present in the case under CW law? (circle ONE best answer)

Clearly Yes b/c the facts reported in the probation report are legally sufficient to support a determination of the factual presence of a special circumstance in the case under *Carlos* Window law 1

Clearly No b/c the facts reported in the probation report are not legally sufficient to support a determination of the factual presence of a special circumstance in the case under *Carlos* Window law. 0

A close call 2

(If Q.72 = 1, code Part VII Q.77 = 1; if Q.72 = 0 code Q.77 = 0; if Q.72 = 2 code Q.77 = 2 and explain the basis of the close call in the Part I Thumbnail Sketch template, Q.85.)

Under 2008 law:

73. Are the statutorily defined and potentially applicable special circumstance(s) in the case different under 2008 law compared to CW law (whether or not the SC was charged by the prosecutor or rejected by the jury in the instant case)? (circle ONE best answer)

Yes, all are different b/c none of the statutorily defined and potentially applicable special circumstance(s) under 2008 law were statutorily defined and potentially applicable under *Carlos* Window law 1

No, they are the same b/c one or more of the relevant special circumstance(s) that were statutorily defined and potentially applicable under 2008 law were also statutorily defined and potentially applicable under *Carlos* Window law 2

74. Is a special circumstance factually present in the case under 2008 law? (circle ONE best answer)

Clearly Yes b/c the facts reported in the probation report are legally sufficient to support a determination of the factual presence of a special circumstance in the case under 2008 law 1

Clearly No b/c the facts reported in the probation report are not legally sufficient to support a determination of the factual presence of a special circumstance in the case under 2008 law. 0

A close call 2

(If Q.74 = 1, code in Part VII Q.80 = 1; if Q.74 = 0 code Q.80 = 0; Q.74 = 2 code Q.80 = 2 and explain the basis of the close call in the Part I Thumbnail Sketch template Q.85.)

Part VII. Summary of Coder Classifications on Factual-Homicide Liability and Death-eligibility in Three Time Periods

Pre-*Furman* law:

75. Factual murder liability and death-eligibility? (circle ONE best answer)

Clearly yes 1

Clearly no 0

A close call 2

Carlos Window (CW) law (12/12/1983 – 10/12/1987):

76. Factual M1 liability under CW law? (circle ONE best answer)

Clearly yes 1

Clearly no 0

A close call 2

77. Special circumstances present under CW law? (circle ONE best answer)

Clearly yes 1

Clearly no 0

A close call 2

Not applicable b/c no M1 conviction or not factually M1 8

78. Death-eligibility under CW law? (circle ONE best answer)

Clearly yes 1

Clearly no 0

A close call 2

January 1, 2008 law:

79. Factual M1 liability Jan. 1, 2008? (circle ONE best answer)

Clearly yes 1

Clearly no 0

A close call 2

80. Special circumstances present Jan. 1, 2008? (circle ONE best answer)

Clearly yes 1

Clearly no 0

A close call 2

Not applicable b/c no M1 conviction or not factually M1 8

81. Death-eligible Jan. 1, 2008? (circle ONE best answer)

Clearly yes 1

Clearly no 0

A close call 2

81A-88. <u>Check all that apply in the following table:</u>

Thumbnail Template Questions	**Check below with an "X" if the question was answered in the Thumbnail Template/File**
Q.81A.Information insufficiency.	
Q.82. M1 liability differences under pre-Furman, CW, and 2008 law.	
Q.83. Special circumstances differences under CW and 2008 law.	
Q.84. Death-eligibility differences.	
Q.85. Ambiguity.	
Q.86. Legal Issues.	
<u>Q.87. Special Circumstances present in a CFF M2/VM Conviction</u>	
<u>Q.88. Other facts or circumstances</u>	

89. Date the DCI for the coding for this case was completed:

MONTH |___|___|

DAY |___|___|

YEAR |___|___|___|___|

Page numbers when a Question and/or a Cross Reference is to a Page number:

A **Question (s) or Reference**	B **Page(s)**
Para. 2.a. and 2.b.	7
Q. 53	25-28
Q. 60	32
Q. 60A	33-36
Q. 60B	37
Q. 60C	37
Q. 61	37
Q. 62	38
Part VI	38
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Q. 75	51
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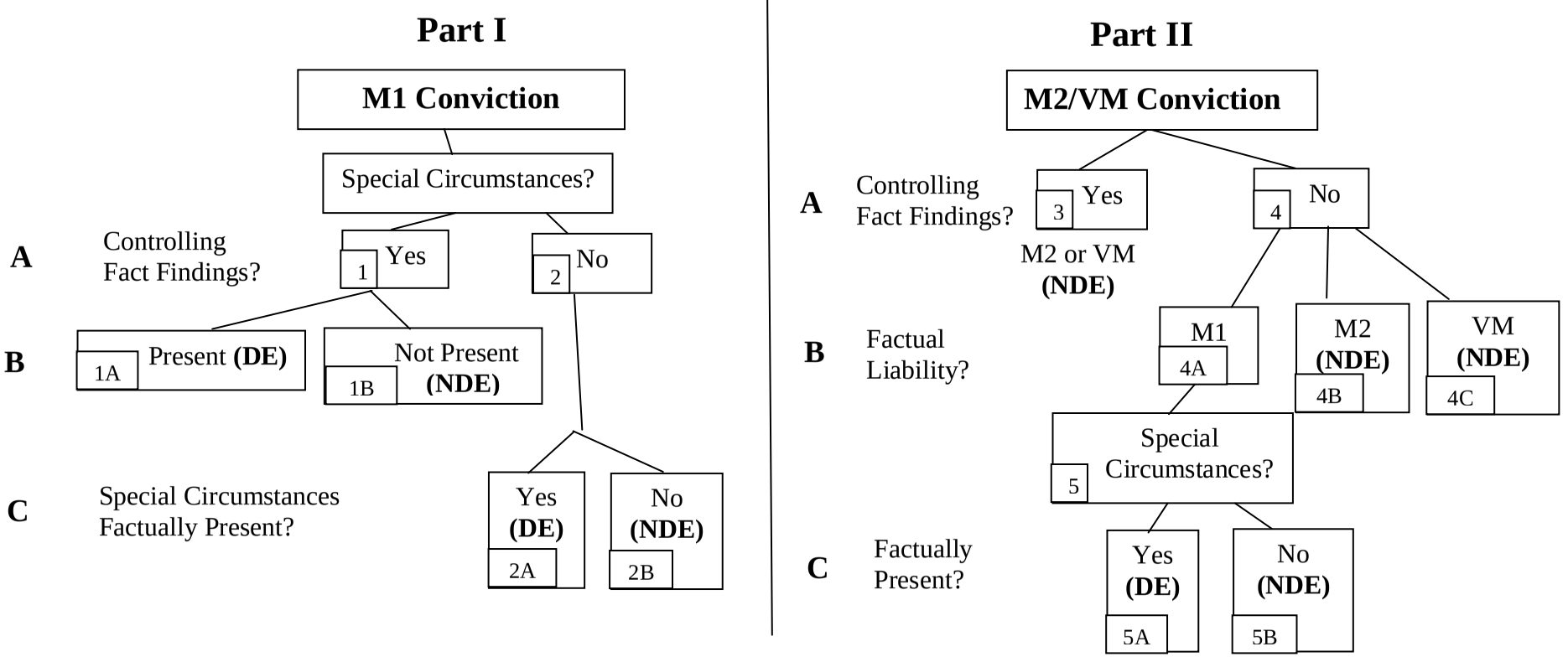
Q. 80	52
Q. 81	52
Q. 81A	53
Q. 82	53
Q. 84	53
Q. 85	53
Q. 87	53
Q. 88	53

FIGURE 1
PATHWAYS TO DEATH ELIGIBILITY CLASSIFICATIONS UNDER *CARLOS* WINDOW AND 2008 LAW:
CALIFORNIA HOMICIDE STUDY[1]



[1]DE = Death eligible; NDE = Not death eligible

Exhibit F
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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORINIA, SOUTHERN DIVISION

ERNEST DEWAYNE JONES, Petitioner, v. VINCENT CULLEN, Warden of California State Prison at San Quentin, Respondent.	Case No. CV-09-2158-CJC DEATH PENALTY CASE

EXHIBITS IN SUPPORT OF MOTION FOR AN EVIDENTARY HEARING VOLUME 1

EXHIBIT G
DECLARATION OF GEORGE WOODWORTH, PH.D.

AMENDED DECLARATION OF GEORGE WOODWORTH, PH.D.

I, George Woodworth, Ph.D., declare as follows:

1. From 1971 until June 2010, I was employed at the University of Iowa, first as an Associate Professor from 1971 until 1996 and then as a Professor of Statistics and Actuarial Science from 1996 until my retirement earlier this year.

2. I received a bachelor's degree from Carlton College in 1962 and a doctorate in Statistics from the University of Minnesota in 1966. My resume is attached at Appendix A of this declaration.

3. My areas of research interest are Bayesian Statistical Methodology and Applications. Areas in which I have done collaborative research are Clinical (medical) Trials, Employment Discrimination, and Capital Charging and Sentencing.

4. I have applied statistical methods to Capital Charging and Sentencing systems for many years. I am the co-author of Equal Justice And The Death Penalty: A Legal And Empirical Analysis (1990) (with David Baldus and Charles A. Pulaski Jr.). I have co-authored numerous research papers on death penalty sentencing, including Race Discrimination In America's Capital Punishment System Since *Furman v. Georgia* (1972): The Evidence Of Race Disparities And The Record Of Our Courts And Legislatures In Addressing The Issue, Report To American Bar Association, Section Of Individual Rights And Responsibilities (July 25, 1997) (with David Baldus); and Arbitrariness and Discrimination in the Administration of the Death Penalty: A Legal and Empirical Analysis of the Nebraska Experience (1973-1999), 81 Neb. L. Rev. 486 (2002) (with David Baldus, Catherine Grosso, and Aaron Christ).

5. I have qualified as an expert witness and testified in state and federal court proceedings, including *McCleskey v. Kemp*, Case No. CIV C81-2434A (N.D. Ga.).

6. Our study in this case reports the findings of an empirical study of 27,453 California homicide cases with a date of offense between January 1, 1978, and June 30, 2002, that resulted in a first or second degree murder or voluntary manslaughter conviction. The findings of the study are based on a stratified sample of 1,900 cases drawn from the 27,453 case universe.

7. Professor Baldus and I documented the rates of death eligibility under post-*Furman* law among several categories of legally relevant homicide cases. We also compared post-*Furman* California death eligibility rates with post-*Furman* death eligibility rates in other states based on different research methodologies. One of these methods is based on the Federal Bureau of Investigation's Supplementary Homicide Reports (SHR) reported in a recently published paper by Jeffery Fagan and colleagues.[1] The results of their analysis of death eligibility rates are presented in Table 1.[2] It lists the states in increasing order of their rates of death eligibility with California leading all states with a death eligibility rate of 37.8%.

8. The purpose of this declaration is to document the extent to which the reported California estimate of a 37.8% death eligibility rate reported in Table 1 underestimates the actual rate. The reason is that the SHR-based methodology on which the Table 1 estimates are based reflects only a minor "lying in wait" type aggravating circumstance – "sniper killings," the only species of "lying in wait" that is included in the FBI's SHR database. The broad scope of California's lying-in-wait special circumstance (California Penal Code section 190.2(a)(15)) (LIW) is simply not reflected in the SHR-based estimates of death eligibility.

9. When I adjust the California SHR data for the wide prevalence of the LIW special circumstance cases under California law, the death eligibility rate for California based on the SHR data is 50.3%. The underlying data for each state on which the Fagan, *et. al*.

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[1] Jeffrey Fagan, Franklin E. Zimring, & Amanda Geller, Capital Punishment and Capital Murder: Market Share and the Deterrent Effects of the Death Penalty, 84 Tex. L. Rev. 1803, 1816-17 (2006) describe their methodology as follows. "The SHR has the unique advantage of providing detailed, case-level information about the context and circumstances of each homicide event known to the police. This allows us to identify the presence of factors that map onto the statutory framework of the Texas murder statutes and more broadly onto the Model Penal Code aggravating factors." To generate a death eligibility estimate for each state, the authors classified a murder or non-negligent homicide as death eligible if it included any of "the following elements that are part of the recurrent language of capital-eligible homicides across the states: (a) killings during the commission of robbery, burglary, rape or sexual assault, arson, and kidnapping; (b) killing of children below age six: (c) multiple-victim killings; (d) 'gangland' killing involving organized crime of street gangs; (e) institution killings where the offender was confined in a correctional or other governmental institution; (f) sniper killings… (g) killings in the course of drug business." They also defined a law enforcement officer victim as a qualifying aggravating factor. When the defendant's age was known cases were classified as not death eligible if the defendant was under 16 years of age at the time of the offense.

[2] This Table contains the same information as Table 4, Part II in the Baldus declaration.

TABLE 1

State Death-Eligibility Rates Rank Ordered From Low (Alabama) to High (California) (1978-2003)[1]

A State	B Percent of Homicides that are Death Eligible	C 95% Confidence Interval for Estimate in Column B
Alabama	13.1	12%, 15%
North Carolina	16.8	16%, 18%
Florida	18.2	17%, 20%
Kentucky	18.2	16%, 20%
Louisiana	**18.3**	17%, 19%
Delaware	18.4	14%, 23%
Tennessee	18.7	17%, 20%
Mississippi	19.7	18%, 22%
Georgia	20.3	18%, 22%
New York	20.4	18%, 22%
Virginia	20.6	20%, 22%
Texas	21.7	20%, 23%
Maryland	21.9	20%, 23%
Ohio	22.0	21%, 23%
Missouri	**22.4**	21%, 24%
South Carolina	22.5	21%, 24%
Nevada	22.7	21%, 24%
New Mexico	22.9	21%, 25%
Arkansas	23.0	21%, 25%
Connecticut	23.2	21%, 25%
Arizona	23.8	22%, 25%
Kansas	23.9	20%, 28%
Indiana	24.0	22%, 25%
Pennsylvania	25.0	24%, 26%
New Jersey	**25.5**	24%, 27%
Colorado	26.1	24%, 28%
Montana	26.5	20%, 33%
Wyoming	26.9	22%, 32%
South Dakota	27.4	21%, 34%
Oregon	28.0	25%. 30%
Washington	28.0	26%, 30%
Oklahoma	28.3	25%, 32%
Nebraska	**28.9**	25%, 32%
Illinois	28.9	27%, 31%
Idaho	29.7	25%, 34%
Utah	30.0	27%, 33%
New Hampshire	31.9	26%, 38%
California	37.8	36%, 40%

[1]The estimates in this table are based on the number of death-eligible homicides reported to the FBI using the Fagan-Geller-Zimring estimation procedure described in the Amended Declaration of David C. Baldus at page 18, note 35.

estimates and my California reanalysis are based are presented in Tables 1, 2, and 3.

10. In the balance of this declaration I explain the basis for this adjusted California rate estimated with the SHR data.

11. According to the SHR data 37.8% of the 76,225 California murder and non-negligent manslaughter cases reported between 1978 and 2003[3] were death eligible by virtue of possessing one of the special circumstances described in Footnote 1. The SHR population of reported cases contains the 27,453 First-degree murder (M1), second-degree murder (M2), and voluntary manslaughter (VM) convictions comprising the universe of our study (hereafter called the Narrowing Study). The first adjustment of the 37.8% SHR death eligibility rate corrected an undercount of lying-in-wait cases; the adjustment consists of deleting the 132 cases (0.2% of the total) in which sniping was the sole special circumstance[4] and replacing them with an estimated 11,411 cases (15.0% of the total) in which lying in wait was the sole special circumstance[5]. This estimate is based on our observation that 15% of the cases in our universe of California's M1, M2, and VM cases were death eligible solely by virtue of the lying-in-wait special circumstance and assuming that rate applies to the larger SHR population. The second adjustment corrects an overcount in the SHR death-eligibility rate; the adjustment consists of deleting an estimated 1,753cases (2.3% of the total) which were death eligible solely by virtue of the gang related special circumstance during the period January 1, 1978, through March 7, 2000, when gang related killing was not a California special circumstance.[6] This adjustment is based on our observation that 2.5% of the cases in our universe described above would have been death eligible solely by virtue of the gang related special circumstance; we arrived at the 2.3% adjustment to the SHR by prorating our 2.5% rate to the 90.8% of our study period during which that circumstance was not applicable. Appendix B presents the basis of my analysis in more detail.

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[3] Table 1, header and last row; Appendix B, part 1, table row 14.

[4] Appendix B, part 1, table row 5.

[5] Appendix B, part 1, table row 11.

[6] Appendix B, part 1, table row 12.

Table 2

Capital Homicides by State by Total and Type of Killing (Percent),1978-2003, Using Fagan-Geller-Zimring Estimation of Capital Eligibility*

FIPS	State	Total N of Capital Homicides	Percent Felony Murder	Percent Child Killings	Percent Multiple Victims	Percent Institution Killings	Percent Police Killings	Percent Organized Crime	Percent Youth Gangs	Percent Sniper
1	alabama	1,292	56.72	18.53	25.50	.32	2.19	4.53	.59	1.31
2	alaska	297	35.64	17.81	56.04	.43	4.72	.21	.64	.21
4	arizona	1,952	42.19	16.63	40.80	1.12	1.72	4.09	4.14	.07
5	arkansas	1,210	53.17	16.24	35.08	.31	2.22	2.72	2.92	.68
6	california	28,790	38.40	8.75	22.43	.50	.49	.48	39.01	.66
8	colorado	1,230	39.52	24.31	36.92	.41	1.40	6.52	3.31	.39
9	connecticut	863	52.21	18.27	35.67	1.14	1.06	2.61	3.82	.20
10	delaware	137	37.63	43.90	36.39	.50	.00	.00	.00	.00
12	florida	3,180	46.52	15.60	43.08	.47	1.53	.82	1.11	.21
13	georgia	3,145	65.67	14.49	26.06	.36	.92	1.06	.15	.03
15	hawaii	268	42.80	29.72	31.78	1.44	1.01	1.69	1.22	.00
16	idaho	256	19.80	32.84	45.16	2.10	2.54	5.43	.61	.00
17	illinois	6,220	45.40	11.63	24.13	.11	.58	3.82	26.10	.97
18	indiana	2,018	47.67	16.88	40.61	.62	1.53	2.00	2.11	.11
19	iowa	388	33.30	31.55	45.36	.00	.86	1.73	.44	.00
20	kansas	490	33.17	24.89	47.30	.40	3.72	.59	1.71	.00
21	kentucky	906	50.19	19.05	38.47	.79	1.06	.85	1.08	.36
22	louisiana	2,740	56.12	13.18	36.39	.14	1.59	1.15	.86	.30
23	maine	174	39.31	29.24	33.28	.46	.60	1.39	.00	1.36
24	maryland	2,668	57.01	15.20	36.19	1.53	1.16	.27	.29	.31
25	massachusetts	1,005	45.18	17.81	37.73	.29	2.64	7.10	4.17	.42
26	michigan	4,939	56.41	15.00	37.70	.91	1.04	1.60	.37	.21
27	minnesota	848	43.99	25.43	35.60	.53	1.98	2.10	6.61	.14
28	mississippi	965	58.96	14.59	31.57	.00	3.23	1.15	1.75	.15
29	missouri	2,444	50.89	19.06	36.40	.37	1.30	1.46	2.67	.31
30	montana	101	32.39	25.21	49.16	.83	7.05	.00	1.83	.00
31	nebraska	260	34.09	32.67	37.88	.00	1.95	4.05	.77	.00
32	nevada	804	44.71	14.52	35.79	.68	1.34	5.78	7.09	.12
33	new hampshire	163	29.95	28.06	48.51	1.16	4.43	.00	.00	.00
34	new jersey	2,668	61.40	20.58	29.05	.20	1.61	1.45	1.23	.07
35	new mexico	655	38.66	17.59	35.98	3.36	1.86	3.25	8.86	.12
36	new york	9,040	59.10	16.17	31.25	.76	.44	.91	1.26	.07
37	north carolina	2,554	47.21	13.93	43.89	.27	1.33	1.19	.03	.58
38	north dakota	61	32.77	36.34	74.03	.00	2.41	.00	5.26	.00
39	ohio	3,217	53.91	21.41	34.61	.06	1.30	1.14	.84	.42
40	oklahoma	1,819	45.76	19.87	36.80	.65	1.22	6.62	.87	.79
41	oregon	866	42.63	23.86	39.31	1.06	1.05	2.80	3.92	.33
42	pennsylvania	4,267	57.74	18.50	35.13	.48	.86	1.35	.72	1.02
44	rhode island	193	43.47	24.51	41.75	1.45	1.45	5.25	1.28	.64
45	south carolina	1,912	62.12	14.37	28.58	.16	1.42	2.15	.29	.24
46	south dakota	74	39.58	37.85	24.31	2.43	13.19	.00	.00	.00
47	tennessee	1,975	59.08	11.45	32.80	1.11	1.24	.62	1.00	.39
48	texas	10,399	54.40	14.94	35.95	1.07	1.41	2.11	1.39	.16
49	utah	436	29.45	34.46	38.54	1.37	1.32	6.05	2.90	.26
50	vermont	87	39.57	20.83	58.22	.00	2.32	.00	.00	.00
51	virginia	2,455	49.10	17.41	40.99	.27	1.82	.96	.17	.20
53	washington	1,574	41.71	18.95	42.17	1.32	1.31	6.70	3.65	.14
54	west virginia	536	44.14	15.17	44.21	3.29	1.24	.24	.00	.11
55	wisconsin	1,074	44.47	25.70	35.62	.74	1.48	3.67	5.21	.13
56	wyoming	139	36.32	37.08	40.08	1.88	1.78	.83	.00	.32

* Percentages greater than 100 due to multiple classification of homicides in capital-eligible categories

Table 3

Capital Homicides by State by Total and Type of Killing (Percent),1976-2003, Using Fagan-Geller-Zimring Estimation of Capital Eligibility, Single versus Multiple Categories of Killings*

FIPS	State	% Felony Murder Only	% Multiple Victim Only	% Child Victim Only	% Institution Killing Only	% Organized Crime Only	% Youth Gang Only	% Sniper Only	% Multiple Criteria	% Police Killings**
1	alabama	51.14	18.20	16.15	.32	4.53	.48	1.08	7.50	2.19
2	alaska	23.98	45.57	13.45	.00	.21	.64	.21	10.48	4.72
4	arizona	37.13	33.31	14.14	1.12	3.79	3.66	.07	7.66	1.72
5	arkansas	47.12	25.76	13.02	.31	2.54	2.52	.27	9.74	2.22
6	california	34.76	14.39	7.16	.49	.35	35.72	.46	8.31	.46
8	colorado	32.87	27.45	20.99	.41	6.26	3.07	.39	9.80	1.40
9	connecticut	42.51	23.84	14.06	1.00	2.44	3.59	.20	12.58	1.06
10	delaware	30.85	22.71	35.00	.50	.00	.00	.00	13.68	.00
12	florida	41.45	35.76	12.76	.47	.74	.87	.05	7.76	1.53
13	georgia	60.52	19.30	12.34	.36	.95	.15	.03	6.98	.92
15	hawaii	38.21	26.41	28.27	1.44	1.89	1.22	.00	5.70	1.01
16	idaho	17.30	36.63	28.80	2.30	5.43	.61	.00	6.54	2.54
17	illinois	40.56	16.55	9.56	.11	3.63	24.27	.86	7.96	.56
18	indiana	41.56	31.48	13.01	.82	1.70	1.90	.11	9.42	1.63
19	iowa	27.96	37.36	26.90	.00	1.73	.44	.00	8.64	.86
20	kansas	29.91	39.05	20.14	.40	.59	1.49	.00	8.46	3.72
21	kentucky	45.26	30.66	18.07	.79	.85	1.08	.36	6.78	1.06
22	louisiana	50.73	25.82	10.37	.14	.87	.86	.30	7.93	1.59
23	maine	37.05	27.63	25.86	.46	1.39	.00	1.38	5.65	.60
24	maryland	50.79	27.72	12.06	1.42	.27	.29	.16	6.54	1.16
25	massachusetts	36.62	27.26	14.06	.29	6.46	4.17	.25	11.13	2.64
26	michigan	46.32	27.87	11.78	.84	1.26	.37	.19	10.31	1.04
27	minnesota	36.66	23.64	19.76	.53	2.10	6.05	.14	12.38	1.98
28	mississippi	52.02	22.96	11.92	.00	1.15	1.75	.00	9.31	3.23
29	missouri	43.37	26.62	16.02	.37	1.25	2.60	.31	10.01	1.30
30	montana	28.52	38.16	18.09	.83	.00	1.83	.00	11.00	7.05
31	nebraska	28.96	28.98	27.92	.00	4.05	.77	.00	6.89	1.95
32	nevada	38.67	27.98	13.81	.68	5.00	6.76	.12	7.92	1.34
33	new hampshire	20.76	36.25	25.81	1.16	.00	.00	.00	10.96	4.49
34	new jersey	53.16	18.59	16.36	.20	1.24	1.15	.07	10.95	1.61
35	new mexico	33.29	26.07	14.90	3.36	3.25	8.07	.12	8.03	1.86
36	new york	63.27	24.08	13.74	.76	.80	1.18	.03	7.52	.44
37	north carolina	42.60	37.76	11.69	.27	1.06	.03	.56	6.45	1.39
38	north dakota	19.17	58.18	34.09	.00	.00	5.26	.00	15.85	2.41
39	ohio	46.17	24.14	17.36	.06	1.06	.73	.42	10.81	1.30
40	oklahoma	40.17	27.92	16.76	.65	5.65	.75	.52	9.14	1.22
41	oregon	36.03	29.90	19.16	1.06	2.80	3.43	.11	10.50	1.05
42	pennsylvania	46.27	23.10	14.44	.39	1.11	.72	.90	12.44	.86
44	rhode island	36.02	27.81	20.32	1.45	2.95	1.28	.64	13.94	1.45
45	south carolina	66.77	22.08	12.65	.18	2.02	.29	.24	8.71	1.42
46	south dakota	35.42	26.14	34.36	2.43	.00	.00	.00	5.56	13.19
47	tennessee	53.93	26.49	10.13	1.05	.54	1.00	.21	6.55	1.24
48	texas	46.04	27.51	12.67	1.04	1.78	1.25	.11	8.63	1.41
49	utah	24.28	27.83	30.29	1.37	4.44	2.22	.28	11.27	1.32
50	vermont	26.86	42.71	16.85	.00	.00	.00	.00	16.51	2.32
51	virginia	43.33	33.28	14.90	.27	.86	.17	.20	7.79	1.82
53	washington	35.08	30.89	14.90	1.32	5.51	3.28	.14	11.48	1.31
54	west virginia	38.49	37.35	13.23	2.66	.24	.00	.11	7.36	1.24
55	wisconsin	36.86	24.50	20.49	.47	3.67	5.21	.00	11.55	1.48
56	wyoming	28.56	31.16	31.81	1.68	.83	.00	.32	10.58	1.78

* Police Killings may overlap with other criteria. Since data source is separate from the data source for the specific criteria, we show the percent of all capital-eligible crimes for this category.

The foregoing is true and correct and executed under penalty of perjury under the laws of the United States and the State of California on November 4, 2010.

George Woodworth
Iowa City
2010.11.04 18:38:27
-05'00'

GEORGE WOODWORTH, Ph.D.

Appendix A: Resume of George Woodworth, Ph.D.

GEORGE WOODWORTH

CURRICULUM VITAE

February 25, 2009

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Personal Data:

Born: May 29, 1940, Oklahoma City, Oklahoma
Marital Status: Married with two children

Education:

B.A. Carleton College, Northfield, Minnesota, 1962
Ph.D. University of Minnesota, 1966

Employment:

Instructor, Department of Statistics, University of Minnesota, 1965-66.

Assistant Professor, Department of Statistics, Stanford University, 1966-71.

Assistent (Visiting Assistant Professor), Department of Mathematical Statistics, Lund Institute of Technology, Lund, Sweden, 1970-71 (on leave from Stanford).

Associate Professor, Department of Statistics, The University of Iowa, Iowa City, Iowa, 1971-1996.

Associate Director, Director (1973-1980), Acting Director (1982-3), Adviser (1984-present): University of Iowa Statistical Consulting Center.

Associate Professor, Department of Preventive Medicine, Division of Biostatistics, University of Iowa, 1990-1996.

Professor, Department of Statistics and Actuarial Science, University of Iowa, 1996-.

Professor, Department of Preventive Medicine, Division of Biostatistics, University of Iowa 1996- .

Research Interests:

Bayesian Inference and Pedagogy

Smooth Bayesian Inference

Bayesian Experimental Design

Applications of Statistics in Biomedical Science, Behavioral Science, and Law and Justice

Multivariate Analysis and Discrete Multivariate Analysis

Dissertations Supervised:

Stanford University Ph.D.:

1. Reading, James (1970). "A Multiple Comparison Procedure for Classifying All Pairs out of k Means as Close or Distant".
2. Withers, Christopher Stroude (1971). "Power and Efficiency of a Class of Goodness of Fit Tests."
3. Rogers, Warren (1971). "Exact Null Distributions and Asymptotic Expansions for Rank Test Statistics."

University of Iowa, Ph.D.:

4. Huang, Yih-Min (1974). "Statistical Methods for Analyzing the Effect of Work-Group Size Upon Performance."
5. Scott, Robert C. (1975). "Smear and Sweep: a Method of Forming Indices for Use in Testing in Non-Linear Systems."
6. Hoffman, Lorrie Lawrence (1981). "Missing Data in Growth Curves."
7. Patterson, David Austin (1984). "Three-Population Partial Discrimination."
8. Mori, Motomi (1989). "Analysis of Incomplete Longitudinal Data in the Presence of Informative Right Censoring." (Biostatistics, joint with Robert Woolson)
9. Galbiati-Riesco, Jorge Mauricio (1990). "Estimation of Choice Models Under Endogenous/Exogenous Stratification."
10. Shin, Mi-Young (1993). "Consistent Covariance Estimation for Stratified Prospective and Case-Control Logistic Regression."
11. Lian, Ie-Bin (1993). "The Impact of Variable Selection Procedures on Inference for a Forced-in Variable in Linear and Logistic Regression."
12. Nunez Anton, Vicente A. (1993). "Analysis of Longitudinal Data with Unequally Spaced Observations and Time Dependent Correlated Errors."
13. Bosch, Ronald J. (1993). "Quantile Regression with Smoothing Splines."
14. Samawi, Hani Michel (1994). "Power Estimation for Two-Sample Tests Using Importance and Antithetic Resampling." (Biostatistics, joint with Jon Lemke)
15. Chen, Hungta (1995). "Analysis of Irregularly Spaced Longitudinal Data Using a Kernel Smoothing Approach." (Biostatistics)
16. Nichols, Sara (2000). "Logistic Ridge Regression." (Biostatistics)
17. Dehkordi, Farideh Hosseini (2001). "Smoothness Priors for Longitudinal Covariance Functions." (Biostatistics)
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102. Woodworth, G.G. (1985), "Recent Studies of Race- and Victim Effects in Capital Sentencing," *Proceedings of the Third Workshop on Law and Justice Statistics*, ed. G.G. Woodworth, U.S. Department of Justice, Bureau of Justice Statistics, pp. 55-58.

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Unpublished Reports:

108. Baldus, D.C., Woodworth, G.G., Pulaski C.A. (1989). "Procedural Reform Study," *Inter-University Consortium for Political and Social Research: Criminal Justice Archive.*

109. Baldus, D.C., Woodworth, G.G., Pulaski C.A. (1989). "Charging and Sentencing Study," *Inter-University Consortium for Political and Social Research: Criminal Justice Archive.*

Work in Process:

110. Woodworth, G.G., *Statistical Issues in Recent Re-Analyusis of Capital Charging and Sentencing Data*, read at John Jay College, February 21, 2007.

111. Woodworth, G.G., "Bayesian Experimental Design of Sequential Clinical Trials." To be submitted to *Statistics in Medicine*, 2009.

112. Woodworth, G.G., *Biostatistics II: Intermediate Bayesian Analysis*, Proposal accepted by John Wiley, December 2006, completion date May 1, 2009.

Professional Honors and Awards:

1987 Harry Kalven prize of the Law and Society Association (with David Baldus and Charles Pulaski).

1987 Iowa Educational Research and Evaluation Association, annual award "For Excellence in the Field of Educational Research and Evaluation for Best Educational Evaluation Study," (with Larry Hedges and James Shymansky).

1991 Gustavus Myers Center for the Study of Human Rights in the United States, selection of *Equal Justice and the Death Penalty* as an outstanding book on the subject of human rights (with David Baldus and Charles Pulaski).

1996 Elected Fellow of the American Statistical Association

Service Activities

Departmental Service:

University of Iowa Statistical Consulting Center:
Founder, Associate Director, Director (1973-1980)
Acting Director (1982-3)
Member of Steering Committee and Adviser (1984-present).

University Service:

Outside member of over thirty Ph.D. dissertation committees, 1973-present.

Woodworth, G.G., Lenth, R.V.L. (1982) "A Stratified Sampling Plan for Estimating Departmental and University-Wide Administration Effort."

University of Iowa, Basic Mathematics Committee, January 1983-84.

Statistics Advisor to the University of Iowa Journal of Corporation Law, 1984-85.

University of Iowa, Research Council, 1984-87, Chairman 1986-87.

University House Advisory Committee, 1986-87.

Chairman, Political Science Review Committee, 1988-89.

Interdisciplinary Ph.D. Program in Applied Mathematical Sciences, 1988-present.

University of Iowa, Judicial Commission, 1979-81, 1990-93.

University of Iowa, Liberal Arts Faculty Assembly, 1985-87, 1995-6.

Professional Service:

NAACP Legal Defense and Education Fund, 1980-3: Statistical Analysis of the Georgia Charging and Sentencing Study, Expert testimony in McCleskey vs. Zant (decided in the U.S. Supreme Court).

ASA Law and Justice Statistics Committee, 1982-1987: Member of two methodological review panels in Washington, DC. Organizer of two-day Workshop on Law and Justice Statistics, August 1985.

ASA Visiting Lecturer Program, 1984-1988.
1984 Invited talk at Culver-Stockton College
1986 Invited talk at Moorhead State University
1988 Invited talk at Grinnell College

Invited Participant, 1984, *Planning Session for Florida Capital Charging and Sentencing Study*, Florida Office of Public Defender, Richard H. Burr, Esq.

Editor, *Proceedings of the Third Workshop on Law and Justice Statistics*, American Statistical Association, 1985.

Invited Panelist, 1986 Law and Society Association Annual Meeting, Panel discussion of current state of capital sentencing research.

Invited Speaker, 1987 *Seminar-Workshop on Meta-Analysis in Research*, University of Puerto Rico, San Juan, Faculty of Education, Department of Graduate Studies.

Associate Editor, *Evaluation Review*, 1983-1986.

Baldus, D., Woodworth, G.G., Pulaski, C.A. (1989). Oral Testimony before the U.S. Senate Judiciary Committee (presented by D. Baldus).

Invited Participant, ASA Media Experts Program (1989).

Statistical Consultant to Special Master, David Baldus. State of New Jersey, Administrative Office of Courts -- Proportionality Review System. 1989-present.

ASA Law and Justice Statistics Committee, second appointment, 1993-95.

Baldus, D., Woodworth, G.G. (1993), "An Iowa Death Penalty System in the 1990's and Beyond: What Would it Bring?" Report submitted to the Senate Judiciary Committee, Iowa Legislature, February 24, 1993.

Baldus, D., MacQueen, J.C., Woodworth, G.G. (1993), "An Empirically-Based Methodology for Additur/Remittitur Review and Alternative Strategies for Rationalizing Jury Verdicts," Report prepared for the Research Conference on Civil Justice Reform in the 1990's.

Baldus, D.C., Woodworth G.G. (1995), "Proportionality Review and Capital Charging and Sentencing: A Proposal for a Pilot Study," Commonwealth of Pennsylvania, Administrative Office of Courts.

Session Chair, Joint Statistical Meeting, Minneapolis, 2005.

Session Discussant, 2006 FDA/Industry Statistics Workshop, Washington, DC, September 2006

Invited Speaker at a one-day conference on Race and Death Penalty Research, at John Jay College of Criminal Justice, CUNY, February 21, 2007.

Refereeing *(since 1980)***:**

1980: Journal of the American Statistical Association
1982: Journal of Educational Statistics
1983: Journal of Statistical Computation and Simulation
Annals of Mathematical Statistics
Evaluation Review (associate editor)
1984: Transportation Research
Law and Society Review
American Journal of Mathematical and Management Sciences
Journal of Educational Statistics
Evaluation Review (associate editor)
1985: Edited Proceedings of 3rd Workshop on Law and Justice Statistics
Evaluation Review (associate editor)
1986: Psychological Bulletin
National Science Foundation
Evaluation Review (associate editor)
1987: J. Amer. Statist. Assoc.

1988: Science *(ca. 1988)*
1990: Annals of Otology, Rhinology & Laryngology
American Speech-Language-Hearing Association
Macmillan Publishing Company
Survey Methodology Journal
1991: International Journal of Methods in Psychiatric Research
1993: Multivariate Behavioral Research
1994: International Journal of Methods in Psychiatric Research
1995: SIAM Review
Duxbury Press
Acta Applicandae Mathematicae
1996: American Journal of Speech-Language Pathology
1998: Duxbury Press
2001: John Wiley and Sons, Inc.
2002: Addison-Wesley
2004: J. Amer. Statist. Assoc.
2005 J. Amer. Statist. Assoc.

Extramural Consulting and Pro Bono Work:

American College Testing
Allergan
Beling Consultants, Moline IL
Bettendorf Iowa AEA
Coerr Environmental, Chapel Hill
Defender Association of Philadelphia
Death Penalty Information Center
Florida State Public Defender's Office
Gas Research Institute.
Hoechst Marion Roussel / Aventis
Guidant Corporation
HON Corporation
Legal Services Corporation of Iowa
Iowa State Attorney General's Office
Kaiser Aluminum
Electric Power Research Institute
NAACP Legal Defense and Education Fund
National Research Council
Supreme Court of Nebraska
Pittsburgh Plate Glass
Rhone-Poullenc
Stanford Law School
StarForms
Supreme Court of New Jersey
Vigertone Ag Products
Westinghouse Learning Corporation
WMT news department

Intramural Consulting:

I consult almost on a weekly basis with colleagues and students throughout the University, including at one time or another (but not limited to): Audiology, Biology, Exercise Physiology, Geology, Law, Marketing, Nursing, Otolaryngology, Physics, Psychology, Psychiatry, Science Education, the Iowa Driving Simulator, and the National Advanced Driving Simulator.

Expert testimony / depositions:

Robert R. Lang, Esq. (Legal Services Corporation of Iowa)
1982 Ruby vs. Deere (gender discrimination)
Mark R. Schuling, Iowa Assistant Attorney General.
1984 Burlington Northern Railroad Co. vs. Gerald D. Bair, Director (taxation)
Teresa Baustian (Iowa Asst. Atty. General - Civil Rights Division)
1988 Howard vs. Van Diest Supply Co. (age discrimination)
Walter Braud, Esq.
1988 Hollars et. al. vs. Deere & Co. et. al. (gender discrimination)
Mark W. Schwickerath, Esq.
1988 Schwickerath vs. Dome Pipeline, Inc. (effects of chemical spill)
Richard Burr, Esq.
1990 Selvage vs. State of Florida (capital sentencing)
Amanda Potterfield, Esq.
1990 Reed vs. Fox Pool Corporation (product liability)
1994 State of Iowa vs. Dalley (forensic identification via DNA)
Jerry Zimmerman, Esq.
1991 George Volk Case (age discrimination)
1993 Rasmussen vs. Rockwell (age discrimination)
1994 Hans vs. Courtaulds (age discrimination)
Thomas Diehl, Esq.
1992 State of Iowa vs. William Albert Harris (jury composition)
Diane Kutzko, Esq. (Iowa State Bar Association)
1995 Consultation on the validity of the Iowa bar exam.
John Allen, Esq.
1995 Buchholz vs. Rockwell (age discrimination)
Michael M. Lindeman, Esq.
1995 Beck vs. Koehring (age discrimination)
Timothy C. Boller, Esq.

1995 Larh vs. Koehring (age discrimination, see refereed publications, item 68)

Thomas C. Verhulst

1995 Carr vs. J.C. Penny (racial discrimination)

J. Nick Badgerow, Esq.

1995 Zapata et. al., vs. IBP, Inc. (racial/national origin discrimination)

David J. Goldstein, Esq., Faegre and Benson, Minneapolis

1999 Payless Cashways, Inc. Partners v. Payless Cashways (age discrimination)

Catherine Ankenbarndt, Deputy First Assistant Wisconsin State Public Defender

2001 Civil commitment hearing of Keith Rivas (Prediction of Sexual Recidivism)

Michael B. McDonald, Assistant Florida Public Defender

2001 Frye hearing in re Actuarial Prediction of Sexual Recidivisim (see refereed publications, item 69).

Greg Bal, Assistant Iowa Public Defender

2001 Civil commitment hearing of Lanny Taute (Prediction of Sexual Recidivism,

Harley C. Erbe, Esq. Walker Law Firm, Des Moines

2002 Campbell et al. v. Amana Company (Age Discrimination)

Texas State Counsel for Offenders, Huntsville, TX

2002 Daubert hearing in re Actuarial Prediction of Sexual Recidivisim

Michael H. Bloom, Assistant Wisconsin Public Defender

2002 Detention of Morris F. Clement, Forest County Case No. 00 CI 01 (Prediction of Sexual Recidivism)

Federal Court Division, Defender Association of Philadelphia, Capital Habeas Corpus Unit

2002 Petitioner Reginald Lewis (racial discrimination)

2006 Commonwealth v. Baker (jury composition)

Stephen Snyder, Esq., Grey Plant Mooty Mooty and Bennett.

2006-7 (with Jay Kadane)

Appendix B: Tabulations of Special Circumstances.

Part 1. Analysis of California Supplementary Homicide Reports Data

1	SHR Data	Sole SC or w/ other(s) Count	Sole SC or w/ other(s) Percent[7]	Sole Special Circ. Count	Sole Special Circ. Percent	Calculations
2	Felony Murder	11055	14.5	10007	13.1	
3	Multiple Vics.	6458	8.5	4143	5.4	Typical: (felony murder)
4	Police Vic.	141	0.2	141	0.2	11055 = 28790 x 0.3840[8]
5	Sniping	190	0.3	132	0.2	
6	Gang Related	11231	14.7	10284	13.5	10007 = 28790 x 0.3476[9]
7	Child Killing	2519	3.3	2061	2.7	
8	Other	< 286	< 0.4	< 230	< 0.3	
9	all Capital	28790[10]	37.8			
10	minus sole Sniping	132	0.2			132 = 28790x0.0046[11]
11	plus sole LIW	11411	15.0			11411 = 76225x0.15[12]
12	minus sole gang related, 01Jan98 to 07Mar00	1753	2.3			2.3 = 2.50x0.0.906[13] 1753 = 0.023 x 76225
13	equals adjusted Capital	38316	**50.3**			
14	Total	76225				76225 = 28790/33.77[14]

Part 2. Analysis of the Narrowing Study of California M1, M2, and VM Convictions

15	M1, M2, VM Convictions	Sole SC or w/ other(s) Count	Sole SC or w/ other(s) Percent	Sole SC Count	Sole SC Percent
16	Felony Murder	6488	23.6	3640	13.3
17	Multiple Victims	1602	5.8	559	2.0
18	Police Victim	0	0.0	0	0.0
19	Lying in Wait	8020	29.2	4129	15.0
20	Gang related	2607	9.5	691	2.5
21	Other	4769	17.4	1822	6.6
22	any SC	16417	59.8	10841	39.5
23	Total	27453			

[7] Percent of total SHR cases (76225)

[8] Table 2, row 6, Percent Felony Murder

[9] Table 3, row 6, Percent Felony Murder Only

[10] Table 2, row 6, Total N of Capital Homicides

[11] Table 3, row 6, Percent Sniper Only

[12] Appendix B, part 2, table row 19, Sole SC Percent

[13] 0.906 = (days between 01Jan78 and 08Mar00)/(days between 01Jan78 and 30Jun02) = 8102/8946

[14] Table 1, last row, Percent of UCR Homicides that are Death Eligible (Capital)

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Attorneys for Petitioner ERNEST DEWAYNE JONES

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORINIA, SOUTHERN DIVISION

ERNEST DEWAYNE JONES, Petitioner, v. VINCENT CULLEN, Warden of California State Prison at San Quentin, Respondent.	Case No. CV-09-2158-CJC DEATH PENALTY CASE

EXHIBITS IN SUPPORT OF MOTION FOR AN EVIDENTARY HEARING VOLUME 1

EXHIBIT H
DECLARATION OF STEVEN F. SHATZ

DECLARATION OF STEVEN F. SHATZ

I, STEVEN F. SHATZ, declare as follows:

1. I am the Philip and Muriel Barnett Professor of Trial Advocacy at the University of San Francisco School of Law, where I have been employed on a full-time basis since 1972. During that time, I have regularly taught the required courses in Criminal Law and Criminal Procedure at U.S.F., and, in 1993 and 1994, I was a Lecturer at Boalt Hall, teaching Criminal Law. I practiced criminal law in California before joining the faculty at U.S.F., and I joined the faculty to help create and, for one year, co-direct, the U.S.F. Criminal Law Clinic. During the period 1986-92, I was the director of the U.S.F. Law Clinic, the successor to the Criminal Law Clinic and supervised students handling civil rights cases and criminal appeals. In 1991, I was Visiting Professor at Hastings College of Law, where, in addition to teaching a Criminal Practice course, I established Hastings's criminal law clinical program. I am the author of a casebook on California criminal law, *California Criminal Law: Cases and Problems* (1st and 2nd eds) (Lexis Publishing, 1999, 2004) and a co-author of a casebook on the death penalty, *Cases and Materials on the Death Penalty* (1st, 2nd and 3rd eds) (Thomson/West, 2001, 2005, 2009). I have been qualified, and have testified as, an expert witness on the California death penalty in two cases: *People v. Erskine*, S.D. Sup.Ct. No. SCD161640, and *Ashmus v. Wong*, No. C 93-0594 TEH (N.D. Cal.). I was co-counsel for one death-sentenced defendant, Teddy Sanchez, on his direct appeal and his petition for habeas corpus in the

California Supreme Court; I have not been counsel in any other capital case.

2. I am providing this declaration concerning three empirical studies I have conducted on California murder conviction cases. The studies are described below (¶¶ 10-16). The purpose of the first study, and one of my purposes in the subsequent two studies was: (1) to determine the degree to which the special circumstances listed in California Penal Code § 190.2 limit death-eligibility for persons convicted of first degree murder, and (2) to determine what percentage of persons convicted of first degree murder who are statutorily death-eligible are sentenced to death, *i.e.*, California's death sentence rate. To date, I have published two law review articles based the studies: *The California Death Penalty: Requiem for Furman?* 72 N.Y.U. L.REV. 1283 (1997) (with Nina Rivkind) and *The Eighth Amendment, the Death Penalty, and Ordinary Robbery-Burglary Murderers: A California Case Study*, 59 FLA. L.REV. 719 (2007).

3. My attempt to determine the death eligibility and death sentence rates in all three studies was based on the understanding: (1) that, under *Furman v. Georgia*, 408 U.S. 238 (1972) and subsequent cases, particularly *Zant v. Stephens*, 462 U.S. 862, 877-78 (1983), states must "genuinely narrow" the death-eligible class and the measure of genuine narrowing is whether (unlike the situation at the time of *Furman*) the death penalty is imposed in a "substantial portion" of the cases where the defendants are death-

eligible (*Penry v. Lynaugh*, 492 U.S. 302, 327 (1989)); and (2) that California relies upon the special circumstances provisions of Penal Code § 190.2 to perform the required "narrowing" function. *People v. Jablonski*, 126 P.3d 938, 973 (Cal. 2006); *People v. Bacigalupo*, 862 P.2d 808, 813 (Cal. 1993).[1]

4. My conclusions regarding the constitutionality of the California scheme are informed by the fact that in *Furman* the justices addressed death penalty schemes where approximately 15-20% of those convicted of capital murder were actually being sentenced to death (*see* 402 U.S. at 309, n.10 (Stewart, J., concurring); *id.* at 386, n.11 (Burger, C.J., dissenting); *id.* at 435-36 n.19 (Powell, J., dissenting))[2] and held such schemes created too great a risk of arbitrariness to satisfy the Eighth Amendment.

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1. Unlike other states (*e.g.*, Louisana, Texas) which have narrow definitions of capital murder, California has always had a broad definition of first degree murder which currently includes, in addition to premeditated killings, killings done with one of seven means or in the commission or attempted commission of one of thirteen felonies. *See* Cal. Pen. Code § 189. As a consequence of the felony-murder rule, first degree murder includes, not only intentional killings, but negligent and accidental killings as well.

2. *See also Gregg v. Georgia*, 428 U.S. 153, 182 n.26 (plurality); *Woodson v. North Carolina*, 428 U.S. 280, 296, n.31 (1976) (plurality). The pre-*Furman* experience in California was consistent with the Court's understanding concerning the death sentence rate. *See Aikens v. California*, 406 U.S. 813 (1972) (Brief for Petitioner, Appendix F, pp. 4f-5f) (citing the estimate of a former Director of the California Department of Corrections and statistics from 1967 and 1969).

HISTORY OF THE 1978 DEATH PENALTY LAW

5. The current California death penalty scheme is a product of the 1978 "Briggs Initiative."[3] This initiative replaced the Legislature's much narrower 1977 death penalty law and, according to its author, State Senator John V. Briggs, was intended to "give Californians the toughest death-penalty law in the country."[4] The original 1978 law ("1978 Version") had 27 separately enumerated special circumstances making a first degree murderer death-eligible.[5] Under the 1978 Version, a non-killing accomplice was death-eligible only upon proof that the accomplice had the intent to kill. The 1978 Version was in effect for murders committed from November 8, 1978, through June 5, 1990.

6. In 1990, the 1978 death penalty law was broadened by initiative.[6] The initiative added two felony-murder special circumstances (mayhem and rape by instrument) and broadened death

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3. Initiative Measure Proposition 7 (approved Nov. 7, 1978).

4. California Journal Ballot Proposition Analysis, Calif. J., No. 1978, Special Section, at 5. By "toughest death penalty law," the proponents meant the law "which threatens to inflict that penalty on the maximum number of defendants." *Carlos v. Super. Ct.*, 672 P.2d 862, 871 n.13 (Cal. 1983).

5. Penal Code § 190.2(a) listed 19 special circumstances, one of which (felony-murder) had 9 enumerated sub-parts. One of the special circumstances - the "heinous, atrocious, or cruel" special circumstance (Pen. Code § 190.2 (a)(14)) was subsequently declared to be unconstitutional in *People v. Superior Court (Engert)* (1982) 31 Cal.3d 797 and was ignored for purposes of the three studies.

6. Initiative Measure Proposition 115 (approved June 5, 1990).

eligibility for non-killing accomplices by eliminating the intent to kill requirement and requiring only that the accomplice have acted with "reckless indifference to human life and as a major participant" in a special circumstances felony.[7] This broadened death penalty scheme ("1990 Version") was in effect for murders committed from June 6, 1990, through March 26, 1996.

7. In 1996, the 1978 death penalty law was again broadened by initiative.[8] The initiative added three more special circumstances: felony murder carjacking, murder of a juror and murder by discharging a firearm from a motor vehicle. This version of the death penalty scheme ("1996 Version") was in effect for murders committed from March 27, 1996, through March 7, 2000.

8. In 2000, for the third time in a decade, the 1978 death penalty law was expanded by initiative.[9] The initiative added a 33rd special circumstance to Penal Code § 190.2 - murder to further the activities of a criminal street gang - expanded the lying in wait special circumstance and overturned a limiting construction the California Supreme had given to two special circumstances, felony-murder kidnapping and felony-murder arson. This version of the death penalty scheme ("2000 Version") was in effect for murders committed from March 8, 2000, through July 1, 2009.

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7. Penal Code § 190.2(d).

8. Initiative Measure Proposition 196 (approved Mar. 26, 1996).

9. Initiative Measure Proposition 18 (approved Mar. 7, 2000)

9. The most recent expansion of the 1978 death penalty law is not the product of an initiative, but of the California Supreme Court's decision in *People v. Farley*, 210 P.3d 361 (Cal. 2009). In *Farley*, the court overturned the burglary "merger" rule which had prohibited the application of the felony-murder rule and the felony-murder special circumstance when the defendant's purpose in a burglary was to commit an aggravated assault or murder. This decision expanded the size of the death-eligible pool by 2-3% by making death-eligible anyone who enters a building, room, etc. belonging to someone else with the intent to kill or, commit an aggravated assault against, the victim.[10] This is the version of the death penalty scheme ("2009 Version") currently in effect.

DESCRIPTION OF THE STUDIES

The "Appellate Study"

10. The first study I conducted, and the principal study, for purposes of this declaration was the "Appellate Study." The methodology of the Appellate Study is described in detail in the N.Y.U. Law Review article cited in ¶2. In summary, the data was drawn from appellate opinions in first degree murder cases decided on appeal during the period 1988-92. The study examined all published decisions during the period and all unpublished decisions

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10. For example, consider *People v. Sailie*, 820 P.2d 588 (Cal. 1991). Saille was thrown out of a bar by a security guard for being drunk and was subsequently denied re-entrance. Saille returned with a rifle and entered the bar intending to kill the security guard, but ultimately killing a patron. Saille would not have been death-eligible under any of the earlier versions of the law, but would be death-eligible under the current version.

in the First Appellate District during the period. The study encompassed 158 death penalty cases, 246 non-death first degree murder cases and 192 second degree murder cases. I assumed that the distribution of types of first degree murders occurring in these cases was representative of the distribution generally in California.[11] With respect to each case, I determined whether special circumstances had been found, and, if not, whether, under the facts as stated by the appellate court, a reasonable juror could have found a special circumstance beyond a reasonable doubt.[12] I determined the percentage of murder cases that were special circumstances cases, and, eliminating a percentage of cases to account for juvenile murderers, who were not death-eligible (estimated at 3.5% of non-death cases), I calculated the percentage of first degree murderers who were death-eligible. I then divided the percentage of first degree murderers actually sentenced to death by the percentage who were death-eligible to determine the death sentence rate for death-eligible murderers.

11. Below (¶¶ 17-26), I apply each of the five versions of the death penalty statute to the Appellate Study cases to compare the death eligibility and death sentence rates for the various periods.

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11. This assumption was tested in part by comparing the findings with regard to the study cases with appealed second degree murder cases and with unappealed cases in three counties.

12. This is the test suggested by the Supreme Court in its decisions in *Godfrey v. Georgia*, 446 U.S. 420, 428-29 (1980), and *Maynard v. Cartwright*, 486 U.S. 356, 364 (1988), for determining the narrowing effect of individual aggravating circumstances.

The "Alameda Study"

12. In 2007, I completed the second study, covering murder conviction cases in Alameda County for murders committed during the period November 8, 1978 to November 7, 2001 ("Alameda Study").[13] In the Alameda Study, I attempted to survey all murder conviction cases for the study period. Working from five lists of cases created by the Alameda County District Attorney's Office in response to a California Public Records Act request for all murder filings since 1977, supplemented by three other lists of murder conviction cases, I surveyed 816 murder conviction cases, including all death penalty cases (cases in which the defendant was sentenced to death) for the period.[14] The study included 473 first degree murder cases, among which were 49 death penalty cases. I believe that the 767 non-death penalty murder cases in the study comprise approximately 98% of such cases during the period, and I assume that they are representative of the missing cases.

14. The data for the study was derived from a review of trial court casefiles, supplemented with appellate opinions, where available. Each case was coded in two ways: (1) with reference to the version of the death penalty statute in effect at the time of the murder and (2) with reference to the 2000 Version of the law.

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13. November 8, 1978 is the effective date of the 1978 death penalty law.

14. The numbers differ slightly from the numbers reported in Florida Law Review article cited in ¶2 because 13 of the missing cases were identified and reviewed after the article went to press.

The "Current Study"

15. I am in the process of completing a third study ("Current Study") based on discovery produced by the California Department of Corrections and Rehabilitation in response to a subpoena *duces tecum*. The study covers all persons sentenced upon a conviction for first degree murder in California during the period 2003-2005. The data for the Current Study was based on a review of the pre-sentence reports for the 1298 defendants convicted of first degree murder and sentenced to the California Department of Correstions and Rehabilitation ("CDCR") during the three-year period,[15] supplemented by appellate opinions in the cases, where available.

16. As was the case with the Alameda Study, each case was coded in two ways: (1) with reference to the version of the death penalty statute in effect at the time of the murder and (2) with reference to the 2000 Version of the statute.

THE FINDINGS FOR THE SCHEME AS A WHOLE

The Appellate Study

17. In the calculations for the 1978, 1990 and 1996 Versions below, I use 33.2 as the average number of death sentences per year and 9.6% as the percentage of convicted first degree murderers

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15. CDCR produced data for 1298 defendants convicted of first degree murder, but, in some cases the data was incomplete. I am attempting to obtain the missing data; however, given how few cases are missing data, the results described here will not be materially changed by inclusion of the missing data. For example, there was insufficient data in only 13 cases to permit a determination of death eligibility, and obtaining the data could only *lower* the death sentence rate.

sentenced to death. These are the figures from the original study period (1988-1992) and were used in the N.Y.U. Law Review article. In fact, the average number of death sentences during the 21-year period encompassing the first three versions of the law (1979-1999) is 31.3, so the death sentence rates (as a percentage of first degree murderers and as a percentage of death-eligible murderers) for these versions of the law are somewhat overstated. For the period 2000-present, encompassing the 2000 and 2009 Versions of the law, I use the average number of death sentences per year for the 10-year period 2000-2009, which is 21.6; and the average number of adult convicted first degree murderers per year from the Current Study (2003-2005), which is 393.

18. **1978 Version.** Using the Appellate Study cases and the calculation methods described above (¶¶ 10, 17), I calculate that, under the 1978 Version, approximately 84% of all convicted first degree murderers (87.2% of adult convicted first degree murderers) were death-eligible. If 84% of convicted first degree murderers were death-eligible and only 9.6% of convicted first degree murderers were actually sentenced to death, California's death sentence rate for death-eligible defendants during the period was approximately 11.4%.

19. The above calculations do not take into account that, for murders occurring during a four-year period, December 12, 1983 to October 13, 1987, the California Supreme Court interpreted § 190.2 to require proof of the defendant's intent to kill for a special circumstances finding. *See Carlos v. Superior Court*, 672 P.2d 862

(Cal. 1983), *overruled* by *People v. Anderson*, 742 P.2d 1306 (Cal. 1987).

20. I have reexamined the Appellate Study cases applying § 190.2 as interpreted by *Carlos*. In the course of that reexamination, I have resolved all questionable cases against finding an intent to kill, thus adopting the interpretation most favorable to the constitutionality of the scheme.[16] Applying the *Carlos* interpretation would affect the categorization of 21 cases. Under § 190.2 as interpreted by *Carlos*, approximately 76.6% of convicted first degree murderers would have been death-eligible, and the resulting death sentence rate for death-eligible defendants would have been approximately 12.5%.[17]

21. **1990 Version.** Using the Appellate Study cases and the calculation methods described above (¶ 10, 17), I calculate that, under the 1990 Version, the death eligibility rate for adult

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16. Reliance on facts stated in appellate cases probably leads to *understatement* of the number of cases where a jury could have found intent to kill. Where, in cases not governed by *Carlos*, the prosecution did not have to prove intent to kill, it may not have developed or introduced available evidence on the issue, and the appellate opinion may not have discussed evidence which would have supported such a finding.

17. This death sentence rate for the period 1983-1987, represents the *highest* statewide death sentence rate under the 1978 death penalty law. In calculating the death sentence rate for *Carlos* window cases, I do not mean to suggest that the calculations have any bearing on the constitutionality of the 1978 death penalty law. It is my understanding that the Eighth Amendment requires *legislative* narrowing of the death-eligible class (see *Zant v. Stephens*, 462 U.S. 862, 878 (1983)), so that the California Supreme Court's erroneous and short-lived narrowing interpretation cannot validate a statute if, as a whole, it was unconstitutional when passed.

convicted first degree murderers during this period was 89.1%, and the death sentence rate for death-eligible defendants was approximately 11.1%.

22. **1996 Version.** Using the Appellate Study cases and the calculation methods described above (¶ 10, 17), I calculate that, under the 1996 Version, the death eligibility rate for adult convicted first degree murderers during this period was 89.9%, and the death sentence rate for death-eligible defendants was approximately 10.9%.[18]

23. **2000 Version.** Using the Appellate Study cases and the calculation methods described above (¶ 10, 17), I calculate that, under the 2000 Version, the death eligibility rate for adult convicted first degree murderers during this period was 91.4%, and the death sentence rate for death-eligible defendants was approximately 6.1%.

24. **2009 Version.** Using the Appellate Study cases and the calculation methods described above (¶ 10, 17), I calculate that, under the 2009 Version, the death eligibility rate for adult convicted first degree murderers during this period would be 94.0%, and the death sentence rate for death-eligible defendants would be

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18. The figures given for the 1990 and 1996 Versions are lower than that given in the N.Y.U. Law Review article for two reasons: (1)post-1997 case authority interpreting § 190.2(d) establishes that, with respect to two cases categorized as not involving a death-eligible defendant, there were sufficient facts to justify a special circumstances finding; and (2), at the time of the article, I treated the published and unpublished case samples as separate for calculation purposes but have since concluded that the difference between the two samples is not statistically significant and the samples should be combined.

approximately 5.9%.

25. In addition to overstating the death sentence rates as to the 1978, 1990 and 1996 Versions of the law because of my use of a higher average number of death sentences (*see* ¶17), the previous paragraphs almost certainly overstate the true death sentence rates because of three additional protocol decisions I made that favored the constitutionality of California's scheme: (1) I did not consider, in deriving the death sentence rate, statutorily death-eligible defendants who (because of plea bargaining or jury leniency) were convicted only of second degree murder or lesser crimes; (2) I based the study on *initial* death sentences and, therefore, did not take account of defendants who obtained reversals of their convictions or death sentences and were not resentenced to death; and (3) I did not take account of the effect of *Atkins v. Virginia*, 536 U.S. 304 (2002) (holding unconstitutional the application of the death penalty to mentally retarded persons), although apparently mentally retarded persons may be overrepresented on death row.[19]

26. In sum, the 1978 death penalty was exceedingly broad when it was adopted, making death eligible 87.2% of adult first degree murderers and producing a death sentence rate for death-eligible first degree murderers of approximately 11.4%. The death eligibility rate has gone up and the death sentence rate has gone down with each successive expansion, to the point where the 2009

19. *See Atkins*, 536 U.S. at 346-347 (Scalia, J., dissenting).

Version of the death penalty statute makes 94.0% of convicted first degree murderers death-eligible and can be expected to produce a death sentence rate for death-eligible first degree murderers of just under 6%.[20]

The Alameda Study

27. The Alameda Study covered cases under the 1978, 1990, 1996 and 2000 Versions of the statute. Overall, 23-year period, the death eligibility rate for adult convicted first degree murderers was 87.0%, and the death sentence rate was 12.7%.

28. Almost half the adult first degree murder conviction cases in the study (217/439) involved murders occurring in the period covered by 1978 Version of the statute. In those cases, 88.9% of the defendants were death-eligible. The death sentence rate for death-eligible defendants was 15.5%. The difference between the Alameda Study death sentence rate and the lower Appellate Study death sentence rate is likely a reflection of the fact that Alameda County has been a relatively "high death" county. *See* Glenn L. Pierce & Michael Radelet, *The Impact of Legally Inappropriate*

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20. These findings are entirely consistent with the findings of Professor David Baldus and his colleagues, who recently completed a study of 27,928 cases where defendants were convicted of non-negligent homicide (first degree murder, second degree murder or voluntary manslaughter), using a stratified sample of 1618 cases. See Declaration of David C. Baldus filed in *Ashmus v. Wong*,Civ. No. C93-00594-TEH (N.D. Cal.). Professor Baldus concluded, *inter alia*, that "the rate of death eligibility among California homicide cases is the highest in the nation by every measure" (*id.* at 25) and that "the post-*Furman* California death sentencing rate among death-eligible cases is among the lowest in the nation and 66% (10/15) lower than the death sentencing rate in pre-*Furman* Georgia. *Id.* at 25-26.

Factors on Death Sentencing for California Homicides, 1990-1999, 46 Santa Clara L. Rev. 1, 27 (2005).

29. The other half of the Alameda Study cases (222) involved adult first degree murders covered by the 1990, 1996 and 2000 Versions of the law. In these cases 85.1% of the defendants were death-eligible, and the death sentence rate for death-eligible defendants was 9.5%.

30. Applying the 2000 Version of the statute to the Alameda Study cases, 91.5% of the defendants would have been death-eligible, and the death sentence rate for death-eligible defendants would be 5.9%, virtually the same figures produced by the Appellate Study.

The Current Study

31. The Current Study found an overall death eligibility rate for adult first degree murderers of 84.1% and a death sentence rate of 5.6%. Although many of the Current Study cases involved murders under the 2000 Version of the law, if the 2000 Version were applied to all the cases, the death eligibility rate would be 85.3% and the death sentence rate would be 6.6%.[21]

32. Under the 2009 Version of the death penalty statute, the death eligibility rate for the Current Study would be 87.2% and the death sentence rate would be 6.3%.

The State's Calculations

33. In *Frye v. Woodford*, CIV S-99-0628 LKK JFM (E.D. Cal.),

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21. This death-sentencing rate is higher than actual rate found in the Current Study because the average yearly number of defendants sentenced to death was higher for the decade as a whole than for the three-year period of the study.

in response to interrogatories, the State analyzed the appellate first degree murder cases used in the Appellate Study. The State agreed that 157 out of 158 death penalty cases were special circumstances cases. With regard to the other 246 cases, the State took the position that, in 7 cases, the facts contained in the court's opinion were insufficient to determine the existence of special circumstances and in 65 of the remaining 239 cases there was insufficient evidence of a special circumstance. Thus, the State found that in 174 cases special circumstances were proved or provable.

34. Assuming, *arguendo*, that the State was correct in its characterization of *all* of the cases, and applying the same calculation methods described above (including disregarding the 7 cases where the State contended there were insufficient facts), the State in effect conceded that at least 73.0% of first degree murderers are factually death-eligible, yielding a corresponding death sentence rate of 13.2%.

THE FINDINGS FOR PARTICULAR SPECIAL CIRCUMSTANCES

35. It is my understanding that not only does the Eighth Amendment require that a death penalty scheme as a whole narrow the death-eligible class, but it also prohibits the imposition of the death penalty "when juries generally do not impose the death sentence in a certain kind of murder case."[22] Accordingly, below I

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22. *Gregg v. Georgia*, 428 U.S. 153, 205-206. (1976) (citing with approval the Georgia's Supreme Court's understanding of the law)

provide data on the frequency with which six commonly occurring special circumstances result in a death sentence.

Theft-related felony-murders: Robbery (§ 190.2(a)(17)(A)), Burglary (§ 190.2(a)(17)(G)),[23] Carjacking (§ 190.2(a)(17)(L))

36. Using the data from all three studies, I calculated the death sentence rate for defendants who killed during a robbery, a (theft-related) burglary or carjacking, where no more aggravated special circumstance was proved or provable. Virtually all the cases in the Appellate Study arose in the 1980s. The death sentence rate for defendants, convicted of first or second degree murder, who were factually death-eligible under one of these special circumstances was approximately 5.5%. The Alameda Study cases for the most part arose during the 1980s and 1990s. The death sentence rate for defendants convicted of first or second degree murder, who were factually death-eligible under one of these special circumstances was approximately 4.5%.[24] Most of the Current Study cases arose during the late 1990s and early 2000s. The Current Study only covered defendants convicted of first degree murder. The death sentence rate for defendants convicted of first degree murder

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23. While burglary may be committed for purposes other than theft, *e.g.*, with the intent to commit a sexual assault, only the more common theft-related burglaries are included in these calculations.

24. Of course, calculating the narrowing effect of the robbery/burglary/carjacking special circumstance by only examining the pool of convicted murderers (as was done in both studies) overstates the narrowing effect of the circumstances. Some portion of robbery/burglary/carjack murderers are allowed to plead to lesser offenses, while others are given immunity for testimony against co-defendants, so that the true percentage who receive the death penalty is below the cited 5.5% and 4.5%.

who were factually death-eligible under one of these special circumstances was less than 2%.[25] The death sentence rate for defendants who are made death-eligible by these theft-related special circumstances has always been far lower than the death sentence rate for the statute as a whole, and it has steadily declined over time.

Lying in Wait (§ 190.2(a)(15)) and Drive-by Killing (§ 190.2(a)(21))

37. The lying wait special circumstance has been part of the death penalty statute in all versions of the statute. The drive-by killing special circumstance was added in 1996 and, therefore, is applicable for the 1996, 2000 and 2009 Versions of the statute. Both have the effect of making death-eligible intentional killers whose killings are not connected to felonies. In the Appellate Study, only one of the 157 death sentences was based on the finding of a lying wait special circumstance alone. The death sentence rate for the lying in wait special circumstance alone was .45%. In the Alameda Study, *none* of the 49 death sentences was based alone on a finding of a lying wait special circumstance, a drive-by shooting special circumstance or both lying in wait and drive-by shooting special circumstances. In the Current Study, one of the 55 death sentences was based on a finding of a lying in wait special circumstance alone. None was based on a drive-by shooting special circumstance alone or combined with a lying in wait special

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25. Since the study covers only defendants convicted of first degree murder and since many robbery/burglary murderers are convicted of second degree murder or lesser charges (see n.24), even a figure this low overstates the death sentence rate.

circumstance. The death sentence rate for cases where the lying wait and/or drive-by shooting special circumstances were the only proved or provable special circumstances is .71%.

Gang Motive (§ 190.2(a)(22))

38. The "gang motive" special circumstance was added to Penal Code § 190.2 in 2000, so only the Current Study contains data on the death sentence rate for such killings. In that study, among the 982 death-eligible first degree murderers, 337, more than one-third, had a proved or provable gang motive special circumstance. None of the 55 defendants sentenced to death was sentenced on the basis of a gang motive special circumstance alone, and only seven of the 337 defendants with a proved or provable gang motive special circumstance (2%) were sentenced to death at all. In three of the seven death penalty cases, a gang motive special circumstance was found, but, in two of the cases, a multiple murder special circumstance was also found, and, in the third case, the special circumstances of peace officer victim and killing to avoid arrest were also found. In the four other death penalty cases where there was a provable, but not found, gang motive special circumstance, the defendant was sentenced to death on the basis of the special circumstances of multiple murder (three cases) and kidnapping and rape (one case).

CONCLUSIONS

39. A statutory scheme in which death eligibility is so broadly defined that it has never produced a statewide death sentence rate even approaching the 15-20% death sentence rate

produced by the schemes held unconstitutional in *Furman* and that in 2003-2005 produced a death sentence rate of no more than 5.6% does not "genuinely narrow" and creates too great a risk of arbitrary application to be constitutional under the Eighth Amendment.

40. When special circumstances rarely result in a death sentence, their use in any given case is a violation of the Eighth Amendment. That is the case for the following special circumstances: the theft-related felony-murder special circumstances - robbery, burglary and carjacking - which currently result in a death sentence less than 2% of the time; lying in wait and drive-by shooting, which result in a death sentence less than 1% of the time; and "gang motive" which, in the period 2003-2005, never resulted in a death sentence.

I declare under the penalty of perjury under the laws of the United States and the State of California that I have read the foregoing declaration, and it is true and correct.

Executed this 8th day of July, 2010, in San Francisco California.

STEVEN F. SHATZ

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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORINIA, SOUTHERN DIVISION

ERNEST DEWAYNE JONES, Petitioner, v. VINCENT CULLEN, Warden of California State Prison at San Quentin, Respondent.	Case No. CV-09-2158-CJC DEATH PENALTY CASE

EXHIBITS IN SUPPORT OF MOTION FOR AN EVIDENTARY HEARING VOLUME 1

EXHIBIT I
DECLARATION OF GERALD UELMAN

DECLARATION OF GERALD F. UELMEN

I, Gerald F. Uelmen, declare as follows:

1. I am a Professor of Law at Santa Clara University School of Law, Santa Clara, California, where I served as Dean of the Law School from 1986 to 1994. Prior to that, I was a Professor of Law at Loyola Law School, Los Angeles, California from 1970 to 1986. Throughout my 39 year teaching career, I have taught courses in Criminal Law and Criminal Procedure, and have closely followed the death penalty law and jurisprudence of California. From 2004 to 2008, I served as Executive Director of the California Commission on the Fair Administration of Justice, and drafted the Commission's Report on the California Death Penalty Law. I have conducted research and written law review articles on the administration of the death penalty law in California, spoken at numerous seminars on this topic, and offered testimony as an expert in several death penalty cases.

2. My curriculum vita is attached to this declaration as Appendix A.

3. I provide this declaration at the request of counsel for Mr. Troy Ashmus regarding the salient legislative history of California's death penalty procedures since 1972. In the course of preparing this declaration, I have reviewed substantial legal, legislative, and historical material. A list of the material that I consulted is attached to this declaration as Appendix B.

4. Prior to 1972, all first-degree murders codified in former California Penal Code section 189[1] were punishable by death under California law.[2] Former Cal. Penal Code § 190 (West 1970); *People v. Anderson*, 6 Cal. 3d 628, 652 (1972).

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[1] All further statutory references are to the California Penal Code unless otherwise specified.

[2] In addition to first-degree murder, the following crimes were also punishable by death at this time: treason (Pen. Code § 37), perjury in capital cases (Pen. Code § 128), kidnaping for ransom or robbery with bodily harm to the victim (Pen. Code, § 209), train wrecking (Pen. Code, § 219), malicious assault by life prisoner (Pen. Code, § 4500), explosion of destructive devices causing great bodily injury (Pen. Code § 12310), and sabotage resulting in death or great bodily injury (Mil. & Vet. Code § 1672, subd. (a)). The death penalty was mandatory for the treason and perjury offenses and for malicious assault by a life prisoner if a non-inmate victim died and discretionary for first-degree murder and the other offenses. *People v. Anderson*, 6 Cal. 3d 628, 652 (1972).

5. In 1972, the California Supreme Court invalidated the California death penalty scheme, holding that it violated the state constitution's prohibition against cruel or unusual punishments. *People v. Anderson*, 6 Cal. 3d 628 (1972). California voters swiftly reacted by passing Proposition 17 in November 1972, which amended the California Constitution to provide that capital punishment is not unconstitutional, overturning the *Anderson* decision. Meanwhile, in June 1972, the United States Supreme Court announced several opinions in *Furman v. Georgia*, 408 U.S. 238 (1972), collectively interpreted as holding that the death penalty may not be imposed under sentencing procedures that create a substantial risk that it will be inflicted in an arbitrary and capricious manner, thus the statute must provide a "meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not." *Gregg v. Georgia*, 428 U.S. 153, 188 (1976) (*quoting Furman v. Georgia*, 408 U.S. at 313 (White, J., concurring)).

6. In response to Proposition 17 and *Furman*, the California Legislature enacted a death penalty statute in 1973 that mandated imposition of the death penalty for individuals found guilty of first-degree murder when one of ten special circumstances were present.[3] In 1976, the California Supreme Court invalidated this mandatory statute in light of the intervening United States Supreme Court ruling in *Woodson v. North Carolina*, 428 U.S. 280 (1976), which held that mandatory death penalty schemes violate the Eighth Amendment of the United States Constitution. *Rockwell v. Superior Court*, 18 Cal. 3d 420 (1976).

7. In 1977, the California Legislature again responded to the decisions of the United States Supreme Court by enacting a new death penalty statute with the passage of Senate Bill 155, introduced on January 19, 1977, by then-Senator George Deukmejian.[4] Then-Senator John Briggs was a co-author of this legislation.[5] On May 27, 1977, Senate Bill 155 as

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[3] Petitioner's Exhibit (Exh.) 139 at 7-12 (1973 Cal. Stat. c. 719, §§ 1- 5 (S.B. 450)).

[4] Exh. 139 at 82-95 (1977 Cal. Stat. c. 316, §9 (S.B. 155), effective August 11, 1977); Exh. 139 at 96-97 (Senate Final History, 1977 Cal. Stat. c. 316, §9 (S.B. 155), effective August 11, 1977).

[5] Exh. 139 at 96-97.

subsequently amended, was enrolled and transmitted to then-Governor Edmund G. Brown Jr. for his signature.[6]

8. The 1977 death penalty bill was drafted to restore discretion to the sentencer to impose death upon a finding of first-degree murder when one of twelve legislatively drawn special circumstances was present.[7] In enacting Senate Bill 155, the California Legislature expressly considered the constitutional parameters of a valid death penalty statute as defined by United States Supreme Court jurisprudence.[8] In preparation for considering Senate Bill 155 and other capital punishment bills before it in early 1977, the Legislature called upon constitutional law experts to educate its members about the recent United States Supreme Court decisions addressing the constitutionality of the death penalty, including concerning the Eighth Amendment narrowing requirement.[9]

9. On May 27, 1977, Governor Brown vetoed Senate Bill 155 based upon his moral opposition to the death penalty.[10] Although the Legislature ultimately overrode Governor Brown's veto and Senate Bill 155 went into effect on August 11, 1977,[11] the veto override process was highly controversial, driven in many respects by the political aspirations of Senator John Briggs, an announced candidate for Republican nomination for Governor of California for the June 1978 primary election.

10. Although Senator Briggs supported capital punishment, helped introduce Senate Bill 155, and had voted for its passage initially, he ultimately attempted to block its enactment, ostensibly to use capital punishment as a political issue during the 1978 gubernatorial race.[12] Prior to the bill's enactment, Senator Briggs threatened to uphold the governor's promised veto,

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[6] Exh. 139 at 97-97.

[7] Exh. 139 at 82-95.

[8] *See e.g.* Exh. 139 at 15-79 (Constitutional Issues Relative to the Death Penalty: Special Hearing of the California Assembly Committee on Criminal Justice, January 24, 1977 (transcript)).

[9] *See e.g*. Exh. 139 at 19-23, 57-63.

[10] Exh. 139 at 96-97; Exh. 139 at 81 (Press Release, Office of Governor Edmund G. Brown (May 27, 1977)); Exh. 140 at 4-6 (Death Penalty Poll Casts Doubt On Veto Override, L.A. Daily Journal, March 29, 1977, at 1, 4).

[11] Exh. 139 at 96-97.

[12] Exh. 140 at 4-6; Exh. 140 at 18-19 (Override Vote Set Today on Death Penalty Vote, L.A. Daily Journal, June 23, 1977, at 1).

admitting that he would be "delighted" to see a death penalty proposition on the November 1978 ballot,[13] and thus preventing the incumbent Governor Brown from "duck[ing] th[e] issue" of capital punishment in the election.[14] After the governor vetoed Senate Bill 155, Senator Briggs reportedly announced that he would abstain from voting in the override proceedings even if his was the crucial vote, and that regardless of the outcome of the override proceedings, he would attempt to qualify an "even tougher" death penalty initiative for the November 1978 ballot.[15] Senator Briggs, then the only announced Republican candidate for governor, explained his strategy concerning his planned initiative: "When you have a law on the books you remove it as an issue . . . I don't want to remove it as an issue."[16] Senator Briggs had also announced his desire to "send [Governor Brown] out naked in November" on the issue of capital punishment.[17]

11. Political leaders distanced themselves from Senator Briggs and his strategy during the override process, accusing Briggs of grandstanding, and dismissing him as a "fellow who is seeking publicity."[18] Senator Briggs was publically criticized for his attempts to thwart the veto override. For example, former Governor Ronald Reagan warned that attempts to bypass the override process "could bring on charges of opportunism later."[19] Then-Los Angeles County Sheriff Peter Pitchess released a letter to Senator Briggs stating: "I am shocked that you, or any other human being, would try to make a cheap partisan show out of a matter of such grave consequence. I do not intend to stand idly by while you allow the death penalty issue, a matter of critical importance to the safety of our citizens, to degenerate into a sideshow

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[13] Exh. 140 at 6.

[14] Exh. 140 at 12 (Briggs Nixes Death Penalty Vote Override, The Recorder, June 2, 1977, at 1, 7).

[15] Exh. 140 at 12.

[16] Exh. 140 at 12-14.

[17] Exh. 140 at 7 (Death Bill Passed By Senate on Slender Two-Vote Margin, L.A. Daily Journal, April 1, 1977, at 1).

[18] Exh. 140 at 12.

[19] Exh. 140 at 15, 17 (Reagan Backs Override Of Death Veto, The Recorder, June 16, 1977, at 1, 6).

to dramatize your own political ambitions."[20] As threatened and arguing that Senate Bill 155 was not sufficiently tough, Senator Briggs abstained from voting in the override proceeding, temporarily resulting in the override being one vote short of passage in the Senate.[21] The passing vote was ultimately cast by another member of the Senate, and the veto override passed in the Assembly soon thereafter.[22]

12. Fear of a "far broader" death penalty ballot initiative lacking the constitutional protections of Senate Bill 155 drove pivotal votes in the process of legislatively enacting Senate Bill 155.[23] Assemblyman Henry Mello, who cast the necessary "aye" vote after the bill initially fell one vote short in the Assembly, reported that although he was "philosophically opposed" to capital punishment, he feared a death penalty initiative drafted by law enforcement groups would be "far broader and far worse" than the legislatively drawn Senate Bill 155.[24] Similarly, concerning his "difficult and painful vote" to enact Senate Bill 155, Assemblyman Tom Bane explained that "I believe if this bill is not enacted the eventual result will be far worse. The people of California will support an initiative which will not have the protections of SB 155."[25]

13. In November 1977, approximately three months after Senate Bill 155 went into effect, Senator Briggs and the law enforcement-dominated group he co-chaired, Citizens for an Effective Death Penalty, launched a ballot initiative campaign in order to enact "the nation's toughest, most effective death penalty law"[26] through Proposition 7, which became known as the "Briggs Initiative."[27] Senator Briggs hired Donald Heller, a former Assistant United States

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[20] Exh. 140 at 22 (Pitchess Scores Solon On Move To Defeat Death Bill, L.A. Daily Journal, June 28, 1977, at 4).

[21] Exh. 140 at 20-21 (Close Senate Override On Death Penalty, The Recorder, June 24, 1977, at 1, 6).

[22] Exh. 139 at 96-97; Exh. 140 at 21.

[23] Exh. 140 at 9 (Assembly Passes Death Penalty Bill, The Recorder, May 17, 1977, at 1, 6).

[24] Exh. 140 at 9.

[25] Exh. 139 at 80 (Letter from Tom Bane, Assemblyman, California Assembly, to Mark Waldman, Legislative Counsel, American Civil Liberties Union (May 23, 1977)).

[26] Exh. 139 at 102 (California Voters Pamphlet, General Election, Nov. 7, 1978, at 32-46).

[27] *See* Exh. 140 at 24 ('Insurance Death Penalty' Drive Planned, The Recorder, Nov. 3, 1977, at 1); Exh. 140 at 26 (George Skelton, Briggs Launches Death Penalty Initiative Drive, L.A. Times, Nov. 10, 1977, at 3, 20).

Attorney who had never tried a capital case, to draft the proposed statute.[28] The Briggs Initiative included 27 special circumstances, more than double the number included in the 1977 law; substantially broadened the definitions of special circumstances that were included in the 1977 law; eliminated the across-the-board intent to kill requirement of the 1977 law; and expanded death-eligibility for accomplices. *See* Steven F. Shatz & Nina Rivkind, The California Death Penalty Scheme: Requiem for Furman, 72 N.Y.U.L. Rev. 1283, 1311-13 (1997); Cal. Penal Code § 190.2 (West 1988).

14. Senator Briggs admitted that he intended to use his death penalty initiative to further his own political career.[29] At a press conference announcing the unveiling of the initiative campaign, Senator Briggs announced: "I intend to make this a very big part of my gubernatorial campaign, I don't mind telling you"[30] and reportedly stated that he planned to seek necessary petition signatures on campaign stops.[31] In promoting his initiative, Senator Briggs charged that the death penalty bill enacted by the Legislature in 1977 was "weak and unconstitutional,"[32] contained "ridiculous" limitations on its application,[33] and did not adequately protect "the average citizen" from murderers.[34] Senator Briggs said of the initiative measure "This is the peoples' death penalty bill . . . [t]he other was the Legislature's,"[35] and that the people of California had been ". . . fooled one more time by the politicians into thinking they have death penalty protection when in fact they don't."[36] The Briggs-chaired

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[28] Exh. 140 at 27 (New Death Penalty Proposal Unveiled, The Recorder, November 10, 1977, at 1); Exh. 140 at 49 (Dan Morain, California Debate: Agony Over Resuming Executions, L.A. Times, Aug. 18, 1985 at 1).

[29] Exh. 140 at 26.

[30] Exh. 140 at 26.

[31] Exh. 140 at 27.

[32] Exh. 140 at 26.

[33] Exh. 140 at 29 (Richard Bergholz, Briggs Hits 'Weak' Death Penalty Law, L.A. Times, Feb. 14, 1978, at A21).

[34] Exh. 140 at 26.

[35] Exh. 140 at 27.

[36] Exh. 140 at 26.

sponsoring group of the initiative claimed that Senate Bill 155 did not go far enough, reserving capital punishment only in some circumstances surrounding the crime of murder.[37]

15. Senator Briggs' ballot petition materials targeted the fears of Californians. In a mailing sent to the state's citizens seeking petition signatures for the Briggs Initiative, Senator Briggs informed voters that: "Your life is being threatened by the hardened, violent criminals who are stalking the streets of your community . . ." and that "If a bloodthirsty criminal like Charles Mason had you or your family brutally murdered, that criminal would not face the death penalty under current California law. In fact, he could be back on the streets in 7 years!" and promised that his law would "give Californians the protection of a tough, effective death penalty through the initiative process."[38]

16. The campaign and ballot materials generated for California voters by Senator Briggs and the Briggs Initiative sponsors state that the proposed death penalty statute was intended to expand the death penalty to apply to "every murderer."[39] In the argument in favor of Proposition 7 in the ballot pamphlet, voters were told that "the death penalty law passed by the State Legislature was as weak and ineffective as possible," listing certain types of murders not covered by the 1977 law that would be covered by the Briggs Initiative, and that if passed, the Briggs Initiative would "give every Californian the protection of the nation's toughest, most effective death penalty law."[40] The ballot argument also stated that

> . . . if you were to be killed on your way home tonight simply because the murderer was high on dope and wanted the thrill, that criminal would not received the death penalty. Why? *Because the Legislature's weak death penalty law does not apply to every murderer. Proposition 7 would.*[41]

17. Members of the law enforcement community and those charged with prosecuting offenders of the laws of California expressed constitutional concerns about the

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[37] Exh. 140 at 24; Exh. 139 at 98 (Letter from Senator John V. Briggs, Co-Chairman, Citizens for an Effective Death Penalty, to Concerned Citizen (undated)).

[38] Exh. 139 at 98 (emphasis in original); *see also* Exh. 140 at 30 (W.E. Barnes, Sen. Briggs: 'Your Life is in Danger', S.F. Examiner & Chronicle, April 2, 1978, at A10).

[39] Exh. 139 at 102.

[40] Exh. 139 at 102.

[41] Exh. 139 at 102. (Emphasis added).

breath of the proposed initiative, with its expansive list of death-eligible crimes. Lowell Jensen, then-Alameda County District Attorney, stated that the Legislature's 1977 death penalty bill "is about as far as you can go in line with Supreme Court decisions"[42] and thus Proposition 7 is "vulnerable to legal attack."[43] William O'Malley, then-Contra Costa County District Attorney, stated that "Prop. 7 is too broad to stand a court test. It tries to cover all the bases and that's where the trouble is."[44] Joseph Freitas Jr., then-San Francisco County District Attorney, warned that "Proposition 7 has not been carefully prepared"[45] and that "California voters should understand that they are being cruelly manipulated by a man for whom the issue of life and death itself is just so much fuel for his political machine."[46] In urging defeat of Proposition 7, the California State Bar Conference of Delegates described the Briggs Initiative as "unnecessary, unlawyerlike and irrational."[47] Citing that the proposition would "radically expand" the types of murder punishable by death, the Board of Directors of the Barristers Club of San Francisco unanimously voted to oppose Prop. 7, calling it "unnecessary, poorly drafted and irrational."[48]

18. The Briggs Initiative was approved by California voters on November 7, 1978, and went into effect on November 8, 1978, supplanting the 1977 death penalty statute enacted by the Legislature. Proposition 7, § 6, approved Nov. 7, 1978, eff. Nov. 8, 1978. The statute enacted by the Briggs Initiative significantly expanded both the number of death-eligible crimes, or special circumstances, as well as the scope of existing special circumstances. As acknowledged by the California Supreme Court, the special circumstances set forth in Penal Code section 190.2 are intended to serve the constitutionally required narrowing function in the

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[42] Exh. 140 at 37 (Gayle Montgomery, District Attorneys Troubled by Prop. 7, Oakland Tribune, Oct. 24, 1978, at C11-12).

[43] Exh. 140 at 41 (Editorial, We Oppose Proposition 7, Oakland Tribune, Oct. 28, 1978, at 20).

[44] Exh. 140 at 41.

[45] Exh. 140 at 40 (Major S.F. Opponents of Prop. 7, S.F. Chronicle, Oct. 26, 1978, at 6).

[46] Exh. 140 at 42 (District Attorney Freitas Comes Out Against Prop. 7, L.A. Daily Journal, Nov. 2, 1978, at1).

[47] Exh. 140 at 31 (Bob de Carteret and C. Wong, State Bar Delegates Urge Defeat of Prop. 7 Initiative, L.A. Daily Journal, Sept. 17, 1978, at 1).

[48] Exh. 140 at 32 (Barristers Vote 'No' On Prop. 7, The Recorder, Oct. 10, 1978, at 1, 11).

California death penalty scheme. *People v. Visciotti*, 2 Cal. 4th 1, 74 (1992); *People v. Bacigalupo*, 6 Cal. 4th 457, 467-68 (1993).

19. The Briggs Initiative contained typographical or other errors, as well as legal ambiguities and unconstitutional provisions. According to then-California Supreme Court Justice Cruz Reynoso, "(Briggs) had bragged he would have the toughest death penalty law in the world, and he did not pay any attention to the guidelines set down by the U.S. Supreme Court," resulting in the California Supreme Court being "forced to overturn cases to clarify the law."[49] Former California Supreme Court Justice Joseph Grodin explained that in light of the Briggs Initiative, the Court's role in addressing death penalty cases had been "rendered particularly difficult by ambiguities in the death penalty statute."[50] Acknowledging the drafting errors contained in the death penalty law he enacted, such as inclusion of the felony murder special circumstance of killing in the commission of arson in violation of Penal Code section 447, which had been repealed in 1929 (1929 Cal. Stat. c. 25, 47, § 6), Senator Briggs himself introduced legislation during the 1979-1980 Legislative Regular Session to "correct" several drafting errors in the statute in an effort to "clean up the death penalty initiative."[51] Opponents of this proposed legislation pointed out the "irony" of Senator Briggs' proposed bill, which requested that the Legislature make changes in the initiative measure Senator Briggs sponsored "in order to avoid the legislative process," noting that many of the errors contained in the initiative "undoubtedly" would not have occurred had Senator Briggs not sought to ignore that process.[52]

20. In the years following the enactment of the Briggs Initiative, the California judiciary was required to resolve ambiguities in the death penalty statute. In *People v. Engert*,

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[49] Exh. 140 at 53 ('Blame Briggs, Not High Court' For Reversals, The Recorder, Aug. 19, 1986, at 3).

[50] Exh. 140 at 49.

[51] Exh. 139 at 110-15 (California Assembly Committee on Public Safety, Bill Analysis, Senate Bill No. 2054 (1979-80 Reg. Sess.) as amended May 6, 1980; Senate Committee on Judiciary, Bill Analysis, Senate Bill No. 2054 (1979-80 Reg. Sess.) as introduced).

[52] Exh. 139 at 116 (Letter to John Briggs, Senator, California Legislature, from James R. Tucker, Legislative Advocate, American Civil Liberties Union (June 13, 1980)).

31 Cal. 3d 797 (1982), the California Supreme Court declared that the special circumstance defined in former Penal Code section 190.2(a)(14) that the murder was "especially heinous, atrocious, or cruel manifesting exceptional depravity" was unconstitutionally vague and thus struck the provision. In *Carlos v. Superior Court*, 35 Cal. 3d 131 (1983), the California Supreme Court construed Penal Code section 190.2(b) to require a finding of intent to kill before a defendant could be subject to a felony murder special circumstance under former Penal Code section 190.2(a)(17), resolving ambiguity in the statute concerning the fundamental issue of death-qualifying mental state culpability to avoid potential constitutional concerns. In *People v. Turner*, 37 Cal. 3d 302 (1984), the Court clarified that under *Carlos*, the intent to kill requirements in former Penal Code section 190.2(b) applied to both actual killers and accomplices and applied to all special circumstances set forth in 190.2(a) other than the prior murder special circumstance (§ 190.2(a)(2)). In *People v. Bigelow*, 37 Cal. 3d 731, 750 (1984), citing to the "vague and broad generalities" of the language of the Briggs Initiative generally and the financial gain special circumstance (§ 190.2(a)(1)) specifically, the Court adopted a limiting construction requiring that the victim's death be an essential pre-requisite to the financial gain sought by the defendant for this special circumstance to apply. The *Bigelow* Court also held that the conjunctive language of the kidnap felony murder special circumstance in former section 190.2(a)(17)(ii) as drafted, specifying "[k]idnapping in violation of Sections 207 and 209," was a careless drafting error and that the intent of the provision should be construed to permit a special circumstance finding if the defendant was convicted of kidnapping under either section 207 or 209. *Id*. at 755-56. In *People v. Davenport*, 41 Cal. 3d 247 (1985), the Court narrowly construed the torture murder special circumstance (former § 190.2(a)(18)) to save it from constitutional infirmity, by holding that the special circumstance required proof of the intent to inflict torture. In *People v. Weidert*, 39 Cal. 3d 836 (1985), the Court limited the witness killing special circumstance as enacted (former § 190.2(a)(10)) to apply only to witnesses in criminal proceedings, to the exclusion of juvenile proceedings. During the initial period following the enactment of the statute, the California Supreme Court

issued several other rulings concerning the application of the Briggs Initiative on issues other than those directly pertaining to the special circumstances.

21. By the mid 1980s, the California Supreme Court had reversed the vast majority of death sentences in the cases that came before it.[53] California District Attorneys, Sheriffs, Chiefs of Police, and politicians who supported capital punishment harnessed their collective outrage at the California Supreme Court's failure to affirm death sentences obtained under the Briggs Initiative by campaigning to oust Supreme Court Chief Justice Rose Bird and Associate Justices Cruz Reynoso and Joseph Grodin in the 1986 judicial retention elections.[54] This coalition joined forces under the name "Californians to Defeat Rose Bird,"[55] and made claims in the highly publicized campaign such as that "The majority of the Bird Court will not allow anyone in California to be executed regardless how perfect the trial"[56] and that because these justices are "largely responsible for overturning 39 of 42 death sentences which they have decided," voters were encouraged to "think about brutal killers who live to celebrate another Christmas because the Rose Bird Court has allowed them to escape their just punishment."[57] This unprecedented election, the results of which were driven by the perception that these justices were soft on crime and did not adequately enforce the death penalty, resulted in the three challenged justices being removed from the California Supreme Court.

22. With newly-installed justices on the bench headed by former Chief Justice Malcolm Lucas, the California Supreme Court overruled *Carlos v. Superior Court,* which narrowly construed intent to kill requirements of the Briggs Initiative, in *People v. Anderson*, 43 Cal. 3d 1104 (1987). The newly comprised Court otherwise broadly interpreted issues that came before it concerning the application of the special circumstances and the statute generally, and paved the way for continued expansion of the death penalty. For example, the Court

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[53] *See* Exh. 139 at 117-18, 131-33 (Miscellaneous Campaign Materials: Californians to Defeat Rose Bird (1985-1986)).

[54] *See* Exh. 139 at 117-33.

[55] Exh. 139 at 123-26.

[56] Exh. at 129.

[57] Exh. at 133.

broadly interpreted the lying in wait special circumstance by holding that the "concealment" element of lying in wait can be satisfied by a defendant's "concealment of purpose" even when there is no attempted or actual physical concealment involved. *People v. Morales*, 48 Cal. 3d 527, 554-55 (1989). Prior to 1981, the Court consistently applied lying in wait to cases in which the defendant physically concealed him or herself for some period of time before attacking the victim. *See Webster v. Woodford*, 369 F.3d 1062, 1073 (9th Cir. 2004). Soon after Rose Bird and her colleagues were removed from the California Supreme Court, the Court's affirmance rate in capital cases shifted dramatically. The California Supreme Court reversed fifty-eight death sentences and upheld just four during Rose Bird's decade on the bench, while under her successor, Chief Justice Lucas, the Court affirmed sixty-four of the eighty-nine capital appeals it reviewed in three years.[58]

23. Since passage of the Briggs Initiative in 1978, the definition of first-degree murder and the special circumstances have continually been expanded, further broadening the pool of death-eligible crimes in California. In 1983, Penal Code section 189 was amended to add murder perpetrated by means of knowing use of armor piercing bullets to the list of statutory first-degree murders. 1982 Cal. Stat. c. 950, 3440, § 1 (S.B. 1342), eff. Sept. 13, 1982.

24. The definition of first-degree murder and the special circumstances were further expanded in 1990 with the passage of Proposition 115, effective June 6, 1990, known as the "Crime Victims' Justice Reform Act," a central purpose of which was to "clarify, restore, and overturn various Bird [C]ourt decisions which affect potential capital cases,"[59] including those that judicially narrowed or otherwise limited the application of the Briggs Initiative.[60] The voter ballot arguments in favor of Proposition 115 explained that Proposition's 115's "'Bird

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[58] Exh. 140 at 55 (Rebecca LaVally, The Death Penalty in California - Closing in on the First Execution, California Journal, July 1, 1990).

[59] Exh. 139 at 314 (Joint Hearing on Crime Victims Justice Reform Act, Proposition 115 on the June 1990 Ballot: California Senate Committee on Judiciary and Assembly Committee on Public Safety, December 11, 1989 (transcript, staff analysis, written testimony in support of and opposition to initiative)).

[60] *See* Exh. 139 at 617-36 (1990 Crime Victims Justice Reform Initiative, Proposition 115 Manual: State of California Department of Justice (1990)).

Court' death penalty provisions improve our death penalty law and overturn decisions by Rose Bird and her allies which made it nearly inoperative."[61] Proposition 115 was intended and served to "expand" the definition of first-degree murder and the list of special circumstances.[62]

25. Proposition 115 added the following types of first-degree felony murders Penal Code section 189: kidnapping, sodomy, oral copulation, rape with a foreign object, and train wrecking.[63] It also added the mayhem felony murder and rape with a foreign object felony murder special circumstances to Penal Code section 190.2(a)(17).[64] Proponents of these expansions noted that prior to Proposition 115, the first-degree felony murders in section 189 and the felony murder special circumstances in section 190.2(a)(17) were "not the same" and thus the measure was necessary to "conform" the list of first-degree felony murders and the felony murder special circumstances.[65] According to the State of California Office of the Attorney General, the result of these expansions accomplished by Proposition 115 was to "make all types of first degree felony murders subject to capital punishment."[66]

26. Proposition 115 also broadened some existing special circumstances. The witness killing special circumstance defined in Penal Code section 190.2(a)(10) was expanded to apply to witnesses in juvenile proceeding, nullifying the California Supreme Court's ruling to the contrary in *People v. Weidert*, 39 Cal. 3d 836 (1985).[67] The torture murder special circumstance was expanded by eliminating the requirement of "proof of the infliction of extreme physical pain no matter how long its duration" previously required by that special circumstance.[68] The drafters of Proposition 115 apparently attempted to revive the "heinous, atrocious, or cruel" special circumstance (former Penal Code section 190.2(a)(14)) held to be

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[61] Exh. 139 at 650 (California Ballot Pamphlet, Primary Election (June 5, 1990), Full Text of Proposition 115).

[62] Exh. 139 at 648.

[63] Exh. 139 at 658.

[64] Exh. 139 at 660.

[65] Exh. 139 at 285.

[66] Exh. 139 at 616, 630-31.

[67] Exh. 139 at 275; Exh. 139 at 659.

[68] Exh. 139 at 660.

unconstitutional in *People v. Engert*, by including it in the proposed new law and affirmatively making non-substantive amendments to the provision.[69] Proposition 115 codified the California Supreme Court's holding in *People v. Anderson*, that as to actual killers, intent to kill is not a required element for any of the special circumstances unless explicitly made so by the statute.[70] According to the Senate Committee on Judiciary and Assembly Public Safety Committee analysis of Proposition 115, the proponents of the Proposition desired this amendment to preclude any future judicial re-imposition of intent to kill beyond the holdings of *Anderson*.[71] The Proposition also expanded the liability of felony murder accomplices, eliminating the intent to kill element and requiring only that the accomplice act with "reckless indifference to human life and as a major participant" for the felony murder special circumstances to apply.[72] Proposition 115 also corrected drafting errors included in the Briggs Initiative, including to the kidnapping and arson felony murder special circumstances.[73]

27. Along with Proposition 115, Proposition 114 was also approved by California voters on June 5, 1990, effective June 6, 1990, and served to expand the definition of "peace officer" for purposes of the peace officer special circumstance in Penal Code section 190.2(a)(7), and other areas of the Penal Code.[74]

28. The definition of first-degree murder was again expanded in 1993 with the addition of felony murder carjacking and murder perpetrated by means discharging a firearm from a motor vehicle to the list of statutory first-degree murders in Penal Code section 189. 1993 Cal. Stat. c. 611 (S.B.60), § 4, eff. Oct. 1, 1993; 1993 Cal. Stat. c. 611 (S.B.60), § 4.5, eff. Oct. 1, 1993; 1993 Cal. Stat. chap. 611, § 4.5, effective October 1, 1993. According to the Assembly Committee on Public Safety's analysis of Senate Bill 60, which enacted the carjacking felony murder theory of first-degree murder, this additional type of first-degree

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[69] Exh. 139 at 660.

[70] Exh. 139 at 661.

[71] Exh. 139 at 279.

[72] Exh. 139 at 661.

[73] Exh. 139 at 660.

[74] Exh. 139 at 671-74 (California Ballot Pamphlet, Primary Election (June 5, 1990), Full Text of Proposition 114).

murder was necessary because it was "difficult to prove" this crime under the robbery felony murder theory.[75] According to a Senate Committee analysis of Senate Bill 310, which enacted the drive-by murder theory first-degree murder, this amendment to Penal Code section 189 was designed to "change the elements of first degree murder to make it easier to obtain a first-degree murder conviction for a drive-by shooting murder."[76] According to the author and sponsor of Senate Bill 310, those convicted of drive-by killings should be subject to the death penalty, and then-current law did not "adequately punish" this type of murder.[77]

29. Despite that the special circumstances are supposed to narrow death-eligibility from first-degree murder, the Legislature and electorate continued to remove differences between first-degree murder and the special circumstances by enacting subsequent amendments to the list of special circumstances deemed necessary when it was discovered that a type of first-degree murder was not punishable by death. Soon after felony murder carjacking and drive-by killings were added to the list of statutory first-degree murders in Penal Code section 189, the Legislature acted to ensure that this same criminal conduct also constituted special circumstance liability, thus, was punishable by death. 1995 Cal. Stat. c. 477 § 1 (S.B. 32); 1995 Cal. Stat. c. 478 (S.B. 9).

30. With the passage of Senate Bill 32, which was approved by California voters on March 26, 1996 by Proposition 195, the felony murder carjacking special circumstance and the juror killing special circumstance were added to the Penal Code as sections 190.2(a)(17)(L) and 190.2(a)(20), and the felony murder kidnapping special circumstance was expanded to include murders resulting from carjacking kidnap (Penal Code section 190.2(a)(17)(B)). 1995 Cal. Stat. c. 477 § 1 (S.B. 32) and Proposition 195, approved March 26, 1996, effective March 27, 1996.[78] Urging passage of Senate Bill 32, the author, then-Senator Steve Peace, asserted that

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[75] Exh. 139 at 679-80 (California Assembly Committee on Public Safety, Bill Analysis, July 13, 1993 Hearing, Senate Bill No. 60 (1993-94 Reg. Sess.), as proposed to be amended).

[76] Exh. 139 at 677 (California Senate Committee, Bill Analysis, March 30, 1993 Hearing, Senate Bill No. 310 (1993-94 Reg. Sess.), as amended March 29, 1993).

[77] Exh. 139 at 676.

[78] *See* Exh. 139 at 712-24 (California Ballot Pamphlet, Primary Election (March 26, 1996), Full Text of Proposition 195).

felony murder carjacking and felony murder kidnap carjacking were "the only crimes that are subject to the first degree felony murder rule that are not special circumstances under law"[79] and thus, according to the argument in favor of Proposition 195 in the voter pamphlet, the addition of these two new special circumstances would "conform" the list of special circumstances to the list of first-degree felony murders.[80] In urging passage of his bill, Senator Peace on the one hand took the position that the carjacking felony murder and the kidnap-carjacking felony murder special circumstances were "merely 'clean-up' provisions since a carjacking is essentially a robbery and robbery is already a special circumstance and kidnapping is also a special circumstance."[81] He also acknowledged, however, that carjacking first-degree murders **"cannot easily** be prosecuted" under the robbery felony murder special circumstance, rather, securing such a conviction required "a series of procedural hoops," but that the proposed legislation "**solves** the problem by directly making carjacking related first degree murders a special circumstance."[82]

31. The juror killing special circumstance was added to the Penal Code as section 190.2(a)(20) by this same legislation, despite law enforcement officials' apparent inability to identify any case in California involving the murder of a juror.[83] The bill's author argued that this additional special circumstance was necessary since "It is obvious given the central role that jurors play in the administration of justice, killing a juror because of his or her official actions is just as much an outrage as killing a judge or a witness."[84] The bill's author also referenced the need to "legislatively rectify drafting errors and other problems with the [ ] 1978

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[79] Exh. 139 at 706 (Letter to Governor Pete Wilson, from Senator Steve Peace, California State Senate (Sept. 15, 1995) (emphasis in original).

[80] Exh. 139 at 714.

[81] Exh. 139 at 706.

[82] Exh. 140 at 69-70 (Letter to the Editor, Sacramento Bee, from Senator Steve Peace, California State Senate (March 4, 1996) (emphasis in original); Exh. 140 at 156-57 (Editorial, Letters, Sacramento Bee, March 19, 1996, at B7).

[83] *See* Exh. 140 at 75 (State Propositions at a Glance, S.F. Chronicle, March 24, 1996, at 6/Z1).

[84] Exh. 139 at 690 (California Senate Committee on Criminal Procedure, Analysis, March 7, 1995 Hearing, Senate Bill No. 32 (1995-96 Reg. Sess.), as proposed to be amended); Exh. 139 at 157; Exh. 139 at 714.

death penalty law" as being behind the need to add the juror killing special circumstance to Penal Code section 190.2.[85]

32. At the same time Senate Bill 32 and corresponding Proposition 195 went into effect, Senate Bill 9 was passed and approved by California voters by Proposition 196, which added the drive-by murder special circumstance to Penal Code section 190.2 (§ 190.2(a)(21)). 1995 Cal. Stat. c. 478 (S.B. 9), § 2 (Prop. 196, approved March 26, 1996) effective March 27, 1996.[86] The legislation was enacted in recognition that drive-by shooting murder "is first degree murder, but is not one of the enumerated special circumstances" [87] and thus the voter ballot for Proposition 196 informed voters that the measure simply "adds first-degree murder resulting from a drive-by shooting to the list of special circumstances . . ."[88] According to proponents of this expansion of the death penalty, drive-by shootings were "no longer confined to the inner city,"[89] rather, drive-by shootings, thought largely to be gang-related, were "spreading like wildfire to the suburbs and even rural California,"[90] thus, the sentence for first-degree murder without special circumstances was thought to be "too lenient."[91]

33. The drafters of Senate Bills 32 and 9 and the corresponding propositions again included the "heinous, atrocious, cruel" special circumstance (§ 190.2(a)(14)) in the proposed amended law, again making non-substantive amendments to this unconstitutional special circumstance.[92]

34. Concerns have been raised that political considerations played a significant role in these more recent expansions of the California death penalty. Because first-degree felony murder carjacking and kidnap-carjacking, as well as drive-by first-degree murder were

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[85] Exh. 140 at 69-70.

[86] *See* Exh. 139 at 725-37 (California Ballot Pamphlet, Primary Election (March 26, 1996), Full Text of Proposition 196).

[87] Exh. 139 at 703 (California Senate Committee on Criminal Procedure, Analysis, March 7, 1995 Hearing, Senate Bill No. 9 (1995-96 Reg. Sess.), as introduced).

[88] Exh. 139 at 726.

[89] Exh. 139 at 726.

[90] Exh. 139 at 728.

[91] Exh. 139 at 702.

[92] Exh. 139 at 718; Exh. 139 at 731.

potentially already covered by existing special circumstances, these death penalty bills were criticized as being "grandstanding" political bills[93] and a waste of time utilized to gain political mileage out of high profile types of crime.[94]

35. In 2000, both the definition of first-degree murder and the special circumstances were once again expanded. The first-degree murder statute was expanded by the addition of torture felony murder to the list of first-degree felony murders in Penal Code section 189. 1999 Cal. Stat. 1c. 694, §1, (AB 1574) effective January 1, 2000. The purpose of adding torture felony murder to section 189 was to ease the prosecution's burden in securing a first-degree murder conviction when the crime of torture is involved.[95] Specifically, the purpose of the bill was to "eliminate" the prosecution's burden of proving that the torture of the victim was willful, deliberate and premeditated, as is required by the murder by means of torture theory of first-degree, and require only proof that the defendant intended to torture.[96] According to the Assembly Committee of Public Safety's analysis of Assembly Bill 1574, which enacted this amendment, this addition to section 189 would "significantly affect the way a prosecutor would go about charging" torture-related killings.[97] The inability of the Los Angeles County District Attorney's Office to obtain a first-degree murder conviction in a specific case apparently gave rise to the need for this expansion of the first-degree murder statute. According to the Los Angeles District Attorney's Office, the "source" of Assembly Bill 1574, a "miscarriage of justice" had occurred in a then-recent case, when the jury convicted the defendant of torturing a child to death, "but nevertheless found that there was no 'premeditation or deliberation' and

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93 Exh. 140 at 62 (Mike Lewis, Expansion of Capital Crimes Nears Passage, Sonoma County Herald-Recorder, Sept. 19, 1995, at 8, 15).

94 *See* Exh. 140 at 64 (Pamela Martineau, Wilson Signs Bill Allowing Death Penalty for Murdering Carjackers, Metropolitan News Enterprise, Los Angeles, California, Sept. 27, 1995, at 9).

95 Exh. 139 at 783-84 (California Assembly, Third Reading, Assembly Bill No. 1574 (1999-2000 Reg. Sess.), as introduced Feb. 26, 1999); Exh. 139 at 785-89 (California Assembly Committee on Public Safety, Analysis, April 13, 1999 Hearing, Assembly Bill No. 1574 (1999-2000 Reg. Sess.), as introduced Feb. 26, 1999).

96 Exh. 139 at 786-87.

97 Exh. 139 at 786.

returned a verdict of second not first degree murder."[98] According to the bill sponsor, Assembly Bill 1574 "corrects this anomaly" and "ensures" that when a murder occurs during the crime of torture, the crime is treated as first-degree felony murder.[99]

36. The death penalty was also expanded in several respects in 2000. Senate Bill 1878 and corresponding Proposition 18, which became effective March 8, 2000, expanded the kidnap and arson felony murder special circumstances (Penal Code §§ 190.2(a)(17)(B), (H), (M)) as well as the lying in wait special circumstance (Penal Code § 190.2(a)(15)). 1998 Cal. Stat. c. 629, § 2 (S.B. 1878), Proposition 18, approved by California voters on March 7, effective March 8, 2000.[100] The purpose of this bill was to "overturn specific court cases regarding the death penalty by changing the language regarding lying in wait, and to eliminate the distinction between committing a murder during the commission of an arson or kidnapping and committing an arson or kidnapping to facilitate a murder"[101] "for purposes of expanding the death penalty."[102] Specifically, according to the bill sponsor, Senate Bill 1878 was "clearly designed to abrogate" California Supreme Court precedent set forth in *People v. Green*, 27 Cal. 3d 1 (1980), *People v. Weidert*, 39 Cal. 3d 836 (1985) and *Domino v. Superior Court*, 129 Cal. App. 3d 1000 (1982).[103]

37. Senate Bill 1878 and corresponding Proposition 18 amended the lying in wait special circumstance by expanding the former statutory language requiring that the defendant intentionally killed the victim "while lying in wait," which had been interpreted in *Domino* to require proof that no cognizable interruption separate the period of lying in wait from the

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[98] Exh. 139 at 807 (California Senate Rules Committee, Third Reading, Analysis, Assembly Bill No. 1574 (1999-2000 Reg. Sess.), as introduced (Sept. 2, 1999)).

[99] Exh. 139 at 807.

[100] *See* Exh. 139 at 809-17 (California Ballot Pamphlet, General Election (March 7, 2000), Full Text of Proposition 18).

[101] Exh. 139 at 742 (California Senate Committee on Public Safety, Analysis, April 21, 1998 Hearing, Senate Bill No. 1878 (1997-98 Reg. Sess.), as introduced as reflected by proposed amendments).

[102] Exh. 139 at 780 (California Assembly Committee on Appropriations, Analysis, July 29, 1998 Hearing, Senate Bill No. 1878 (1997-98 Reg. Sess.), as amended July 16, 1998).

[103] Exh. 139 at 755 (Letter to The Honorable Quentin L. Kopp, California State Senate, from Gregory D. Totten, Chief Deputy District Attorney and Peter D. Kossoris, Senior Deputy District Attorney, Office of the District Attorney, Ventura County, California (April 23, 1998)).

period during which the killing takes place, to "by means of lying in wait," language identical to the first-degree murder theory of lying in wait, which does not include this additional temporal requirement.[104] As explained by the bill sponsor, the statutory language of the lying in wait special circumstance prior to this amendment required "more rigorous proof" than the first-degree murder theory of lying in wait, a distinction the sponsor felt was "not a fair or just one" and in need of elimination.[105] This distinction was apparently perceived as problematic because it "allows some persons to satisfy the requirements for first degree murder without satisfying the requirements to limit their sentence options to death or [life without the possibility of parole]."[106] In other words, the "more rigorous proof" required by the special circumstance that provided some statutory narrowing from first-degree murder by means of lying in wait was eliminated *because* of the narrowing function it provided. In order to eliminate this narrowing distinction, the purpose of this amendment was "to conform" the narrower definition of lying in wait as used in the special circumstance to the broader first-degree murder definition.[107]

38. Also as a result of Senate Bill 1878 and Proposition 18, the kidnap and arson felony murder special circumstances were expanded to apply to cases in which the felony of kidnapping or arson was committed primarily or solely for the purpose of facilitating murder when intent to kill is present, thereby expressly exempting these two special circumstance from the "independent felonious purpose" doctrine, as set forth in the longstanding California Supreme Court decisions of *People v. Green*, 27 Cal. 3d 1 (1980), and *People v. Weidert*, 39 Cal. 3d 836 (1985), which was the Legislature's stated intent in amending these two special

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[104] Exh. 139 at 744-45, 752; Exh. 139 at 809-10.

[105] Exh. 139 at 739-40 (Letter to Mr. Charles Fennessey, Deputy Legislative Secretary, Governor's Office, from Gregory D. Totten, Chief Deputy District Attorney, Office of the District Attorney, Ventura County, California (Dec. 4, 1997)).

[106] Exh. 139 at 757 (California Department of Finance, Bill Analysis, Senate Bill No. 1878 (1997-98 Reg. Sess.), as amended April 28, 1998 (May 13, 1998)).

[107] Exh. 139 at 752-73; Exh. 139 at 759-60 (California Assembly Republican Bill Analysis, Senate Bill No. 1878 (1997-98 Reg. Sess.), as amended July 16, 1998); Exh. 138 at 769 (California Assembly Committee on Public Safety, Analysis, June 23, 1998 Hearing, Senate Bill No. 1878 (1997-98 Reg. Sess.), as proposed to be amended).

circumstances.[108] The "independent purpose" doctrine limitations the California Supreme Court applied to the felony murder special circumstances were judicially enacted out of constitutional necessity; according to the California Supreme Court, without this narrowing construction, the special circumstance would run afoul of the narrowing requirements of *Furman v. Georgia*, 408 U.S. 238 (1972), and *Gregg v. Georgia*, 428 U.S. 153 (1976). *People v. Green*, 27 Cal. 3d 1, 59-63 (1980). In urging passage of Proposition 18, however, these judicial decisions were described to voters in the ballot pamphlet arguments as "unjust, illogical remnants of the Rose Bird court" in need of abrogation in order to "restore logic, fairness and justice to our death penalty laws."[109]

39. The expansions of the California death penalty enacted by Senate Bill 1878 and Proposition 18 were enacted "as a result of"[110] a single 1997 trial in Ventura County, California, in which the jury rejected the lying in wait special circumstance as to one of two defendants, and the facts of which "unfortunately" did not support charging the kidnap felony murder special circumstance (as it then existed) against either defendant.[111] Although the jury found the financial gain special circumstance (Penal Code § 190.2(a)(1)) to be true as to both defendants in that case,[112] the prosecution of these defendants apparently was not sufficiently extensive for the Ventura County Deputy District Attorney's Office, who sponsored Senate Bill 1878 and corresponding Proposition 18 following this trial in order to "correct two separate problems with the law of special circumstances" which limited the applicability of the lying in wait special circumstance and prevented application of the kidnap felony murder special circumstance in their case.[113] The bill's sponsor explained that it was "Because of some bizarre Rose Bird court decisions from the 1980s," that the two defendants could not be charged with a

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[108] Exh. 139 at 818 (1998 Cal. Stat. c. 629, § 2 (S.B. 1878) as chaptered Sept. 21 1998, approved by Proposition 18 on March 7, 2000, effective March 8, 2000).

[109] Exh. 139 at 811.

[110] Exh. 140 at 144 (Editorial, Letters: Help Our Children, Vote for Prop. 18 . . ., Ventura County Star, Feb. 29, 2000, at B09).

[111] Exh. 139 at 767-68.

[112] Exh. 139 at 767-68.

[113] Exh. 139 at 744, 767-68.

kidnap special circumstance and one could not be found guilty of the lying in wait special circumstance, but that "Proposition 18 will correct the tortured interpretations of the law these 1980s decisions represent, as well as a similar misinterpretation regarding the arson special circumstances."[114]

40. The most recent expansion to the California death penalty statute came as a result of the passage of Proposition 21, which added the criminal street gang killing special circumstance to Penal Code section 190.2 (§190.2(a) (22)), effective March 8, 2000. The argument in favor of Proposition 21 in the ballot pamphlet informed voters that "Prop 21 ends the 'slap on the wrist' of current law by imposing real consequences for GANG MEMBERS, RAPISTS AND MURDERES who cannot be reached through prevention or education."[115] The roots of Proposition 21 can be traced to former Governor Pete Wilson. In 1998, then-Governor Wilson, along with several law enforcement organizations, attempted to pass a legislative crime package designed to overhaul the juvenile justice system and increase punishments for juvenile offenders. When the legislation was defeated, Wilson and the bill's sponsors put their plan, referred to as "The Gang Violence and Juvenile Crime Prevention Act," on the ballot as Proposition 21.[116] Reportedly, then-Governor Wilson put this issue on the ballot at a time when he planned to run for President of the United States in order to advance his standing in the March 2000 primary election.[117]

41. The drafters of Senate Bill 1878 and corresponding Proposition 18, and of Proposition 21 again included the unconstitutional "heinous, atrocious, cruel" special circumstance (§ 190.2(a)(14)) in the proposed amended laws.[118]

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[114] Exh. 140 at 144-45.

[115] Exh. 139 at 829 (California Ballot Pamphlet, General Election (March 7, 2000), Full Text of Proposition 21).

[116] Exh. 139 at 831; Exh. 140 at 96-97 (Propositions, California Journal, Feb. 1, 2000); *and see Robert L. v. Superior Court*, 109 Cal. Rptr. 2d 716, 721 (2001) *superseded by Robert L. v. Superior Court*, 30 Cal. 4th 894 (2003).

[117] Exh. 140 at 135 (Endorsements, L.A. Weekly, Feb. 25, 2000, at 24).

[118] Exh. 139 at 815; Exh. 139 at 842.

42. In 2002, the definition of first-degree murder was once again expanded by the addition of murder by means of a weapon of mass destruction to the list of first-degree murders in Penal Code section 189. 2002 Cal. Stat. c. 606 (A.B.1838), § 1, eff. Sept. 17, 2002. According to the Senate Committee on Public Safety's analysis of Assembly Bill 1838, which enacted this amendment, the rationale for the amendment was that destructive devices, already a type of first-degree murder listed in Penal Code section 189, and weapons of mass destruction ("WMD") are "very similar" and that "the most important consequence of designating a murder as murder in the first-degree is that such crimes may be punished by the death penalty if the prosecutor proves specified special circumstances."[119] The Legislature acknowledged that "The list of special circumstances is long. It is very likely that defendants convicted of murders by means of a WMD would be eligible for the death penalty in many, if not most, cases."[120]

43. As the categories of death-eligible offenses have been increasingly broadened, growing concerns have been raised about whether California is "pushing the envelope" with respect to the continued expansion of the special circumstances.[121] Around the time the death penalty statute was expanded to include the felony murder carjacking, felony murder kidnap carjacking, drive-by killing, and the juror killing special circumstances, representatives of the California Attorney General's Office acknowledged that those who seek to further expand the California death penalty "could run out of legal territory to carve out"[122] and that "[i]n the abstract, you could toss a bunch more crap in there, but you have to know your constitutional limits . . . [y]ou have to be very careful."[123] At the time Senate Bill 1878 was making its way through the legislative process in the late 1990s, Dane R. Gillette, then a Senior Assistant Attorney General and currently the Chief Assistant Attorney General, noted that a constitutional challenge for failing to adequately narrow the death penalty in California is not

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[119] Exh. 139 at 890 (California Senate Committee on Public Safety, Analysis, June 18, 2002 Hearing, Assembly Bill No. 1838 (2001-2002 Reg. Sess.), as amended March 7, 2002).

[120] Exh. 139 at 890.

[121] *See e.g*. Exh. 139 at 763.

[122] Exh. 140 at 72-73 (Mike Lewis, Death Penalty Quietly Moves Into Broader Territory, S.F. Daily Journal, March 20, 1996, at 1, 7).

[123] Exh. 140 at 62.

an argument he felt would be successful, but is one his office would "want to avoid if at all possible," acknowledging that it is "a concern."[124] In connection with its analysis of Senate Bill 1878 in 1998, the Assembly Committee on Public Safety noted that United States Supreme Court justices had warned the California Attorney General's Office against expanding California's death penalty.[125]

44. In 1999, the California Legislature acknowledged that "Adding More Special Circumstances Raises Constitutional Concerns," and that "At some point, the courts will likely announce that the 'special circumstances' list contains too many crimes and sweeps too broadly, striking it down on constitutional grounds and the Legislature will be required to rewrite the special circumstances law to return it to a judicially acceptable dimension."[126] The Legislature has also acknowledged that "California's statute is so broad that a high percentage of all first-degree murders are death eligible, thereby eliminating the narrowing function that its special circumstances are supposed to provide."[127]

45. The California Commission on the Fair Administration of Justice was created by Senate Resolution No. 44 of the 2003-04 Session of the California State Senate, adopted on August 27, 2004. The Commission examined many facets of California's criminal justice system, including California Death Penalty procedures. Two of the Commission's findings, agreed to by all or a majority of the Commissioners, are relevant here.

46. The Commission unanimously recommended that "all District Attorney Offices in California formulate and disseminate a written Office Policy describing how decisions to seek the death penalty are made, who participates in the decisions, and what criteria are applied." California Commission on the Fair Administration of Justice, Final Report 155

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[124] Exh. 140 at 86 (Peter Blumberg, Expanding Capital Punishment: Making More Crimes Death-Eligible Has Public Appeal but Major Constitutional Problems, S.F. Daily Journal, May 26, 1998, at 1, 9).

[125] Exh. 139 at 763.

[126] Exh. 139 at 794-95 (California Assembly Committee on Public Safety, Analysis, April 13, 1999 Hearing, Assembly Bill No. 3 (1999-2000 Reg. Sess.), as introduced Dec. 7, 1999).

[127] Exh. 139 at 801 (California Assembly Committee on Public Safety, Analysis, April 13, 1999 Hearing, Assembly Bill No. 625 (1999-2000 Reg. Sess.), as amended April 7, 1999).

(2008). The impetus for this recommendation was "the great variation in the practices for charging specials circumstances." *Id*. Indeed, not only are there not any statewide, uniform capital charging policies, most county district attorney offices lack coherent policies for making such decisions. Because the vast majority of first-degree murders are death-eligible under California's death penalty statute, county District Attorney's offices and individual prosecutors have been forced to develop their own policies or practices, formal and informal, for determining which, of all death-eligible murders, actually deserve to be and are charged as death penalty cases.

47. For example, in 2003, the Alameda County District Attorney described how his office decided who, among those who were death eligible under the statute, would ultimately be charged with death in Alameda County: "I plug everything in, and I make an evaluation of whether a jury may reasonably come back with death . . . [t]hat's kind of the bottom-line test. All murders are bad. How bad is this one?" This District Attorney reportedly estimated that his office sought capital punishment in about a quarter of eligible cases.[128] Concerning the reason behind the ultimate decision to seek the death penalty in eligible cases, the then-Alameda County District Attorney said, "Basically, it can be anything."[129]

48. The Los Angeles County Assistant District Attorney who in 1994 made the final decision on whether to seek the death penalty in cases that were death-eligible after an eight-member committee considered penalty options, reported that the defendant's criminal history was "major, major factor" in deciding whether to seek death by that office at that time.[130]

49. Concerning whether to seek the death penalty in a highly publicized case involving multiple murder, the presiding District Attorney of Stanislaus County stated in 2003 that he "intend[ed] to give the [victim's] family's opinions a lot of weight."[131] Local

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[128] Exh. 140 at 152 (Harriet Chiang, How Prosecutors Choose Death Penalty; Stanislaus D.A. Says Laci Case Meets Most of His Criteria, S.F. Chronicle, April 24, 2003, at A1).

[129] Exh. 140 at 152.

[130] Exh. 140 at 58 (Beth Barrett, Simpson Isn't Seen as Likely Candidate for Death Sentence, Daily News of Los Angeles, July 24, 1994, at N1).

[131] Exh. 140 at 151.

prosecutors interviewed at this time reportedly stated that they pursue capital punishment only in a fraction of the eligible cases.[132]

50. In 2002, the Riverside County District Attorney reportedly stated that his test for what makes a death penalty case is to ask "Is the death penalty appropriate, given all the circumstances, and would a jury be likely to return a death verdict?"[133] This District Attorney reportedly stated that his approach in determining when to charge death in death-eligible crimes had changed through the years; for example, he has learned that juries in his county are less likely to return death verdicts when the defendant is young or the crime is committed among family members and thus, explained that "We understand the costs and other issues. We obviously do not want to go forward on cases where there's no reasonable likelihood a jury will return a verdict of death."[134] In 2008, the Riverside County District Attorney stated that he recently "changed the approach" from that of his predecessor in determining whether to seek the death penalty, including by "open[ing] up the process . . . to law enforcement and to the victim's family," to ask whether they have a recommendation.[135]

51. In 2003, a Santa Clara County Assistant District Attorney who oversaw homicide cases reportedly stated that prosecutors in her county do not seek the death penalty in the majority of eligible cases and that it is a "very fact-specific decision."[136] In 2003, a Chief Deputy District Attorney in San Mateo County stated that, "The manner in which the murder is carried out is probably one of the most -- if not the most -- important factor for the prosecution in assessing whether to seek the death penalty."[137]

52. The second finding made by a majority of the Commissioners was the recommendation to either correct the numerous deficiencies in California "dysfunctional" death

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[132] Exh. 140 at 151-52.

[133] Exh. 140 at 149 (Stuart Pfeifer, California Courts Sentencing Fewer Killers to Death Row; Justice: The Decline Comes as Violent Crime Falls, D.A.s are More Selective in Capital Cases, L.A. Times, June 10, 2002, at Part 1, Metro Desk, p.1).

[134] Exh 140 at 149.

[135] Exh. 140 at 155 (Interactive Map: See Where Murderers Most Often get the Death Penalty, Sacramento Bee, July 1, 2009).

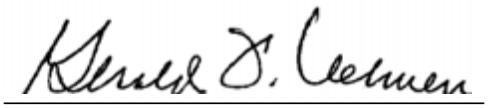
[136] Exh. 140 at 152.

[137] Exh. 140 at 153.

penalty scheme or adopt either a much narrower death penalty statute or replace the death penalty with the maximum penalty at lifetime incarceration. The evidence before the Commission for the first alternative came from several witnesses who testified that "the primary reason that the California Death Penalty Law is dysfunctional is because it is too broad, and simply permits too many murder cases to be prosecuted as death penalty cases. The expansion of the list of special circumstances in the Briggs Initiative and in subsequent legislation, they suggest, has opened the floodgates beyond the capacity of our judicial system to absorb." (Final Report at 138.) As former Florida Supreme Court Chief Justice Gerald Kogan told the Commission having 21 special circumstances is "unfathomable.'" *Id.*

53. After following and studying the enactment, amendment, litigation and interpretation of the California death penalty law for the past 39 years, I have concluded that the California death penalty law imposes no meaningful limitations on the broad discretion of prosecutors and juries to seek and impose the death penalty for first degree murders in California. There is nothing "special" about the special circumstances in California's death penalty law; they have been deliberately designed to encompass nearly all first degree murders. This has resulted in widespread geographic and racial disparity in the administration of California's death penalty law.

The foregoing is true and correct and executed under penalty of perjury under the laws of the United States and the State of California on October 30, 2009.



GERALD F. UELMEN

APPENDIX A

Curriculum Vitae

GERALD F. UELMEN

Business Address: School of Law
Santa Clara University
500 El Camino Real
Santa Clara, California 95053
Tel. (408) 554-5729
E-Mail: GUELMEN@SCU.EDU

Born: October 8, 1940; Greendale, Wisconsin

Marital Status: Married to Martha Uelmen, Family Law Attorney/Mediator, Sunnyvale, California
Three children: Nancy, Amy, Matthew

I. Educational Background

1965-66 Georgetown University School of Law,
LL.M. Degree; E. Barrett Prettyman Fellow in
Criminal Trial Advocacy.

1962-65 Georgetown University School of Law,
J.D. Degree.
Awards and Activities:
Board of Editors, Georgetown Law Journal, Vol.53;
Winner, Edward Douglas White Public Law Argument, (Law School Competition), 1965;
Winner, Beaudry Cup Legal Argument Competition, (1st Year Competition) 1963.

1958-62 Loyola University of Los Angeles,
B.A. in Political Science.
Awards and Activities:
Outstanding Debater, Southern California,1962;
Class President.

1954-58 Mt. Carmel High School, Los Angeles

II. Academic Experience

1986- Present: Professor of Law,
Santa Clara University School of Law

1997: Director, Santa Clara Law School Summer Study Program, Budapest, Hungary.

1995,2000: Visiting Professor of Law, Stanford Law School.

1986-94: Dean and Professor,
Santa Clara University School of Law.

1970-86: Professor of Law, Loyola Law School
Los Angeles, California
(Associate Dean, 1973-75)

Law School Courses Taught: Evidence, Trial Advocacy, Advanced Trial Advocacy, Criminal Law, Criminal Procedure, Advanced Criminal Procedure, Drug Abuse Law, Lawyering Skills, Legal Ethics, Civil Procedure.

III. Legal Experience

1965-66: Representation of indigent defendants in criminal cases in District of Columbia.

1966-70: Assistant U. S. Attorney,
Central District of California, Los Angeles, California.
Prosecution of organized crime cases from grand jury stage through trial and appeal.
Chief, Special Prosecutions Division, 1970;
Sustained Superior Performance Award, 1968.

1971-Present: Occasional representation of defendants in criminal cases in federal and state courts,principally on appeals.

Of Counsel to Law Offices of Douglas Dalton, Los Angeles (1983-1986).

Of Counsel to Law Offices of Ephraim Margolin, San Francisco (1993-present).

Admitted to Practice: District of Columbia (1966);
California (1967); U.S. Supreme Court (1974);
Certified Specialist, Criminal Law, California Board of Legal Specialization (1973-1983).

Significant Cases:
United States v. Friedman, 432 F.2d 879 (1970).
Prosecution and appeal of organized crime conspiracy to cheat in high-stakes gin rummy games at Friars Club.

United States v. Daniel Ellsberg, U.S.D.C., C.D.Cal. (1972).
Preparation and argument of motions and jury instructions in defense of Ellsberg's release of "Pentagon Papers."

United States v. Drebin, 557 F.2d 1316, 572 F.2d 215 (9th Cir. 1978).
Defense and appeal of first criminal copyright charges for "film piracy."

In Re Gordon Castillo Hall, 30 Cal.3d 408 (1981).
Successful habeas corpus challenge to first degree murder conviction based on new evidence of innocence.

Yarbrough v. Superior Court, 39 Cal.3d 197 (1985).
Amicus brief challenging power of courts to appoint attorneys to represent civil defendants without compensation or reimbursement of expenses.

People v. Christian Brando, L.A.Sup.Ct., 2nd D.C.A. (1991-92).
Pretrial Motions, Preliminary Hearing, sentencing hearing and appeal in manslaughter conviction of Marlon Brando's son.

People v. O.J. Simpson, L.A. Sup.Ct.
(1994-95)
Preparation and presentation of Suppression and Evidentiary Motions and Jury Instructions in televised murder trial.

Eslaminia v. White, 136 F.3d 1234 (9th Cir. 1997).
Appeal of Habeas Corpus Petition Challenging Murder conviction arising from "Billionaire Boys Club" case.

People v. Peter Baez, 78 Cal.App.4th 403 (2000); 79 Cal.App.4th 1177 (2000).
Defense of Founder of Santa Clara Medical Cannabis Center.

United States v. Oakland Cannabis Buyers' Cooperative, 190 F.3d 1109 (9th Cir. 1999);
--- U.S. ---(2001).
Defense against effort to close down medical
marijuana facility by federal injunction.

Wo/Mens Alliance for Medical Marijuana v. United States, Pending appeal to 9th Circuit;
Motion for return of medical marijuana seized in D.E.A. raid.

County of Santa Cruz v. John Ashcroft, Pending in U.S. District Court for Northern District of California.
Suit for injunctive and declaratory relief on behalf of terminally ill patients
who are members of Wo/Mens Alliance for Medical Marijuana.

IV. Professional Activity

Judicial Council of California, Task Force on the Quality Of Justice,
Committee on Alternative Dispute Resolution and the Judicial System, 1998-99.

California Attorneys for Criminal Justice: Board of Governors, 1976-Present; President, 1982-1983.

California Academy of Appellate Lawyers: 1981-Present; President, 1990-91.

State Bar of California: Special Investigator in disciplinary investigation, 1975-1976; Ad Hoc Committee to Consider an Appellate Justices Evaluation Commission, 1983-1984; Ad Hoc Committee to Study the Crisis in the Representation of Indigents in Criminal Appeals, 1983- 1984; Executive Committee, Criminal Law Section, 1987-92, Chair, 1991-92; Editorial Board, California Litigation (journal of Litigation Section), 1990-99.

Sixth District Appellate Project: Board of Directors, 1988-Present; Treasurer, 1988-Present.

U.S. Court of Appeals, Ninth Circuit: Co-Chair, Rules Advisory Committee, 1984-1992; Delegate, Circuit Conference, 1983-84.

Los Angeles County Bar Association: Vice Chair, Law Schools Committee, 1981-1983; Executive Committee, Criminal Justice Section, 1981-1986; Vice Chair, Federal Courts Committee, 1974-1977; Chair, Special Committee on Defense of the Courts, 1982; Trustee, 1983-1985.

Markkula Center for Applied Ethics, Santa Clara University: Steering Committee, 1992-1999; Scholar.

National Association of Criminal Defense Lawyers:
Editorial Advisory Board, Champion Magazine.

California Habeas Resource Center: Board of Directors,
1998-Present.

California Lawyer Magazine, Editorial Advisory Board,
1990-Present; Chair, 1997-Present.

Board of Directors, California Supreme Court Historical Society, 2001-Present.

V. Charitable, Civic and Community Activity

Law Foundation of Santa Clara County Bar Association: Board of Directors, 1987-1990; President, 1988.

Suicide Prevention Center, Los Angeles: Board of Directors, 1984-1986.

Public Interest Clearinghouse, San Francisco: Board of Directors, 1986-1995.

Death Penalty Focus: Board of Directors, 1987-1992.

City of San Jose, Citizen Task Force for Campaign Reform: Chair, 1992-93.

Santa Clara County Bench and Bar Historical Society: Director, Court of Historical Review, 1988-Present.

Ascension Catholic Church, Saratoga: Eucharistic Minister, 1986-1990; Marriage Preparation Instructor, 1987-1994.

VI. Honors and Awards

1983 Richard A. Vachon Memorial Award for Community Service, presented by Loyola Law School.

1984 Winner of Ross Essay Prize, American Bar Association.

1990 Justice Byrl R. Salsman Award for Contributions to Community and Profession, Presented by Santa Clara County Bar Association.

1993 La Raza Law Students Association Award "In Recognition of Outstanding Dedication and Commitment to Minority Admissions and Success in Law School"

1993 Santa Clara County Black Lawyers Association Award "For Setting the Standard of Excellence in Achieving Diversity in the Legal Community"

1994 Recognition Award, Death Penalty Focus of California.

1996 St. Thomas More Award, St. Thomas More Society of Santa Clara County. (Co-recipient With Martha A. Uelmen).

1997 Owens Lawyer of the Year, Santa Clara University School of Law Alumni Association.

2002 California Lawyer Attorney of the Year Award. See California Lawyer, March, 2003 at p. 18.

VII. Consulting Activity

Workshop Leader for 1976 Cornell Institute on Organized Crime, Ithaca, New York.

Special Review Committee to make recommendations concerning organization and operations of the Los Angeles County District Attorney's Bureau of Investigation, 1975-1976.

Adjunct Professor for National Institute of Trial Advocacy in Reno, Nevada (1974) and Boulder, Colorado (1975).

Consultant to the Rand Corporation from 1974-1976 in a study of methods to measure performance in the criminal justice system. The results of this study were published in June, 1976 as "Indicators of Justice: Measuring the Performance of Prosecution, Defense, and Court Agencies Involved in Felony Proceeding" (R-1917-DOJ).

Consultant to Drug Abuse Council, Inc., Washington D.C., in assessing impact of proposals for experimental heroin maintenance programs (1976).

Consultant to California Law Revision Commission on revising felony statutes of limitations (1982-1984), and
impact of court consolidation on criminal procedure (1999-Present).

Testimony before the Criminal Justice Committee of the California State Assembly in Hearings on Use

of Deadly Force by Police Officers (1974), Hearings on Reform of the Controlled Substances Act (1976), Hearings on Prosecutorial Discovery (1982), and Hearings on Statute of Limitations (1984). Testimony before the Committee on the Judiciary of the California Senate on Administration of Death Penalty Laws (1986) and workload of California Supreme Court (1998). Testimony before the Committee on the Judiciary, U.S. Senate, on Reform of the Grand Jury System (1976) and the Committee on the Judiciary, Subcommittee on Crime, U.S. House of Representatives, on Police Use of Deadly Force (1980).

Gerald Uelmen's Publications

A. CALIFORNIA SUPREME COURT

Opinion: Dissent, "Supreme Court Reform: Diversion Instead of Division," 11 Pepperdine L.Rev. 5 (1983).

"Death Penalty Laws and the California Supreme Court: A Ten Year Perspective," 25 Crime and Social Justice 78 (1987).

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"The Lucas Legacy," May, 1996, p. 29.
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Los Angeles Times Op-Ed Page:

"A Shift in Style or an Ominous Warning?," December 16, 1985.
"Color Our New Court Bland," January 7, 1987.
"When Law Is in Doubt, Bring out the Canons," March 9, 1988.
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"Will 'Judicial Restraint' Court Defer on Minimum Wage?" September 7, 1988.
"Depublication: The Court Makes Un-Cases," September 12, 1989.
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B. CRIMINAL LAW AND PROCEDURE

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Criminal Defense Techniques, Matthew Bender, 1979.
Authored the following chapters of this six volume treatise:Chapter 17: "Competency to Stand Trial"
Chapter 26: "Prior Conviction Impeachment"
Chapter 46: "Vacation of Illegal Sentences"

"Federal Sentencing Reform: The Emerging Constitutional Issues," in Constitutional Government in America, Carolina Academic Press, 1979.

"Post-Conviction Relief for Federal Prisoners Under 28 U.S.C.," 2255, 69 W.Va.L. Rev. 277 (1967).

"Varieties of Police Policy: A Study of Police Policy Regarding the Use of Deadly Force in Los Angeles County," 6 Loy. (L.A.) L.Rev 1 (1973).

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C. DEATH PENALTY

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"Death Penalty: Blame Briggs, Not Court, April 22, 1986.
"If Defendant Concedes Guilt, Why Delay Death Penalty?" July 16, 1986.
"Finding the Fair Interval Between Sentencing, Death," May 17, 1990.
"Oops! Three Strikes, Death Penalty Out," March 4, 1994.

D. DRUG ABUSE

Drug Abuse and the Law, West Pub. Co., 1982 (2nd Edition). (Co-authored with Dr. Victor Haddox.) (Updated Annually). [Click here to order this book].

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"Cultivation of Marijuana Under the Uniform Controlled Substances Act: Shallow-Rooted Weeds," 13 J. of Psychedelic Drugs, 247 (Fall, 1981).

"Narcotic Maintenance for Chronic Pain Relief: Medical and Legal Guidelines," 73 Postgraduate Medicine 81 (Jan. 1983). Co-authored with Dr. Forest S. Tennant, Jr.

"Symposium, Punishing Drug Offenders: International and Comparative Perspectives," 13 J. Drug Issues, No. 3 (Summer, 1983). Guest Editor

"The Impact of Drugs Upon Sentencing Policy," 44 St. Louis Univ. L. J.359 (Spring, 2000).

"A Defense Lawyer's Guide to Proposition 39," CACJ Forum, Vol. 28, No. 1, p. 37 (2001).

"Formulating Rational Drug Policy in California," 33 McGeorge Law Review 769 (Summer 2002).

"Compassion and Common Sense," San Jose Mercury-News, July 23, 1999.

"High Court Ignores Suffering," San Francisco Chronicle, May 20, 2001.

Los Angeles Times Op-Ed Page:

"G-Men, Guns Blazing, Won't Solve Local Drug Problems," April 10, 1989.
"A New Czar Means Same Old Folly in the Drug War," December 11, 1990.

E. JUDICIAL SELECTION AND INDEPENDENCE

"Elected Judiciary," Encyclopedia of the American Constitution (Macmillan Publishing Co., 1990).

"Supreme Court Retention Elections in California," 28 Santa Clara Law Review 335 (1988).

"Will Reagan Go 'Judge-Shopping?'," National Law Journal, December 29, 1980, p. 13.

"Recalling 1932: The Bench Preserved," Los Angeles Lawyer, February, 1983

"Judging the Supreme Court Judges," Los Angeles Lawyer, May, 1986.

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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORINIA, SOUTHERN DIVISION

ERNEST DEWAYNE JONES, Petitioner, v. VINCENT CULLEN, Warden of California State Prison at San Quentin, Respondent.	Case No. CV-09-2158-CJC DEATH PENALTY CASE

EXHIBITS IN SUPPORT OF MOTION FOR AN EVIDENTARY HEARING VOLUME 1

EXHIBIT J
DECLARATION OF DONALD H. HELLER

DECLARATION OF DONALD H. HELLER

I, Donald H. Heller, declare as follows:

1. I have been an active member of the New York State Bar since 1969 and the California State Bar since 1973. From 1969 to 1973, I was employed as Assistant District Attorney in the New York County District Attorney's Office. From 1973 to 1977, I worked as Assistant United States Attorney for the Eastern District of California. I have been in private practice since 1977. I have also served as Special Prosecutor in both State and Federal Court proceedings in California.

2. In 1977, former California State Senator John Briggs retained me to draft a proposed death penalty initiative that was presented to the California voters as Proposition 7, a ballot measure in the November 1978 election. Proposition 7 became law on November 8, 1978.

3. Senator Briggs first contacted me about drafting the proposed initiative because while serving as Assistant United States Attorney, I successfully prosecuted Lynette Fromme for the attempted assassination of President Gerald Ford in 1975. Senator Briggs asked me if Lynette Fromme had been successful in killing President Ford, whether she would have been subject to the death penalty under the 1977 California death penalty law that the California Legislature had recently enacted over former Governor Brown's veto. I told Senator Briggs that Lynette Fromme would not be subject to the death penalty under the 1977 law because the statute did not include any special circumstances that would apply to that type of killing. Senator Briggs also expressed his displeasure with the 1977 death penalty statute because it was too narrow, in that it did not cover a number of first-degree murders that involved particularly heinous circumstances. After I left the United States Attorney's Office, I was retained by Senator Briggs to draft the proposed initiative.

4. Senator Briggs requested that I draft an initiative that would be as broad and inclusive as possible, covering a wide range of intentional and willful homicides, consistent with United States Supreme Court precedent. He directed me to draft an initiative that would apply to all homicides committed while the defendant was engaged in, or was an accomplice in, the commission of, the attempted commission of, or the immediate flight after, committing or attempting to commit serious felonies, as well as all willful and intentional homicides. The initiative was also intended to include

all first-degree murders then specified in the California Penal Code. I drafted the initiative in conformance with Senator Briggs' requests.

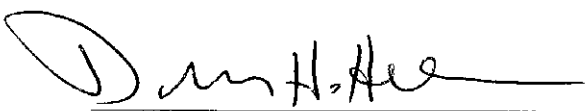
5. In the drafting process, I consulted United States Supreme Court case law concerning mental state requirements and drafted the initiative to comport with such decisions. I also reviewed United States Supreme Court case law with the goal of ensuring that individual special circumstances would withstand constitutional challenges. I considered United States Supreme Court rulings directing that mandatory death penalty statutes were unconstitutional, and which direct that death penalty statutes must provide clear guidance for the jury to follow in exercising its discretion in considering aggravating and mitigating evidence when deciding whether to impose the death penalty upon someone convicted of a capital crime. I have no recollection of whether Senator Briggs and I discussed any United States Supreme Court case law concerning narrowing the categories of death-eligible offenses or whether we considered it constitutionally necessary to narrow the categories of crimes that can be subject to the death penalty in connection with drafting the initiative. I also reviewed other materials when drafting the initiative, including but not limited to the original California death penalty statutory provisions declared unconstitutional in *People v. Anderson*, 6 Cal.3d 628 (1972), the 1977 California death penalty law then in place, the Model Penal Code, and the New York State Penal Code.

6. In retrospect, I am of the considered opinion that the initiative process was ill suited for enacting this type of law. It did not involve the type of open debate inherent in the legislative process, which often times results in fair and appropriate compromise when intelligent and compelling reasons are put forth for revisions of proposed legislation. The initiative process is also susceptible to impermissible political motivations and, unfortunately, motivations of financial gain by promoters. In drafting the proposed initiative, there was no debate or discussion with other lawyers or discussion with knowledgeable death penalty proponents or opponents. The objective was to make the initiative as broad as possible, with the exception of requiring that a defendant be at least eighteen years old at the time of the commission of the homicide.

7. At the time I drafted the initiative, I believed that the initiative provided a fair statutory framework for the imposition of capital punishment consistent with constitutional

requirements. Subsequent to the initiative's enactment into law, I realized that capital punishment over the years has not been fairly applied to defendants; that impermissible factors, such as race and financial privilege, affect the determination of who should live and who should die. Additionally, I was disappointed with the quality of trial court representation and the number of death cases that were overturned because of ineffective assistance of counsel. Finally, I never realized the enormous cost that the mechanism of capital punishment would have on the State of California in dollars, as well as the emotional toll that capital punishment would take on those involved in the process. By this I do not mean on defendants, but on families of victims and families of defendants. I also did not realize the emotional toll capital punishment cases would take on wonderful, dedicated, and competent trial lawyers doing their best to save their clients from death.

The foregoing is true and correct and executed under penalty of perjury under the laws of the United States and the State of California on January 27, 2010.



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EXHIBITS IN SUPPORT OF MOTION FOR AN EVIDENTARY HEARING VOLUME 1

EXHIBIT K
TRANSCRIPT OF PROCEEDINGS FROM *TROY ADAM ASHMUS V. ROBERT K. WONG,* U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, CASE NO. C93-0594 (NOV. 19, 2010)

VOLUME 11

Pages 1560 - 1835

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE THELTON E. HENDERSON, SENIOR JUDGE

TROY ADAM ASHMUS,
Petitioner,
v.
ROBERT K. WONG, ACTING WARDEN OF SAN QUENTIN STATE PRISON,
Respondent.

NO. C93-0594

San Francisco, California
Friday, November 19, 2010

TRANSCRIPT OF PROCEEDINGS

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Reported By:
CHRISTINE TRISKA, CSR 12826
Pro-Tem

Friday, November 19, 2010

9:39 A.M.

P R O C E E D I N G S

THE CLERK: Remain seated and come to order. Court is in session.

THE COURT: Good morning, counsel.

MR. PRUDEN: Good morning.

MR. LAURENCE: Good morning.

THE COURT: Good to see you again.

Could you state your appearances for the record?

MR. LAURENCE: Michael Laurence, Habeas Corpus Resource Center for petitioner.

MS. TOOMEY: Adrienne Toomey, Habeas Corpus Resource Center for petitioner.

MS. GARVEY: And Susan Garvey for Habeas Corpus Resource Center for petitioner.

MR. MATTHIAS: Ron Matthias for respondent, real party in interest, the People of the State of California.

MR. PRUDEN: Glenn Pruden for respondent.

MS. LUSTRE: Alice Lustre for respondent.

THE COURT: Welcome to court.

Are there any preliminary matters we need to go into?

MR. LAURENCE: No, your Honor.

MR. PRUDEN: I don't believe so.

THE COURT: Okay. Let's get going.

MR. LAURENCE: Petitioner calls David Baldus.

THE COURT: Step forward and be sworn in, sir.

(Whereupon, the witness was sworn.)

THE CLERK: State your name for the record, please, and spell your last name.

THE WITNESS: My name is David, D-A-V-I-D, Christopher, C-H-R-I-S-T-O-P-H-E-R, Baldus, B as in boy, A-L, D as in David, U, S as in Sam.

THE COURT: You may proceed.

DIRECT EXAMINATION

BY MR. LAURENCE:

Q Good morning, Professor Baldus. Let me begin by asking you some questions about your qualifications.

Are you an attorney licensed to practice law?

A Yes.

Q When were you -- when were you admitted to practice law?

A In Pennsylvania I was admitted in 1964, and in Iowa I was admitted in 1990.

Q And where did you receive your undergraduate degree?

A Dartmouth College.

Q And have you received any advanced degrees?

A Yes. I have a L.L.B. from Yale Law School in 1964; an L.L.M. from Yale Law School in 1969.

Q And do you have a --
A I'm sorry. And I also have a master's degree in political science from University of Pittsburg in 1962.
Q What is your current position?
A I'm the Joseph B. Tye Professor of Law at the University of Iowa College of Law.
Q How long have you teaching law?
A Since 1969.
Q Have you had any other legal positions?
A Yes. I was the director of the Law and Social Science Program at the National Science Foundation in the years of 1975 and '76; I was the director of the Center for Interdisciplinary Legal Studies at Syracuse University College of Law in 1980 and 1981; and between 1988 and 1991 I served as a special master for proportionality review of death sentences for the New Jersey Supreme Court.
Q Thank you. And just for the record, you have your CV in front of you?
A I do.
Q Have you published any books?
A Yes.
Q What topics?
A I've published two books. One is on proof of discrimination I published in 1980, and another is on -- it's called "Equal Justice and the Death Penalty." It has to do with

race discrimination and comparative excessiveness in the administration of death sentencing, principally in Georgia.

Q Now, I notice your curriculum vitae lists eight pages of additional publications. I don't want us to go through each individual publication.

Would you please summarize the general topics upon which you have published?

A Yes. There are three topics on which I have published. The first has to do with issues of discrimination generally, and specifically with respect to employment discrimination. Second, has to do with the administration of the death penalty, with the focus on comparative excessiveness and race discrimination in outcomes of those systems. And I did one extensive empirical study of jury awards in personal injury cases.

Q And have you had the opportunity to study the administration of capital punishment --

A In -- in California?

Q -- apart from this? Let me ask the question a little bit more precisely.

Prior to your work in this case have you studied the administration of capital punishment statutes in other states?

A Yes. Yes. I've taught capital punishment law for 10 years.

Q And have you examined the administration of statutes in other states?

A Yes.

Q Which states?

A Well, the states in which I've done empirical studies are Georgia, Colorado, Maryland, New Jersey, and Philadelphia County in Pennsylvania.

Q And your declaration lists an additional state, Nebraska.

A Nebraska. That's right. Professor Woodworth and I did a study in Nebraska in 1990.

Q And in general, what types of issues were you looking at in those state studies?

A There are always two issues. One is evidence of racial discrimination in the administration of the death penalty, and the second is comparative excessiveness in the outcomes, that is, to what extent are similarly situated defendants being treated comparably in the administration of the death penalty?

Q Can you give us some general estimate of the number of studies you've conducted along those lines, either capital cases or other types of empirical research in the legal setting?

A Well, in each one of those states that I've mentioned we've done an empirical study, and those are the studies that we had done empirically.

Q Have you testified in court proceedings prior to today?
A Yes.
Q And have you qualified as an expert?
A Yes.
Q How many times?
A Twice.
Q In what types of cases have you testified?
A They are both homicide -- I'm sorry -- death penalty cases. One was *McClesky v. Kemp*, where I testified in a federal habeas proceeding on behalf of *McClesky*, claims of race discrimination in the administration of the Georgia death penalty; and I also testified in 1995 in Pennsylvania in a post-trial -- on a post-trial motion filed by Lance Arrington, who claimed that the death penalty in Philadelphia County was administered in a discriminatory fashion.
Q And are those the only two times you have testified in court?
A Yes.
Q Have you testified before legislative bodies?
A Yes.
Q Can you describe the topics that you've testified on?
A I -- our study in Nebraska was commissioned by the legislature of Nebraska, and they wanted to hear our findings, so I testified to the committee -- the judicial committee there.

And also I've testified in Pennsylvania before the appropriate committees -- judiciary committees about the risk of racial discrimination and the administration of the death penalty in Philadelphia County.

Q How long have you been studying, or -- how long have you been studying the effects of race or other types of influences in capital punishment statutes?

A Twenty-five years.

MR. LAURENCE: Your Honor, I move to have Professor Baldus qualified as an expert in the study and evaluation of the administration of capital punishment statutes.

THE COURT: I find him so qualified.

BY MR. LAURENCE:

Q Professor Baldus, did you provide a declaration regarding Troy Ashmus in this case in December 2010?

A Yes.

MR. LAURENCE: I'd like to show Petitioner's Exhibit 216. May I approach, your Honor?

THE COURT: Right. Let's have a continuing rule that you don't need to seek -- either side seek permission to approach the witness unless I for some reason change that.

MR. LAURENCE: Thank you, your Honor.

BY MR. LAURENCE:

Q Petitioner's Exhibit 216 is the declaration you provided in September of 2010?

A Yes.

Q Now, in preparation for your testimony here today, did you discover minor corrections that needed to be made to that document?

A Yes.

Q What corrections needed to be made?

A We needed to adjust the findings for death sentencing rates among all death-eligible cases to take account of the approximately 600 cases in which a jury or a judge had ruled that there was no special in the case. The original findings did not account for that.

Q And that affected a particular portion of that declaration?

A Yes. It affected small parts of Figure Two in Table Five.

Q Okay. Were there any other modifications that needed to be made?

A One other modification related to one of Professor Woodworth's findings, and that was under the analysis that he conducted under the supplemental homicide report data. His estimate of the death eligibility in California was originally 5.2 -- 50.2, and the adjusted rate is 50.3.

Q So you changed it from 50.2 to 50.3 in your declaration?

A Yes.

Q I'd like to show you what has been marked as Petitioner's Exhibit 219. Are those corrections that you've just mentioned noted in this declaration?

A Yes.

Q Did you make any other substantive changes to the declaration?

A No.

MR. LAURENCE: Your Honor, I move to admit Petitioner's Exhibit 219.

THE COURT: It will be admitted.

(Petitioner's Exhibit 219 was received into evidence.)

BY MR. LAURENCE:

Q Professor Baldus, just a few questions about the study that you've conducted.

What was the general purpose that you had in conducting this study?

A To address issues of the scope of death eligibility under California law during the *Carlos* Window period and under current law, and to assess death sentencing rates during those two periods of time among death-eligible cases.

Q Can you describe the process that you undertook to answer those questions?

A Yes. There are really seven parts to our analysis. One was the design of the study; second one was attaining access to data; to wit, probation reports; next was the creation of a

data collection instrument known as a DCI; the fourth was developing a good body of law on the question of M1 liability and the presence of special circumstances under California law.

The next was coding the cases and entering the data into a machine-readable form and then cleaning the data that had been entered, and then finally was an analysis of the data conducted by Professor Woodworth and me and preparation of our reports for you.

Q Okay. A lot of this is described in your declaration. I only want to touch on a few matters that might assist us this morning.

The third stage that you talked about is the creation of a data collection instrument, the DCI.

Why do you employ such an instrument in this study?

A Well, in all research of this type where people are recording the elements of specific cases you want to have a record that you can verify and be able to systematically analyze in statistical analysis, and that requires machine-readable data, and that can only be generated through the completion of data collection instruments.

Also, that sort of information in this data collection instrument allows you to verify after the coding has been completed the validity of the coding that was done by the coders.

To give you an example, if you look at a sum of the

cases and you find that the coding is different from *Carlos* Window to 2008 law, that would create a flag for you to say, "Why are they coded differently? Was that a mistake, or does that reflect the actual facts of the case?"

Similarly, if you looked at a case that was classified as death eligible but you saw no special circumstances coded as having been present or found, that would be a red flag for you as well to investigate further the validity of the coding.

Q So it assists not only in creating a record of the coding itself, but also in the process of verifying the accuracy of the coding?

A Yes.

Q The next stage you describe was familiarizing yourself with the body of law that was relevant to California.

How did you undertake this task?

A Well, initially I read Law Review articles about California law and studied the treatises written to an extent.

But our main source of information about the applicable law was an expensive coding protocol produced by counsel for Ashmus -- Petitioner Ashmus in this case, which analyzed in extensive detail the predicates for first-degree murder that we were particularly interested in, and also the factual predicates for each of the special circumstances under California law.

Q And did you supplement that coding protocol with any additional research?

A Yes, we did. Whenever you have a document, it's to guide you. It never answers all the questions when you get into the details of cases.

So from time to time, we were to have an issue that I couldn't resolve under the coding protocol, and I would create a memo with a question in it and present it to counsel for Ashmus and request an answer. And we always got back an answer that gave an opinion and generally cited authority, which we would frequently consult.

Q And throughout this process in reviewing the material that was provided to you and your own independent research, did you find any conflict between the material that was provided to you and your own independent research?

A No.

Q Now, the next stage you talk about is the coding and cleaning process.

Can you describe this process by which a case was determined to be death eligible for not?

A Well, the coding was done by 13 law students and eight former law students who are recent graduates over an extended period of time.

And because of the complexity of this process, I realized that just relying on the independent judgments of the

students and young lawyers would not be adequate.

So I undertook in May of 2009 what we call a "cleaning process." I had a team of five students who worked with me full-time during that summer, and we would break the cases down according to common factual patterns, such as the presence of an individual's special circumstances.

We would then review the coding and the thumbnail sketches that were created by the original coders to assess their validity, and in course of that we created a narrative summary for each case, which I signed off on on the basis of my judgment that this was a correct coding of the case in terms of its death eligibility.

Q Did you meet with the coders and the cleaners during that process?

A Yes. I met with them three times a week, and the meetings would normally take one to three hours, and we would go over the segments that they had done since the last meeting.

And those changes that we made then were entered into another document, which was given to our data manager, Richard Newell, and then he would enter those changes into the computer to update the database to reflect our current understanding of what the facts bearing on death eligibility were in that case.

Q Now, you said that cleaners were responsible for common fact patterns.

Were they broken up by special circumstances?

A Yes.

Q And so if I understand you correctly, the initial coders were students who were given a series of cases. They went through the cases and filled out the DCI?

A Correct. Those were randomly given to the students.

As cases came in from California to us, we would then assign them to the students who were available to do the coding, and there was no effort made to try and do a preliminary judgment of what special circumstances might be applicable and divide them up.

And that's what made it a difficult task for the students, because each one of them would be hitting a case, often on which they had had no prior experience. That's why we wanted to summarize and clean them all with a special focus on all of the cases that were similarly situated.

Q So, for example, would a student have been assigned lying in wait as a special circumstance?

A Yes. One student was assigned lying in weight and financial gain. Folke Simons was his name.

Another student was assigned robbery, 17A. Another student were assigned torture, et cetera, et cetera. So we had them all assigned to one student or the other during this period of time.

And that cleaning process went on essentially full-time with these students over the summer of 2009, but it continued, frankly, right up to the end before we filed our first declaration. And then it continued thereafter as we continued to supplement and expand the database as new information came in from California.

Q Now, is this an unusual practice that you are continuing to review coding decisions?

A No. No. This is common practice in any kind of research of this type, where you have complicated issues that students and young lawyers are being asked to assess. So it's a common practice. It's good practice.

THE COURT: Excuse me for a second. You said until new information came in from California.

THE WITNESS: Yes.

THE COURT: What would be an example of that?

THE WITNESS: Those, your Honor, would be probation reports. See, we were getting our information from probation reports that the Attorney General's Office was providing us, or providing counsel, and then they would send it to us.

And those came in bits and pieces over a long period of time, several years.

THE COURT: Okay. Thank you.

BY MR. LAURENCE:

Q And at some point you were involved in the final

decision making regarding an individual coding case.

A Yes. I signed off on each one of them.

Q The next stage you talked about is the analysis process.

Can you briefly describe what you went through to analyze the data that you collected?

A We focused on the questions that counsel for Petitioner Ashmus put to us.

What was the death eligibility of these homicide cases under California law during the *Carlos* Window, during the 2008 periods? How were those cases charged and prosecuted and sentenced?

And that's what focused our analysis. We were guided by the instructions that we received from counsel, and then Professor Woodworth and I would proceed to answer those questions. And those are the answers -- the answers to those questions are what you find in the declaration.

Q Now, the practices you used during this study, were they novel or untested methodologies?

A No. They were generally accepted standards, and Professor Woodworth can explain with respect to the statistical practices that he used.

But with respect to the approaches that I used in developing the database, they were standard practices that are generally accepted in the community and have been applied

in hundreds of cases.

Q Okay. You provided several different declarations in this case. Why?

A Because the database continued to change over time.

See, we weren't in the situation where we could just wait until we got all the data. We were operating under deadlines that you would impose upon us.

And we were asked to submit a report by -- in November of 2009. And so we had stop what we were doing and create the report. And the first report had 608 -- sorry. It had 1,618 cases in it, and that was the basis of our first declaration that we filed.

Then the reports continued to come in, as I indicated to his Honor here, over time, and then we would code those and get them entered, and then we would get instructions of a new deadline. So then we would create a new declaration.

And then the second one was in December 2009, and at that point we had 1823 cases. Then the next one was in February 2010. By that time the database had expanded to 1900, which is where it stands right now. And in the course of that we had new cases. Also, we were cleaning the cases during this period of time. We were reassessing what we call "close calls."

When we were doing this kind of research, often it will be unclear when you don't have full control of all of

the cases, whether or not you can make a firm judgment about a case.

So we had a coding option called a "close call." But as we learned more, particularly as I learned more about the law and its applicability in these cases, we decided that many of those could be definitively coded as death eligible or not death eligible.

So we made a number of those changes -- I think it was about 90 cases or so where we made those changes, and that affected the substantive results to an extent.

Q And what were the effects of overall -- what were the effects of the changes on the overall conclusions?

A They were quite minor. To give you an example, between the first period, the death eligibility rate for first-degree murder under *Carlos* Window was 86 percent, and that was when we had 1618 cases. By the time we had -- 1900 had gone from 86 to 91.

And as for the murder one and -- sorry -- the murder two and the voluntary manslaughter cases there were similar small differences.

Q The most recent change you made that you described earlier in your testimony was to remove 613 cases from Figure One -- Figure Two.

A I just want to verify that that's the exact number.

Let's see. Yes. 613 cases.

Q What affect did it have on the death sentencing rate when you removed 613 cases from the analysis?

A It changed the death sentencing rate among all death-eligible cases from 4.4 percent to 4.6 percent.

Q So a difference of .2 percent?

A Correct.

Q Now, let me just now move quickly to your findings.

Can you give us just a general summary of your findings?

A Certainly. The first question we addressed was the rate of death eligibility among cases overall and broken down by crime of conviction.

And for all cases we found that the death sentence rate was 55 percent under *Carlos* Window law and 59 percent under 2008 law.

Q Let me stop you for one second so I can be clear.

The 55 percent figure for *Carlos* Window includes first-degree murder, second-degree murder and voluntary manslaughter?

A Yes.

Q So of all crimes of conviction the death eligibility rate is 55 percent?

A Yes.

Q Can you give us, please, the first-degree murder conviction rate for *Carlos* Window law?

A Yes. It was 91 percent, and for 2008 law it was 95 percent.

Q So let me make sure I understand you correctly.

If somebody is convicted of first-degree murder that's in the universe of your cases.

Of those cases of somebody who's been convicted of first-degree murder, 91 percent are death eligible under *Carlos* Window law?

A Yes.

Q And 95 percent are death eligible under 2008 law?

A Yes.

Q When you include non-first-degree murder cases, the second-degree murder cases and the voluntary manslaughters, the numbers are 50 --

A 55 for *Carlos* Window And 59 for 2008.

Q Okay.

A We also -- do you want me to continue?

Q Sure.

A We also focused on death-eligibility rates among cases that were factually M1, and we found that under *Carlos* Window law 80 percent of the cases that we deemed to be factually M1 were death eligible, and the percent under *Carlos* -- sorry -- under 2008 law was 86 percent.

Q Let me ask you a question about that.

The factually M1 cases are cases that did not

necessarily result in a first-degree murder conviction?

A Yes.

Q They are cases that were -- may have been but also were second-degree murder convictions and voluntary manslaughter convictions that you determined could have sustained a first-degree murder conviction?

A Yes. There are a number of cases that resulted in voluntary manslaughter and second-degree murder convictions, which, according to our rules of evaluation, if it was not controlled by an authoritative decision by a judge or a jury we would make an assessment of whether or not that case was factually M1.

Q I would like to turn your attention now to the second area of your findings, which is California -- comparison of California's death eligibility rates to other states.

A Yes.

Q And in particular let me ask you to turn to Table Three of Exhibit 219 which is at page 18.

A Would you like me to proceed?

Q Yes. What did you find in comparing California's rates to other states?

A We did this in two ways. Number one, we compared our findings with findings of other studies that had been done that were comparable in terms of methodology to our California study.

Specifically, those were studies that Professor

Woodworth and I had done in New Jersey and in Nebraska, and also studies that were done by Professor Paternoster in Maryland.

We had either conducted these or consulted with Paternoster and knew exactly the kind of methodology we were using, and it was almost identical to what we were using in California, so I thought those were good bases for comparing.

Q Were there any other state comparisons that you could have made using the same methodology?

A No, there weren't. I didn't know of any other studies that had the exact kind of methodology that we were using here in California other than these.

Q Let's take these one by one.

Part one of Table Three, you make a comparison among New Jersey, Maryland and California.

What were the results?

A The results were that the death eligibility rate -- this is the post-Furman period -- were 21 percent in both New Jersey and Maryland. In California the rates were 64 percent under *Carlos* Window law and 68 percent under 2008 law.

Q So let me make sure I'm clear about this. The studies that you looked at in New Jersey and Maryland only involved first-degree murder convictions and second-degree murder convictions?

A That's right.

Q So you adjusted your data to get the 64 percent figure and the 68 percent figure you just gave us?

A Exactly. Those were perfect matches of what the findings were in those states because they were based on screening and analysis of only first-degree murder and second-degree murder cases, and we had done all three categories, including voluntary manslaughter, so we just limited the data for that analysis to those that had resulted in the first-degree murder or second-degree murder case.

Q And your conclusion is that the California death eligibility rate is three times those two states?

A Yes.

Q In Part Two you looked at Nebraska, and Nebraska -- first let me ask you, what is the universe of cases that were considered in Nebraska?

A Right. In that study we -- which Professor Woodworth and I conducted -- we screened M, first-degree, second-degree and voluntary manslaughter cases exactly as we did here in California.

And there we found on the basis of that analysis a 25 percent death-eligibility rate. When we looked at the comparable findings for California, and by that I mean those that resulted from the screening of both first, second-degree murder and voluntary manslaughter, the death-eligibility rates were 55 percent under the *Carlos* Window law and

59 percent under 2008 law.

Q So over double Nebraska's rate?

A Yes.

Q Now, Part Three of this table you looked at different data. Can you tell us what you looked at here?

A Yes. We looked at the findings of a study done by Professor Jeff Fagan, a criminologist and law professor at Columbia University.

And what he did was take the information that's reported in the supplemental homicide report that's produced by the FBI, and it lists for every homicide in the country that's reported to them information on seven or eight factors that are commonly the predicates for aggravating circumstances under state laws.

And on the basis of this information he estimated what the death-eligibility rate was in each jurisdiction. And that's the data that we used that he loaned to us for this purpose.

Q Now, if I understand correctly, in Maryland and Nebraska the data source were probation reports?

A That's right.

Q And in -- I'm sorry -- in New Jersey -- and New Jersey and Nebraska the -- they were probation reports?

A Correct.

Q In Maryland what was the data source?

A It was a report on each case that was maintained by the prison system that was very comparable -- in the opinion of Professor Paternoster very comparable to a probation report. He felt fully confident in relying on it.

Q The supplemental homicide report data was also used to produce Table Four in Figure One in your declaration.

I'd ask you if turn to Figure One, which is on page 26 --

A (Complies.)

Q -- what does this figure tell us about the death eligibility among the states?

A The figure lists along the horizontal axis, the X axis, it lists the death-eligibility rates -- the range of death-eligibility rates among all states that was found by Professor Fagan's analysis.

For example, over -- and the heighths of bars indicate how many states have a death-eligibility rate at that level. For example, if you look at the first bar on the left you see at a rate of 13 -- the death-eligibility rate of 13 percent you see one state, Alabama.

And then if you look, for example, at the third bar in from the left, you can see that there are four states that have a death-eligibility rate of 18, and the median rate when you look at these numbers is 23 for all states.

Q And that's death-eligibility rates?

A Yes.
Q Where is California on this figure?
A Thirty-eight.
Q At the far right side of the --
A Yes.
Q Did you -- did you do some further analysis of this data to incorporate data that you conducted -- that you collected during your study?
A Yes, we did. It was conducted by Professor Woodworth.

And the supplemental homicide report has information on a small species of what we call "lying in wait" here in California. It was a sniper killing, and that embraces only a tiny little fraction of what is death eligibility under California lying in wait law.

So what Professor Woodworth did was to adjust the underlying supplemental homicide report to reflect for that variable, substituted the lying-in-wait information that we had for the sniper information that was present in that data.

See, when the police in California report to the FBI, they just report snipers. They aren't reporting lying-in-wait information as it's defined by California law, and we made an attempt to conform the database of the supplemental homicide report to reflect the realities of California lying-in-wait law.

Q And that rate once it's correct is what?

A 50.3.

Q And finally you looked at death sentencing rates in California, and I'd ask you to turn to Table Five on page 29.

A (Complies.)

Q And would you explain how you calculated the death sentencing rates that are depicted in row Four of Table Five?

A Certainly. We -- these rates are based on our estimates of the number of death sentences in the universe of 27,000 cases 705 we estimate existed during this period, and the number of death eligibility cases, which we estimated at 15,394. And this is simply a calculation of 705 divided by the 15,000 cases, and it produces a death sentencing rate of 4.6 percent.

Q And that's for the time period throughout your study?

A Yes.

Q What's the *Carlos* Window death sentencing rate?

A 6.8 percent. That's in column D as in David.

Q Now, did you calculate the death sentencing rates for death-eligible first-degree murder convictions?

And I'm going to actually direct your attention to the end of paragraph 62 on page 33 of your declaration.

A Yes. And that was 8.7 percent.

Q Now, that has a death-sentencing rate for those who are convicted of first-degree murder?

A Yes.

Q 8.7 percent of those who were death eligible received

a death sentence?

A Yes.

Q Did you also calculate the rate for those under the *Carlos* Window law?

A Yes.

Q And what was that rate?

A 9.4 percent.

Q So it was a slightly higher death-sentencing rate under *Carlos* Window than throughout the time period?

A Yes.

Q Now, finally I just want to talk to you a little bit about the -- your methodology and the validity of your study.

Did you seek any assessment of the validity of your methodology?

A Yes.

Q What steps did you take?

A I modified the declaration that we submitted into a format of a Law Review article and submitted it for external review to four experts in the field who have distinguished themselves over the years.

MR. MATTHIAS: Excuse me. Excuse me, your Honor.

We had an understanding that direct testimony would all be presented by declaration. This description of validating the study is mentioned nowhere in the declaration; likewise, the entire description of the cleaning process that

Professor Baldus described is mentioned nowhere in the declaration. I'm hearing about this for the very first time today, this morning. It's gravely impaired and unfairly impaired my ability to prepare for this hearing.

I would ask that the witness confine his testimony to what is set forth in the declaration. That was the agreement. That was the order.

MR. LAURENCE: Your Honor, I think the cleaning process clearly is described in his declaration. I just clarified exactly what that process was.

I will withhold the question about assessment for redirect examination. I assume that he was going to attack the methodology. If he doesn't, then there's no reason for me to go into this.

Thank you, Professor Baldus.

THE WITNESS: Certainly.

THE COURT: Let's review again, if you want, any prejudice you feel you suffered by this examination, but I'll assume we are okay as we go forward.

MR. MATTHIAS: Well, I would really like to address that. I mean, Mr. Laurence is completely wrong when he tells the Court that the cleaning process is described in the declaration.

The cleaning process is mentioned. It's in a sentence or two, and the sum total of that is what Professor

Baldus did. There is not one word of a special committee of five students getting together, sorting them by type and category, going through it, and none of that is in the declaration. I don't know anything about this.

It's extremely difficult to prepare for a hearing with this kind of extremely complex material unless we abide by the rules and actually give each other what the testimony is going to be in the declaration. That's why we settled on that process.

I'm hearing about a cleaning process, a very technical development, obviously. It was Step Number Five of a seven-step process. Mr. Laurence's examination on that point went on for at least three, five minutes. None of it do I know about. None of it does the Court know about until hearing about it for the first time today.

Events like this have occurred periodically over the course of this litigation. This is the most egregious. It's probably the most time sensitive in terms of the element of surprise, and I find it profoundly unfair, and I think the Court should not permit it.

But that's my bid on prejudice. If I knew more about it and had time to research it and prepare examination and then tell you what that examination would have been like had I known earlier, then maybe I could articulate more fully and more specifically the degree of prejudice.

But standing here today responding to something that I've heard about just a few minutes ago, no, I can't. I can't do any better than I've just done, your Honor.

Would it be all right if I stand there?

THE COURT: Absolutely.

MR. MATTHIAS: Thank you.

CROSS-EXAMINATION

BY MR. MATTHIAS:

Q Good morning, Professor Baldus.

A Good morning.

Q Welcome to the Bay Area. It's good to see you.

A Thank you very much.

Q Now, Professor, in one of the books you wrote, the one you co-authored with Professor Kohl, you said that "the form and content of statistical evidence is shaped by the requirements of substantive law."

I assume, then, in designing the study that you are testifying about today, you were very mindful of some body of law; correct?

A Yes.

Q And what was that body of law?

A It was the California law that defines the elements or the factual predicates for M1 liability, first-degree murder liability, and the law that defines the factual predicates for each of the special circumstances as defined in California law.

Q And is there some more overarching body of law that makes any of that stuff you just described important?

A Well, the constitutional law as defined by the United States Supreme Court. That's what defines the requirements that the states have to satisfy to have a constitutional statute.

Q Okay. That's exactly what I was getting at.

I noticed the *Furman* decision, for example, is cited. It has 144 appearances in your 36-page declaration. I assume there's something in *Furman* that was a major inspiration for the scope and purpose of this study; is that right?

A Yes.

Q And what is the essential teaching of *Furman* to your understanding?

A As I understand it we looked first as what *Furman* held was unconstitutional. It held that a statute that defines death eligibility is all common law murder under Georgia law was overly broad and did not narrow it sufficiently to reduce the risk of arbitrariness in the administration of that statute. That was the first prong of the decision.

The second prong of it was, that if you look at the death-sentencing rate among first-degree murder in that conviction you could see that it was very low, and that provided a significant part of the Court's judgment that in operation it was arbitrary, because it was -- such a very

small fraction of the death-eligible cases actually resulted in death sentences.

Q So what you just described as the second prong --

A Yes.

Q -- that to your understanding is a holding of *Furman*?

A Well, those are the two bases of the decision. The holding -- I was just saying what were the two elements of that holding.

If you want to get the more general principle it is you can't have a statute as broad as pre-*Furman* Georgia common law murder. You've got to narrow it and limit death eligibility in some important ways, and most of the states did. They limited it generally to first-degree murder, and then they would define the groups of statutory aggravating circumstances like this state has done with special circumstances.

Q My question was, is that second prong to your understanding a holding that there is some statistical test that a state must meet in order to satisfy constitutional standards?

A Well, the Court didn't define it as a test, but that was a fact of the case, and the court held that that system was inadequate. It was arbitrary.

Q And is the evil that the Supreme Court sought to prevent by its *Furman* decision -- would you think it would be fair to say that the evil it sought to prevent was the

imposition of wanton and freakish death sentences?

Is that a fair summary in your view?

A Yes. It would be a form of arbitrariness. That's what that's come to be known as generally.

Q Okay. Are there -- are there any other constitutional teachings that informed your study?

A I'm sorry. What did you -- would you say it again, please?

Q Are there any other constitutional teachings that informed your study?

I'll move this closer. I'm sorry.

A No. I would say that that is the central basis of the law that inspired us that came from the United States Supreme Court.

Q Okay. I'm sure you've read *Gregg v. Georgia*?

A Certainly.

Q And you know what *Gregg v. Georgia* says about *Furman*?

A It said that Georgia statute did not violate *Furman*.

Q The new Georgia statute?

A Yes. The amended Georgia statute as it existed in 1974 did not violate *Furman*.

Q Did *Gregg* say anything about what *Furman* held?

A It held that the system that existed before *Furman* was unconstitutional, is what it said. It said it was arbitrary, and it was arbitrary because there was no effort to limit the

death eligibility. And what the Georgia post-*Furman* statute did was limit death eligibility with 11 or 12, if I remember, statutory aggravating circumstances.

They had to exist along with -- it didn't change the degree of murder. It was still common law murder in post-*Furman* Georgia, but it did define special circumstances that had to exist.

Q Let me read you one sentence from *Furman* that begins with the words "*Furman* held" --

A You are reading from *Gregg*?

Q Yes.

> "*Furman* held only that in order to minimize the risk that death would be imposed on a capriciously selected group of offenders the decision to impose it had to be guided by standards so that the sentencing authority would focus on the particularized circumstances of the crime and the defendant."

Now, does that comport with your understanding of what *Furman* held only?

A That is a more artful statement of what I intended to say, and that is that the special circumstances -- here in California we call them "special circumstances." Everywhere else they are called "aggravating circumstances."

That's exactly what the Court is saying that that statute had aggravating circumstances, which narrowed sufficiently to meet the requirements of *Furman*. I agree with that completely. The language you read I agree with completely.

Q And how did that passage that I just read from *Gregg* affect your study?

A It affected my study -- my understanding was that those that had to actually narrow, so it leaves an open question about the extent to which the special circumstances do narrow here in California. And that's what created the empirical question for us: To what extent do they narrow adequately?

And according -- the Court in *Gregg* said in that situation they did narrow adequately just simply on the basis of the face of the statute. That's all they were looking at. They weren't looking at the application of those aggravating circumstances under the pattern of cases that went through the system as we did here in California.

Q My understanding is that your study seeks to sort California cases according to their factual quality.

A Yes.

Q There's no effort in your study to ascribe any significance whatsoever to other information relating to the defendant himself or herself but not directly related to the circumstances of the capital crime or the crime -- the murder

being examined; is that correct?

A Well, the -- our assessment of the applicability or presence in a case of a special circumstance is heavily dependent upon the circumstances of the defendant and what transpired as reported in the probation reports.

Q That's exactly the distinction I'm drawing. Facts about the defendant unrelated to the crime, like, bad childhood, those kinds of -- the sort of the thing that we would normally call perhaps mitigating evidence.

A No. We didn't consider that. It's not relevant.

In my understanding as advised by counsel, mitigating evidence about the history of a defendant is not relevant in any way to the question of the death eligibility of a given offense.

Q So when -- back to the quoted language from Gregg. When Gregg said:

> "*Furman* held only that in order to minimize the risk that death would be imposed on a capriciously selected group of offenders the decision to impose it had to be guided by standards so that the sentencing authority would focus on the particularized circumstances of the crime and the defendant."

Your study does not focus on those last three words

"and the defendant" except to the extent that it relates to the crime.

A Well, I don't agree with your statements about our study.

At the time that *Gregg* was decided there had been no focus at all on mitigation. It never crossed the court's mind. They were focused strictly on whether or not there was aggravating circumstances defined in the statute. Full stop. That's all they were interested in as I read *Gregg*, and that's that general consensus in the literature as I read it as well about the meaning of *Gregg*.

Q Very well. Let's move on to *Lockett*.

A Okay.

Q *Lockett versus Ohio*. You've read it?

A Certainly.

Q Decided six years after *Furman*.

That case said that:

> "The sentencer cannot be precluded from considering as a mitigating factor any aspect of the defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."

My question is, how, if at all, did that teaching, the teaching of *Lockett* inform your study?

A It didn't inform our study because that decision was based on the application of the statute by decision makers. That was not our focus.

Our focus was strictly on whether or not the crime is death eligible without respect to mitigation that may have existed in this case. It's not relevant to our inquiry.

Q It's relevant to how a state must run its death penalty regime.

A Oh, exactly.

Q And your study does not take it into account?

A That's right. Because that wasn't part of the administration of the statute that we were interested in. We were interested only in the legislative decision, not the administration of it by the officials who apply the law.

Q I appreciate you may have had a reason for not, but I'm just establishing the point that you didn't take *Lockett* into account in your structure of your study.

A No.

Q Can you tell me what Georgia's pre-*Furman* death-sentencing rate among death-eligible murder trial convictions was?

A Fifteen percent.

Q Now, how do you know that?

A Because I did a study of pre-*Furman* data.

Professor Woodworth and I in our book "Equal

Justice in the Death Penalty," we -- in our study we were contrasting the death sentencing system before *Furman* with the death sentencing system after *Furman* in the state of Georgia.

And we lay out in the book the basis of our analysis, which was about 295 pre-*Furman* cases that we analyzed, and that produced a rate of 15 percent, which is right in the mid range of the rate that the United States Supreme Court dissenting opinions stated was the death-sentencing rate in pre-*Furman* Georgia. They said it was between 15 and 20 percent among murder-conviction cases, and we were pleased to see that our data conformed with their judgment, their estimate based on very little data was.

Q So you know it from your own research?

A Yes.

Q And you believe it to be confirmed by a passage in the dissenting opinions?

A Yes.

Q In Furman?

A Yes.

Q Do you understand the Supreme Court to have established a statistical test for death-sentencing rates?

A No. They have not specifically held that; no. They have not specifically established any test about what they must be to satisfy *Furman*.

But what we do know is that when they -- it was 15 percent that that wasn't good enough. We know that. But there was no articulated rule based on a quantitative basis, because there's no quantitative evidence before the court then or now.

Q Are you saying that *Furman* stands for the proposition that if a state's death-sentencing rate is 15 percent or less it's unconstitutional?

A No. I'm saying -- no, not at all.

Q Okay.

A I'm saying if the statute -- the statutory structure does not narrow the cases, then that combination would render the statute unconstitutional in my opinion.

Q That combination of what and what?

A Oh, if the statute does not adequately narrow -- because that's what the *Furman* statute failed to do. It did not narrow at all. It made common law murder death eligible.

If under those circumstances there was insufficient narrowing and the death-sentencing rate was only 15 percent, that would impair the constitutionality of the statute. That's my reading of *Furman*.

Q So that 15 percent is part of the constitutional test.

A I'm telling you that they have never articulated -- here's the point I think you want to understand is they had no empirical data focused sharply on the pre-*Furman* period of time.

They looked at a handful of different studies in other jurisdictions and said that it appears to us that the death-sentencing rate is in pre-*Furman* states -- I think they mentioned New Jersey and couple of other states -- is in the range of 15 to 20 percent.

But they had no empirical data about Georgia itself. That's why we were so pleased when we estimated in Georgia that it was exactly what they perceived it to be generally.

Q What were the conditions precedent to death eligibility under pre-*Furman* Georgia law?

A Common law murder.

MR. LAURENCE: Objection, your Honor.

My concern is, I thought we were focusing on the study, and I want to make sure that Professor Baldus is not going to be offered as some expert on constitutional law.

And the question he just asked was, what was the conditions that were in existence in Georgia for sentencing? If we want to focus on what was the influence of the study I'm fine with it. I want to make clear that's the focus.

THE COURT: I'll allow the answer with the understanding that I won't be listening to him as an expert on the subject.

MR. LAURENCE: Thank you, your Honor.

BY MR. MATTHIAS:

Q And just by way of explanation, Professor Baldus, you compare the results under pre-*Furman* Georgia law to other times in history, and you opine in your declaration on that comparison. Am I not correct on that?

A Yes.

Q Okay. That's why I'm asking you about pre-*Furman* law. Not because I brought it up; you did.

So what were the conditions precedent to death eligibility under pre-*Furman* law?

A Liability for common law murder.

Q Or rape?

A Pardon me.

Q Or rape?

A Rape, that's true. That's not relevant any longer, and we didn't apply that in terms of our analysis of the Georgia data in this study. That has no bearing on what we did at all.

Q Fair enough. Now, did Georgia distinguish between the degrees of murder in pre-*Furman* --

A No.

Q -- in the pre-*Furman* era?

A No. It's common law. The definition of murder pre-*Furman* is strictly common law murder.

Q And what are the conditions precedent to death eligibility under California law since 1977?

A Oh, murder one liability and the presence of a special circumstance.

Q So what are the chances of being sentenced to death in California for someone who is convicted of first-degree murder but no special circumstances?

A None.

Q And what are the chances of being sentenced to death in California if you are convicted of only murder two?

A None.

Q And what are the chances of being sentenced to death in California if you are convicted of only voluntary manslaughter?

A Again, none.

Q What are the chances of being sentenced to death in California if you are convicted of murder one and a special circumstance is found true or admitted but the prosecution decides not to seek death, and therefore no penalty phase is held?

A Oh, that would take death off the table if the government didn't seek a penalty trial.

Q All right. Now, if I understand you correctly, people in Georgia pre-*Furman* who were convicted of voluntary manslaughter were not death eligible?

A Yes.

Q And when you determined the death-eligibility rate in

Georgia pre-Furman you did not go back and look at voluntary manslaughters to examine their facts and decide that maybe those should be upgraded and be classified as death eligible; correct?

A We didn't -- let me think about the answer.

Could you state the question again?

Q Sure. When you tried to -- when you tried to ascertain the death-eligibility rate of Georgia in the pre-*Furman* era you did not go back and look at those cases which had resulted in a voluntary manslaughter conviction for the purpose of examining the facts and possibly upgrading it to a death-eligible classification? You did not do that?

A Are you talking about what we did in the Georgia research or in the California research?

Q Is the answer going to be different depending on the --

A Yes.

Q Okay. Then explain that. That's important. Thanks.

A In the California -- in our pre-*Furman* work in Georgia, the only thing we looked at were offenders whose cases resulted in a murder conviction. That's the population among which we estimated the death-sentencing rate. That was our pool.

In the current research when we are trying to assess death eligibility under pre-*Furman* law, we look at the facts of the case here for the crime that was committed here.

Q Let me just interrupt.

But you are not looking at Georgia cases all over again now. I was focusing on the Georgia cases and the definition of death eligibility that was used in connection with the *Furman* decision.

You didn't -- no one did. You didn't go back to look at voluntary manslaughters and say, "Ah-ha. If someone had paid better attention they would have realized this is really a death-eligible crime under Georgia law pre-*Furman*."

You didn't do that.

A We didn't. But I can tell you what the Supreme Court said. It said that if a case could have been charged as a capital crime and wasn't we are very much interested in that. We are interested in whether or not death sentences are routinely imposed among cases that could have resulted in a capital murder conviction.

So that hypothetical is not completely irrelevant to *Furman*. That's embodied in that decision.

Q Is it completely irrelevant to the 15 percent figure that we talked about earlier?

A Yes, it is that.

Q It is that. Okay.

Now, we've been using the term "death eligible." You've use it throughout your declaration and we've also been talking about it today.

At several portions -- in several points, rather, in your declaration you use the term "factually death eligible," and I assume you use those interchangeably; correct?

When you say -- talking among ourselves when you use the expression "death eligible" you mean factually death eligible?

A Yes.

Q And that suggests to me that there's some sort of other kind of death eligibility notion out there that you are distinguishing it from?

A No.

Q No.

A You want me to explain what the basis of it is? I'll be glad to do it.

Q You've answered the question. Let me -- let me -- you've established -- you've told me that you use them interchangeably and that factually death eligible is not -- you don't use that modifier to contrast it with any other notion like "legally death eligible," for example?

A Well, if I can explain.

Q Sure.

A I will tell you there are two forms of factual death eligibility in our analysis. One are the cases where the offender is found guilty or pleads guilty to M1 and is found guilty of or admits the presence of a special. That is a

death-eligible case, and we call this a factual death-eligible case.

We also considered death eligible if the facts are such in the case that had it been prosecuted capitally and could have resulted in a M1 conviction and a finding of a special circumstance and a death sentence had been imposed, would the California Supreme Court have affirmed that finding?

And if we conclude on the basis of the cases that we've looked at under California law that that case would have been sustained had it been capitally charged and convicted we call that factual death eligibility too.

So there are two forms of factual death eligibility that we are speaking to in our research.

Q I understand that. It's not exactly what I asked. Let me try it this way.

Does the term "legally death eligible" mean anything to you?

A We don't use the term, "legally death eligible" as such in the research. It's not relevant to our understanding of what it is we are trying to accomplish in this research.

Q If you would please look at paragraph 59 on -- that's on page 31 of your latest declaration.

A Okay.

Q And you may actually not need to find it, but I'm --

A I'm sorry. What? Page 39?

Q Thirty-one, paragraph 59.
A Oh, I'm sorry. Paragraph 31?
Q Paragraph 59 on page 31. And it's probably not necessary to actually look at it, but if you are more comfortable, by all means.
But all I'm trying to iron out here with these questions is some terminology issues. I just want to make sure that the same term is used consistently throughout or it affects my understanding and it's going to affect my question.
So you use the phrase -- the following phrase appears: "Cases in which a special circumstance could have been alleged" --
A Could you tell me the line you are on, sir?
Q Line 16 apparently.
A Very well.
Q It's just a phrase. "Cases in which a special circumstance could have been alleged and prosecuted."
A Uh-huh.
Q Now, is that synonymous with death eligible slash factually death eligible?
A Yes.
Q Now, in your Nebraska Law Review article you also use the term "potentially death eligible," and I'm wondering if in your Nebraska study what you meant by potentially death eligible

is the same as the paragraph I just had you look at, as well as the phrase or the word -- the phrase "death eligible" and "factually death eligible."

Are these all the same thing?

A I'm relying on my memory of that article that I wrote some time ago. But basically yes. We are looking at cases that did not resolve in a penalty trial.

Q That's what I assumed, and I just wanted to confirm it.

Now, you are aware of Professor Shatz's writings in this area; correct?

A Yes.

Q And you are also aware that he testified in this proceeding; correct?

A Yes.

Q And did you read his testimony?

A I did.

Q Why did you do that?

A Because I was advised that it would be useful to know what you asked him because you might ask me similar questions.

Q You might be surprised.

So having read his testimony, you are aware that he acknowledged with considerable disappointment that courts have been uniformly uninterested in death-sentencing rate evidence.

You are aware that he said that? He acknowledged

that?

A I -- frankly, that was not this part -- I didn't read it in such detail that I can remember everything that he said in his testimony. I'll have to confess that. I read it to mainly get the thread of what you were likely to ask me. That's why I read that.

Q Now, can you name -- well, do you know of a court that has invalidated or even considered the constitutionality of a state's death penalty regime by reference to death-sentencing rates?

A No.

Q Do you agree or disagree with the following observation:

> "In the 34 years since *Furman* was decided the Court had made clear that its decision was not based on the frequency with which the death penalty was sought or imposed; rather, the primary emphasis of the Court's death penalty jurisprudence has been the requirement that the discretion exercised by juries be guided so as to limit the potential for arbitrariness."

MR. LAURENCE: Same objection, your Honor. Same objection. If this is going to how he formulated the study

that's a fine question. But asking whether or not as a legal expert he agrees with that statement is irrelevant.

THE COURT: Okay. I will rule as I did previously. You may answer that.

THE WITNESS: I'm sorry. Could you read it again?

BY MR. MATTHIAS:

Q Sure.

"In the 34 years since *Furman* was decided the Court has made clear that its decision was not based on the frequency with which the death penalty was sought or imposed; rather, the primary emphasis of the Court's death penalty jurisprudence has been the requirement that the discretion exercised by juries be guided so as to limit the potential for arbitrariness."

Do you agree or disagree with that?

A Yeah, I agree with that.

Q I take it, then, you also necessarily then would agree that there's a qualitative as well as quantitative element to this narrowing requirement?

A Precisely.

Q Now, I see you've taught classes on criminal law, federal criminal law, capital punishment and statistical methods

for lawyers.

When was the last time you taught substantive criminal law as contrasted by a criminal procedure course?

A A year ago.

Q When was the last time you taught statistical methods?

A Well, that's over a decade.

Q I'm sorry?

A Over a decade.

Q Is that course even being offered anymore?

A I'm not sure. It was a -- I put the statistical component into an employment discrimination class, and I haven't taught that in 15 or 20 -- it's probably more like 15 years.

Q And you've never taught criminal procedure; correct?

A No.

Q Have you ever taught evidence?

A Yes.

Q When was the last time?

A Oh, 20 years ago.

Q And have you ever taught ethics or professional responsibility as it's called in Iowa?

A No. No.

Q And have you ever taught a criminal practice course -- clinical trial practice, some practice court -- something along those lines?

A No.

Q A simulated trial-type work?
A No, I haven't.
Q Now, when did you begin this study, the study that we are all talking about today?
A 2005.
Q Who contacted you about it?
A I think Michael Laurence contacted me about it is my recollection.
Q And --
A Tim Schardl is another attorney in California. It was one or the other. I can't recall. I knew both of them beforehand. It was one or the other who contacted me.
Q S-H-A-R-D-L?
A No. S-C-H-A-R-D-L.
Q Now, you did devise a study specially for the purpose of producing evidence in this case, and in Mr. Frye's case, Mr. Frye being Mr. Schardl's client; correct?
A Yes. Yes.
Q Who paid for the study?
A To my knowledge it was paid for by Mr. Laurence's office and Mr. Schardl's office. They paid for it to my knowledge.

I send the bills in, and they pay them. Who is providing the money I'm not exactly sure. But I assume one is the state. The state is providing part of it, and the

federal government is providing part of it through the federal defenders in Sacramento.

Q Okay. But the checks come from the federal public defender and the --

A State.

Q -- HCRC?

A That's right.

Q Now, when you were talking with HCRC about developing this study, did you come to any understanding regarding your and HCRC's respective areas of responsibility in connection with the study; who was going to do what and who was responsible for what, and who was going to stay out of the other one's way on this matter or the other thing?

You understand the question?

A Certainly. Certainly.

We were going to devise the study, that is, Professor Woodworth and I were going to devise the empirical study that would address the extent to which this statute narrowed. And HCRC would provide the law that we were to apply in making those results about the factual presence of M1 liability and the special circumstances under California law.

That was the division of responsibility. And they would ask us the questions that they wanted answers to for the purposes of the litigation.

Q So that was the division of labor that you agreed upon?
A Yeah.
Q At the outset?
A Yes.
Q Now, in paragraph 11, which you will find on the middle of page three, you say that "the research, design and sample for the study were produced by Professor Woodworth, Richard Newell and me."
Now, the sample was drawn from a database; correct?
A Yes.
Q And the database was in fact provided by the California Department of Corrections and Rehabilitation; correct?
A Well, the source of information for the creation of the database were probation reports which came through the Department of Corrections -- came from them.
Q Right. On direct you said -- you mentioned my office, and I just want to make --
A Well, I would be sent these probation reports. I didn't know who was producing them. That was not in my department.
Q Right. In fact, by the time you got them you were getting them from HCRC. I mean, you may not have concerned yourself about where they got them from, but the last people to

handle them before you handled them was HCRC; is that right?

A Well, either HCRC or Tim Schardl's office in Sacramento, one or the other. I'm not sure. The mechanics of that I'm not sure.

Q It's your understanding that the reports were actually produced by CDCR?

A Yes.

Q That's all I wanted to just nail that down.

Now, you mentioned in your declaration of somebody named Robin Glenn, who I assume is occasionally referred to as Roberta Glenn.

Is that the same person?

A Well, that's a typo if it says "Roberta." She wouldn't be happy about that.

No. It's Robin Glenn. She's a lawyer who's worked on empirical studies for the last 15 years and has been very important to us in managing the database and cleaning the data.

Q And she oversaw the data coding and cleaning process?

A With me. With me.

We would have -- we would be working with the students. She would be on the conference calls. We would have all the students together in a room, and she would join in through the conference calls. She's not a -- she lives in Massachusetts.

Q So she's been overseeing this project from afar?
A To the extent that I've asked her to, yeah. I oversee the project. Then there are tasks I asked her to do, such as preparing the first drafts of our questions for the HCRC about legal issues that were unclear.
Q Well, is -- sorry.
A I would suggest to her to draft a memo. "Here's the question we don't have an answer to. Please draft a question." And she would do that, and I'd approve it, and then we would send it to HCRC.
Q She was not in residence in Iowa?
A I've never met her. I've never seen her face-to-face. I've worked with her for a long time. She's fantastic.
Q Okay. What is your understanding of her relationship to HCRC?
A She's paid by them.
Q So she's not your employee, she's --
A Well, she operates under my instructions. She's my employee paid by HCRC.
Q And you have no idea where she is today, do you?
A She's in North Hampton, Massachusetts. It's her home.
Q Now, you mentioned that the coding was done by 21 either students or recent grads.
You paid them, or they did it on a volunteer basis?
A Oh, the RAs, the research assistants were paid for by

the University of Iowa College of Law. The recent grads were paid for by HCRC and Tim Schardl's office.

Q And were they paid an hourly rate?

A Yes.

Q What was that rate?

A Here's the way RAs are paid, students. When they work for me they get -- or not just me but any professor. If they are out of the state they get in-state tuition. So that means that they get paid pretty well when you think about the fact that it's a $15,000 benefit they are getting. But they are factually paid in the way of checks only the minimum wage.

Whereas the recent law grads were paid the going wage for new lawyers in Iowa City, which is $37 an hour. That's what they were paid.

Q And the weather is not so good?

A Well, it depends on the time of year.

Q Did you have a budget, that is, on this element alone on just paying the coders?

A The budget was, "Let's get the job done, and HCRC and Tim Schardl's office will pay until it's done."

Q Were any of the students you had working on this project recent grads, or were they -- had they been enrolled in your death penalty seminar class?

A Yes. Some of them had. And a number of them had been enrolled in my criminal law class, but not all of them.

Q Why don't you take a look at footnote one on page three where the names are listed?

A Yes.

Q And if you could tell me which of those students had taken -- as best you can recall. I realize it's been some time -- but to the extent you do recall, how many of them were enrolled in your death penalty seminar?

A Well, Fangzhou Ping was, and John Magana was to the best of my recollection, and, you know, that's the best I can recall. I don't recall those details.

Q How big -- what was the enrollment in the death penalty seminar when you taught it last?

A Twenty people.

Q So what they call a "paper course"?

A Where you write a paper? There is an exam and a paper; yeah.

Q Now, when you were hiring students for this project did you have any hiring criteria?

A Yes.

Q What was it?

A A reasonable academic record.

Q Did you have a minimum GPA in mind?

A No. And a reference. Attention to detail. That was the main thing I was interested in. Would they be able to complete the work, and would they be attentive to details so I

didn't have to double-check everything they did?

Q Were there any course prerequisites?

A No. Because the main course, criminal law, they all had had that.

Q How about criminal procedure?

A No.

Q Or maybe evidence?

A No.

Q When did the coding process actually begin? When did the first students sit down to read a probation report and come up with a classification?

A In the fall of 2008 is when it began in earnest.

Q And when was all the coding completed?

A The end of 2009.

Q Does that include the -- when -- it was the end of 2009, does that include the time of the cleaning process that you've described in considerable detail earlier?

A They were all going on simultaneously.

Q When did the cleaning process begin?

A Well, the cleaning process began in earnest in the summer of, to wit, May '09. And we did not have all the cases coded by that point by any means. Cases were still coming in, and we were still having our students and recent law graduates continuing to code and enter the data.

Q Were the -- was the cleaning team of five students

that you described earlier, are they all among the 21 whose names appear in footnote one?

A Yes, except one.

Q And --

A Well, one was -- let me think here. Oh, no. I'm sorry. They were -- yes. They were all from this group, and they all had done coding.

Q Could you identify the five for me?

A Let's see, John Magana, Fangzhou Ping, Folke Simons, James Vaglio, and Kristen Stoll. And actually, there was another one, Erin Snider for a little while who also worked on it.

Q So it was a team of five, sometimes six?

A That's right.

Q Now, as you know, you've completed five declarations, and Mr. Laurence asked you a little bit about that.

The latest one is Exhibit Number 291, the fifth, and that's the one that was -- I don't know if it was signed, but it was delivered to everybody here yesterday; right?

A Yes.

Q And the first one was done in November of 2009?

A Yes.

Q And trust me when I tell you it was based on a sample of 1,618 cases drawn from a universe of 27,928.

Does that sound right?

A Yes, it is right.

Q Okay. And in the very next declaration in paragraph seven you note that the sample had actually grown at that point to 1,823 but the universe was the same size. It had remained constant. It was 27,928.

And that the purpose of the revised declaration, according to paragraph seven, was to report additional findings based on that larger sample; is that correct?

A Yes.

Q All right. And there's no mention in your second declaration of having verified the findings recited in the first declaration, and therefore, there's also no mention of having made any corrections.

This is correct, I mean --

A Okay. Very well. I'll accept your statement on that. I don't recall.

Q As I understand it, it was just a matter of the sample had gotten larger, you had about 200 more cases and you had to update effectively the results. No corrections were made, just additional information.

I think that's what you said to Mr. Laurence, and I believe it's what's in your declaration.

It's not a trick question. I'm just trying to make sure I understand.

A Very well.

Q All right. Now, the third declaration there's a change in language. This is the declaration that's known to us as Exhibit 214.

At that point the sample had grown to 1900 cases, again, drawn from a universe of the same size, 27,928. And in this declaration you say that you have, quote, "verified" the accuracy of your previous findings and that the new declaration reports additional and corrected findings.

A Yeah.

Q And since you found matters that required correction, I assume when you say "verified" you don't mean confirmed to be correct, but rather you mean confirmed, or you ascertained whether it was correct, and if it wasn't you fixed it.

Is that correct?

A Well, I mentioned in my statement earlier to counsel that we had a number of cases that were coded as close calls, and because we had come to understand the system better I felt we were in a position where we could go in and make some more definitive judgments about those.

So I think there were about 90 cases where we went and recoded the case from a close call to either presence or absence in the case.

Q I'm just focusing on your use of the word "verified."

When you say "verify" you don't mean, "I looked at it and satisfied myself that it was correct." You mean, "I

looked at it to see whether it was correct, and if it wasn't I corrected it."

A Yeah. It was the latter.

Q That's all I was asking.

THE COURT: Excuse me, Counsel. Find a convenient place to take our first recess whenever that might be.

MR. MATTHIAS: Any time is fine with me.

THE COURT: Let's go five more minutes then.

MR. MATTHIAS: Thank you, your Honor.

BY MR. MATTHIAS:

Q Now, on your fourth declaration dated September 15th and it's known to us as 216, we have the same size sample, 1900. Now the universe has shrunk --

A Yes.

Q -- to 27,453.

A Uh-huh.

Q And you again state that you have verified the accuracy of your previous findings, and that the fourth declaration again reports additional and corrected findings.

My first question is, how is it that the universe got smaller again?

A Because when I looked at the various time periods by year, the data got very thin in the last couple of years of the sample. And it was my judgment that we did not have a clearly representative story about those later years.

So I made a judgment that in terms of having a fully representative sample it would be better to delete those cases. It was about -- I can't remember the exact number of cases.

You know, these are weighted cases here. It was only a handful of cases -- I think maybe eight or nine cases or something we deleted. It was strictly on the basis of the fact that they looked too thin over this period of time.

This has to do with the vagaries of how the Department of Correction's database functions, and that's understandable. During the latter years of that database they wouldn't have been updating it the same way they had in the earlier years -- that was my understanding -- and the data seemed very thin, and it didn't seem sufficient to support good inferences for the later period. That's why I struck them.

Q And what these cases all had in common was that they were from a particular time period?

A Yes. That was the only thing.

Q And what was that time period again?

A Well, I can tell you in one second here.

Q Sure.

A They were dated after -- they were dated -- they were dated later than June 30, 2002. The -- originally the database that we got from the Department of Corrections, it had cases up

to 2005, you know, people that had just been admitted to the prison shortly before they sent us the database, I think, and those are the ones that gave me concern. They had nothing whatever to do with whether the case -- how it was a crime of conviction. It was strictly on the basis of my judgment that this was not a rich enough set of data to include.

Q I understand. I just -- when I noticed that the universe got smaller and there was no explanation I felt I should ask, 'cause that seemed -- it seems odd. The universe was slowly but surely getting a little bit bigger each time, I assume because of the inflow of probation reports from CDCR via HCRC or FPD, and then all of a sudden I see a diminished-sized universe, and it simply raises a question, and I asked you, and you explained it, and I thank you.

Now, in your latest declaration, the one dated yesterday -- and this is known to us as 219.

In paragraph seven you again state you verified the accuracy of your previous findings, and that this, the fifth declaration reports additional and again corrected findings.

A Uh-huh.

Q Now, as best you can recall, what were the errors that you discovered upon your preparation of your third declaration?

A I discovered one error.

Q And what was that?

A Do you have the tables? The figures there? It would

be the simplest way for me to explain it to you.

Q What figures should I look at?

A Two.

Q What page is that on?

A That's page 28.

Q Okay. I'm there.

A Okay. You'll notice that in stage three in box 3B it lists 613 cases where the special circumstances was dismissed by the court or rejected by a fact finder.

According to our controlling fact-finding rule those cases are no longer death eligible. What I failed to do was to subtract those cases from the denominator of our estimates in boxes 5A and B.

If you look at the earlier declarations, the denominator there was the original population of 16,000 --

Q Yes. Professor, I think you misunderstood the question. You are describing the correction that you made that is evidenced for the first time in yesterday's declaration.

I'm asking you about the matter that got corrected in this third declaration. There was a correction between the second and the third, and that's what I'm asking you about.

I understand the final corrections that are reflected in box 3B and 5A.

A Oh, okay.

Q I asked you about Exhibit 219, which is the first declaration which recites the facts of a correction but it doesn't identify it. That's why I'm asking.

A I --

Q Can't recall?

A -- can't recall. They would have been trivial little things.

Q That's fine.

Do you recall what corrections were made in the fourth declaration?

A No. All I can tell you is this. We were in a state of constantly cleaning the data. We are evaluating, looking at comparisons between death eligibility in *Carlos* Window, 2008; the consistency between the death-eligibility judgments and the specials that were present.

And I spent enormous amounts of time reviewing those data, and with 1900 cases things slip through, and I would spot the ones that did and I would fix them.

Q And it was not until the fifth declaration that you spotted the box 3B, 5A error; correct?

A Yes.

Q So that error actually appears in three consecutive declarations, each of which had data verified by you before you prepared it and signed it?

A That's right. I made a mistake.

Q You are not planning a sixth declaration, are you?
A Not at the moment.
MR. MATTHIAS: This is probably a good time, your Honor.
THE COURT: Okay. We will take a 20-minute recess. The Court is adjourned.
(Whereupon, there was a recess in the proceedings from 11:12 A.M. until 11:35 A.M.)
THE COURT: You may proceed when you are ready, Counsel.
MR. MATTHIAS: Thank you, your Honor.
BY MR. MATTHIAS:
Q Professor Baldus, what I'd like you to do now is talk to you a little bit and ask you to describe some features of the sampling process.
As I understand it you wanted a sample of a certain size, and that was to ensure validity; correct?
A Yes.
Q What was your target sample size?
A Originally it was about 1800. These targets -- Professor Woodworth can give you a much more informed information on this than I can.
Q Okay. Maybe I should defer my questioning to him.
A I think that would be better.
Q I appreciate that. I appreciate that.

But you had a percentage in mind -- a certain percentage, not in absolute numbers, but a sample should be a percentage of the universe ideally, and I just --

A I don't know if there was a percentage or the number -- the raw number I think was more important. But that's really his department.

Q Was he also in charge of the stratification process?

A Exclusively.

Q Exclusively?

A Put it this way. I determined what are the factors that we should stratify on.

Q Oh, okay. Well, then let me ask about that. Let's jump right to that.

The first thing I understand that the idea of randomly drawing a sample was rejected because it was very clear that doing that would actually not result in a representative sample. It seems counterintuitive, but randomness does not always ensure representativeness; is that correct?

A Again, I'd like you to put those questions to Professor Woodworth.

What our concern was if we took a random sample it would be dominated by Los Angeles, and that's what we didn't want.

Q And you wanted to ensure that you got a fair number

from elsewhere around the state just to ensure more statewide representativeness?

A That's right.

Q And to the extent that the non-randomly drawn sample into each of the 48 strata were not representative on a one-to-one basis, that was compensated for by weighting the cases in proportion to their membership in the universe, and then you ensured that whatever the numbers were on the strata they were never going to be counted more than they should be worth.

Is that fair?

A That's right. But again, you are using terms of art that I'm not really -- I don't want to be answering questions based on terms of statistical art that I'm not really competent to judge, but you've given a nice impressionistic view of what happened and I agree with that.

Q Okay.

A But George can tell you precisely what these terms mean -- representativeness, random -- that's not in my department.

Q Fair enough. I appreciate that.

But you did decide what the stratification should -- the lines along which stratification should occur?

A Yes. That's not a statistical question.

Q Right. That's a structural element.

A That's right.

Q And as I understand it it's stratified along three dimensions.

A Yes.

Q And I don't know if this is useful to you but I think it's useful to me. I'll ask you whether it's useful for anybody else.

I think of this as a three-dimensional matrix. You've got a horizontal axis, you've got a vertical axis and you've got death. You've got three across, three down and four deep, or is it -- it's three by four by four, and you ended up with the 48 strata, which could be thought of as like individual boxes.

Is that fair?

A Yes. It's stated in footnote five of my declaration.

Q Okay. And you -- and there are a different number of cases in each of the different strata just because of the result of the sampling process?

A Yes.

Q Now, let's talk about the strata. One strata is crime of conviction. So across that strata you have three compartments.

A That's right.

Q Voluntary manslaughter, murder two and murder one. And order doesn't matter, because it's a three-dimensional

matrix; right?

A Yes. But they were structured: Murder one and murder two and voluntary manslaughter.

Q All right. So they went this way. It went vertically not horizontally.

A Yes.

Q One of the other axes, and it doesn't matter in what order, is the date. It's a chronological element; right?

A Yeah.

Q You've got pre-*Carlos* Window. You've got *Carlos* Window, and then you've got post-*Carlos* Window, and that latter category is itself subdivided into two groups, the dividing line being December 31st of 1992; correct?

A Correct.

Q Just curious; what was the rationale of subdividing the post-*Carlos* Window period into two of its own strata rather than just regarding it as a single strata?

A It was just to try to get a sample size that was big enough so you could make meaningful statements about the universe, if that became relevant.

Q Okay. So you could have gone out five and achieved even more representativeness but you decided subdividing it into two would probably be good enough, certainly better than one large post-*Carlos* Window strata?

A That first preliminary statement is again loaded with

technical terms of art. Hold that please for George Woodworth.

Q You know, every question I'm asking you is based on your declaration, so those are terms of art that you have used.

A That's correct. That's correct. But I'm not the specialist in that area. Woodworth is.

Q Third dimension. This has to do with population density, and you've divided up the 58 counties and clumped them, grouped them by population density from least dense to most dense, and this became -- and that was in four units and that became the third strata of four.

So we got three by four by four for 48.

A Yes.

Q And then however many of the cases were drawn from the universe to become your sample they were deposited in the appropriate box. You then learned what -- how representative they were relative to the universe, and you or Professor Woodworth gave it a multiplier -- could have been a multiplier of more than one or less than one, but it was designed to even out the non-random quality of having it been drawn that way to make it as representative as possible.

A Yes. That's an impressionistic statement of how that works.

Q Is it accurate?

A I'd say at a very impressionistic level; yes. George Woodworth can give you much more detail on it if you think you

need.

Q Okay. When you decided to stratify along population density as a relevant criteria, you say in your declaration that that was done to ensure adequate sampling from what you call smaller and more rural counties?

A Yes.

Q So if I understand correctly, now we've got this three-dimensional matrix in mind. Since Alpine County and San Bernardino County ended up being in the same population density strata, all other things being equal, for example, a *Carlos* Window case resulting in a second-degree murder conviction out of Alpine County would go into the same box as a *Carlos* Window second-degree murder conviction out of San Bernardino County?

A Your matching is on level one, 49 counties with the population density of fewer than 200 people. That's what we are referring to right there in footnote three.

So you are saying that if we had a case from one of the two of the counties in that area, and they were both from the *Carlos* Window, and they were both from the same time period, they would be in the same stratum.

Is that what you are suggesting?

Q Yes. Although when not -- you used the phrase "from the same area." If you meant geographically that's not what I meant.

These are -- the commonality between Alpine and San

Bernardino according to your structure is they belong in the same strata for population density purposes.

A Yes.

Q And that's because by your criteria Alpine County and San Bernardino County are similarly small and rural?

A They have -- here's this way we defined it. Population density per square mile of fewer than 200 people. I'm not an expert on the nature of each of these counties. We used that quantitative measure to define this stratification.

Q So there was -- some equivalence was then drawn between the notion of being small and rural and being not very densely populated. That's how Alpine and San Bernardino ended up in the same box?

A All I can say is that according to the data that we consulted they each had fewer than 200 people per square mile. That's the only measure we used.

Q Well, the purpose, though, in stratifying along population density was to create what -- to ensure adequate sampling from what you call, quote, "smaller and more rural counties."

So smaller and more rural was defined by reference solely to population density. There's no other criteria, correct, for labeling it as small and rural or large and urban; is that right?

A That was the measure we used, and if it was imprecise

that's a distinct possibility, if it wasn't as precise as one would make it if you conducted a whole empirical study of the rural and small counties of the state. These are rough measures.

Q I appreciate that. And Los Angeles County was placed in its own strata. It's level four. And is that because Los Angeles County is the most densely populated county in California?

A I don't think it is, actually. I think there are others that are slightly -- my memory is it's not the most densely. I think there are a couple of others that may be a little bit more densely populated.

But LA stands out as such a major contributor to homicide in the state, which is why we wanted to suppress its role in the sample.

Q So population density defined the first three of the four strata, and then a different criteria was used for defining the fourth strata?

A Yeah, that is --

Q In which case population density is no longer the defining feature, but raw number size is?

A Well, you know, obviously I don't recall the details of that. You may be able to tell me if I'm wrong, but having read over the papers recently I was struck by the fact that Los Angeles was not the most densely populated. That's my

assumption. That's my memory.

Q You are right. Not even close. That's why I'm asking. And I'm asking, not arguing. It seems to be the defining feature is population density. That takes us through three strata, and all of a sudden we now single out Los Angeles for some reason clearly not unrelated to population density. San Francisco, for example, is three-and-a-half times more dense.

A Okay. Essentially, it's a different breed of cat, let's say, LA in terms of homicide, and I didn't produce these out of whole cloth. I consulted with counsel on this, and there was a general consensus that we should treat LA differently.

Q That's why I asked my earlier question about division of labor. So HCRC had a hand in devising the strata?

A Certainly. These are not empirical questions. These are design questions that define what populations you want to be able to make meaningful questions about.

Q So HCRC decided that population density is important to a point, and then the huge number of people in Los Angeles alone provides an independent reason to make that its own strata?

A HCRC didn't make any decisions. They made recommendations to George and me.

Q Okay. Let's turn to the probation reports, which as I understand it you describe as the primary source of information

for making your classification decisions as to whether something is death eligible as you use that term or not.

In paragraph 15 you say that "the purpose of a probation report is to justify the probation officer's recommendation on the appropriateness of probation as a sentencing alternative in the case."

Who told you that?

A I looked at the recommendations that the probation officers make. That's the only thing they make recommendations on in these reports.

Sometimes they might make a recommendation on sentencing, but principally they are saying, "We don't think this person should get probation because of the severity of the crime." I can't think of more than a handful of cases where they did recommend probation.

Q Well, that's because it would only in be in a handful of cases that probation would even be -- that a murderer would even be eligible for probation.

A That's right. These are very serious offenses.

Q So the probation -- if you are not even eligible for probation then there must be some purpose in preparing a report other than to make a recommendation which would be of no moment?

A No. That's the principal focus of it, as I understand it. There are other purposes. They give the background of the offender. They provide a lot of mitigation and the defendant's

story, and then they look at the various sentencing ranges, and then they gave general suggestions about --

Q Professor, I know what they contain. I'm just asking you about your statement.

You stated that the purpose of the report is to justify the probation officer's recommendation.

And I'm just wondering how that can be when that's not even on issue in the vast majority of the cases, which is why I asked you where you learned that.

A I guess I should have said "a purpose," and I think that's the overriding purpose, but there are lots of other purposes which are served by it.

Q Thank you. I'll move on.

In paragraph 16 you observed that one limitation on the use of probation reports for purposes of your study is that they are sometimes prepared before trial.

Can you think of any other limitations on the use of the probation reports in your study?

A Yes. Sometimes the procedural information in the case of how it proceeded through the system was incomplete. Sometimes the information on the nature of the offense was incomplete. It impaired our ability to determine whether or not a special circumstance was present in this case.

Q And that might be true whether it was prepared before or after a plea or even after a trial. There is this potential

that it would not contain all of the facts and circumstances of the crime?

A That's right.

Q Now, I understand you were in private practice in four years in the '60s -- between '64 and '68.

A Yes.

Q And did you practice criminal law?

A Just in a very minor way. I took the rinky-dink cases, but I didn't do any major felonies or any sort of --

Q Did you ever represent somebody for the purposes of pleading guilty?

A Pleading guilty. Oh, certainly. These were all small offenses -- theft, drunk driving -- that kind of thing. Nothing serious.

Q Well, it's small to you, big to the defendant, I think.

Can you imagine yourself recommending that a client plead guilty based strictly on the information in a probation report?

A Well, certainly.

Q Really?

A You are asking something -- you are talking about these cases here. I'm not an expert in defense of people that are involved in homicides, but I'm telling you that I think in a lot of these cases it's very clear that the defendant is liable

for a very serious offense, and it might make sense for the defendant to plead as many of them did.

Q Now, the probation report, whatever their limitations, they ended up being the sole source of coding in about 84 percent of the cases; is that right?

A Well, let me put it this way. They were the sole source of coding except for the death cases where we would consult the appellate opinion, because they had much better facts in death cases.

And also we would consult appellate opinions when the probation report made reference to the fact that there had been an appellate decision in that case. These would involve cases that were back on remand for new trial or something of that sort.

But other than those exceptions initially that was the information that we relied on that was in the probation report.

Q Okay. Well, my question was what percentage -- could you estimate in what percentage of the cases did you rely entirely on the probation report?

I'm going to ask it again, but you said something else that triggers a question.

You said in the capital cases you went and read the opinion because the facts were so much more well developed there.

By capital cases do you mean cases that resulted in

death judgments?

A Yes.

Q Well, they are clearly death eligible. Why did you spend anymore than two seconds on those cases?

A Well, I wanted to learn about the law of special circumstances. They were very instructive. This was part of my education process learning about what the proper predicates were and how we interpret the evidence related to special circumstances. I found them very instructive in that regard.

Q But I understand you did some independent research and you read some opinions, but I'm talking about cases that were in the sample.

If it was a death case and it was a murder one by definition and it was a special circumstance and the California Supreme Court affirmed it, you went and read that opinion just to really make sure it was a death-eligible case?

A I wanted to know what the special circumstances were that were found. They very often were not reported by the probation report. That's what we wanted to get detail on. What factually the jury found, and that was not present in a lot of the death cases that were reported in a probation report, particularly those that were reported pre-trial. There would have been no such information in the probation report.

Q Sixteen percent were on cases in which you found the

probation report not adequate; is that --

A Well, wait a minute. Are you talking about information insufficiency? Is that what you're speaking about, cause I'm not clear what your question is?

Q My question was, and I'll repeat it again, in what percentage of the cases did you find the probation report adequate to make a coding decision?

A Okay. I will tell you. I will give you an exact figure on that.

Q Let me help. If you take a look at paragraph 18 I think you speak to that point. But you may speak to it somewhere else as well.

A Paragraph 18. What lines are you referring to?

Q You make reference of the 16 percent of the 1900-case sample proved insufficient. I'm really asking -- I'm inferring from that that in 84 percent it was sufficient.

Am I right?

A I'll accept that.

Q Okay. So not to beat this to death, but in 84 percent of the cases you felt that the probation report alone contained enough information that it became the sole source of information for purposes of coding?

MR. LAURENCE: Objection. Misstates his testimony. He said he also consulted opinions, and we also have some additional facts that we talked about.

BY MR. MATTHIAS:

Q That's where the 84, 16 percent rates --

A Can you help me find in here what line are you speaking to?

I haven't thought about that part of my declaration for a bit and I'd like to refresh my memory about it.

Q It's the last sentence.

A In paragraph 18?

Q Right.

"Missing procedural or substantive information occurred in 16 percent of the cases for which we received a probation report."

And those are the cases in which you had to go get more information from some other source.

My question is whether the balance, whether the remaining 84 were based solely on information in the probation report?

MR. LAURENCE: Again, objection, your Honor. He testified he had consulted appellate decisions, and in the capital cases he had the Supreme Court decision.

THE COURT: Okay. As long as there's a question I'll let the professor respond.

THE WITNESS: Well, I don't mean to be dense, but what line of paragraph 18 are you referring to as to 16 percent?

BY MR. MATTHIAS:

Q It's the very last sentence.

A Of paragraph 18?

Q No, 16.

A Oh, I beg your pardon. Sorry. I misunderstood.

Q That's all right.

THE COURT: Let him read that, and why don't you pose the question again?

THE WITNESS: Sixteen percent.

BY MR. MATTHIAS:

Q Okay. That's the percentage of cases in which you had to get the things Mr. Laurence was just listing for you -- appellate opinions, other sources -- in 16 percent of the cases you had to go beyond the probation report.

It seems clear to me that that almost certainly means that in 84 percent of the cases you relied entirely on the probation report and exclusively on the probation report, but because I can't be sure of it I'm asking you.

A Yeah. That's a good estimate. Yes.

Q All right. Thank you.

Now, on this point about appellate opinions and the circumstances under which you would go and refer to appellate decisions, you say in the last paragraph, or the last sentence -- pardon me -- of paragraph 20, you say:

"We also consulted appellate judicial

opinions when applicable."

My question is, what do those last two words mean?

A That's what I stated a minute ago. When there was a death case or when there was a reference to an appellate opinion in the probation report by the probation officer those are the circumstances under which we would seek out an appellate opinion.

Q Were there any other circumstances?

A Not in any kind of systematic way. I mean, I can't say that we didn't perhaps stumble on an appellate case here and there that was relevant, but not in any systematic way.

Q Okay. If you -- I don't know what you have in front of you, but there's an exhibit called Triple W, and it's your protocol. You should be -- it's in a binder. Let me try to help you here.

This is what's been -- it's Triple W, and you might want to keep that handy because we will have some questions on that exhibit as well as other exhibits that are close neighbors to that exhibit.

If you would look on page 16 of the protocol. They are numbered in this lower right-hand corner, protocol 00-something. And --

A Oh, I see. I'm there.

Q Okay. Now, it says on that page that opinions were sought for those cases, quote, "in which the jury or the Court

found or rejected a special circumstance in the case."

This is in the second-to-last paragraph, the second-to-last sentence in the second-to-last paragraph.

Now, that defines a somewhat different universe of cases in which the appellate opinions were sought.

My question is, which did you do? What it says in the protocol or what you just testified to?

A What I just testified to. That was an aspiration that we had at the beginning, but we simply didn't have the resources to do that.

Q Were there any other features of the protocol that were abandoned?

A Not -- no.

Q Okay. Let's talk a little bit about your -- the data-collection instrument. Mr. Laurence covered this with you, and I think I understand it.

You have your 1900 probation reports. You have your 21 students. Somehow these were broken up into workable units of work or task and a student would complete the DCI for each case. Correct so far?

A Yes.

Q And the purpose, of course, is what -- purpose for doing all of this is what we've been talking about, ascertaining death eligibility?

A Yes.

Q And Appendix E, I think you've identified, this is to your declaration, Appendix E to your declaration, you've identified that as a DCI as we call it?

A Yes.

Q Okay. And you've -- a moment ago I had you look at WWW, and that's the protocol?

A Yes.

Q And that's the document that's referred to in paragraph 23, which -- where you use the term "protocol," and I just want to make sure we are all talking about the same document.

A Now, we are talking -- paragraph 23 is the paragraph in my declaration?

Q Correct.

A Okay. Very well.

Q And that is the protocol as distinguished from the DCI or any other instrument?

A The coding protocol was a document created by the HCRC.

Q That was my next question. You didn't write the protocol?

A No. I didn't write the -- I wrote the DCI. HCRC wrote the legal coding protocol. They wrote the law. They wrote the law as it was to be applied, and my understanding is that you have a copy of that protocol.

Q I have a copy of something which I've been told is the protocol and it's Exhibit WWW.

A Yeah.

Q It's a 28-page document?

MR. PRUDEN: Counsel, I have a -- if you would like, I can show you what the coding protocol looks like. I have a copy of it right here.

MR. MATTHIAS: Sure. Sure.

MR. PRUDEN: And I'm advised by counsel that this was given to you.

BY MR. MATTHIAS:

Q Okay. This is actually not what I'm asking about. If you would look at WWW.

A Okay. (Complies.)

Q Okay. And since we are talking about that document, why don't you take a few seconds, or as long as you want, to thumb through it?

It's 28-pages long. It's got lots of different kinds of things in it, and I'd like you to make sure that we are all talking about the same document.

MR. LAURENCE: Counsel, we are willing to introduce the legal aspect of the protocol, if you want to clear this up.

MR. MATTHIAS: I don't know what that means, "legal aspect" of the protocol.

MR. LAURENCE: Your Honor, Professor Baldus is

explaining that the legal part of the coding book was written by the HCRC, which is absolutely correct. We are willing to introduce it as an exhibit in order to allow the witness to be able to compare that to what he's now looking at, which is the first 28 pages of the protocol.

MR. MATTHIAS: Okay. I asked for a copy of the protocol and I was provided 28 pages. I've also been provided some other information, which was never identified to me, as being a protocol. I'm going to have to figure this out. I've got to get into this. I have a letter from Mr. Laurence saying, "Here's the protocol," and he said it's one through 28.

BY MR. MATTHIAS:

Q So is one through 28 at least part of the protocol?

A It is. It's part of the general introduction that was given to the students when they would sign on to be coders.

Q Okay. Did you write pages one through 28?

A Yes.

Q You did?

A Yes.

Q And it's that other document you thought I was talking about which HCRC wrote?

A Yes.

Q But you regard that as part of the protocol?

A That's the core of it. That's the core of it. That's the law that we applied.

Q What is one through 28 if not the core? The shell? What is it?

A It's the procedure that the students are to apply, how to create a thumbnail sketch, when there is -- determine the crime of conviction. There's various steps.

Remember, you've got novices coming on board, and we wanted to try and train them about what this process is all about, and 128 I wrote to give them an overview as to what the study was about. I wrote this a number of years ago.

Q All right. So if I understand you correctly, if I want to know who wrote the protocol I'm going to have to be more specific about which part of the protocol --

A Yeah.

Q -- one through 28 you wrote.

A Yes.

Q And whatever is left of it somebody else or some number of other people might have written. I'm going to have to find that out.

A I can tell you what it is. It's the HCRC. This document, they wrote.

Q Okay. What was --

A That was our bible to determine what the predicates were for M1 and special circumstances.

Q When you say "this document" you are referring to?

A To -- I don't know if it has a number yet for the purposes of this litigation. I'm not sure. Here are the three.

MR. MATTHIAS: Your Honor, may I read this into the record just for clarity?

THE COURT: Yes.

MR. MATTHIAS: Professor Baldus has handed me four stapled documents. The first is called "Overview of the Applicable Law on January 1, 2008," and that is paginated Baldus 0001 through Baldus 0081.

The second element is "Overview of the Applicable Law During the *Carlos* Window Period," and this is paginated Baldus 0083 through Baldus 0137.

Element three is a list of cases in which the lying in wait special circumstance was upheld. A three-page document -- pardon me -- six-page document spanning 0333 through and inclusive 0337.

And the fourth and final element is a document called "California Cases Discussing the Lying in Wait Theory of First-degree Murder and or the Lying in Wait Special Circumstance," and this is Baldus 0191 through Baldus 0212.

BY MR. MATTHIAS:

Q Okay. Do we now have the whole protocol?

A Yes.

Q So it's pages one through 28 and those four components?

A Yes.

Q And that's it?

A Well, like I tell you, one of the things that we had in there was the findings of liability that were reported by the prison system. That is, on numerous occasions when we would be coding we wouldn't know what the crime of conviction was from the protocol. These were the pretrial probation -- sorry -- from the probation reports. Let me start that again.

Sometimes the probation report would not report what the crime of conviction was because the conviction had not yet been obtained in the case. And in those situations we applied -- we looked at and consulted the data that were maintained by the Department of Corrections that did indicate what the crime of conviction was, so that was a part of it as well.

Q So that would be Element Six?

A Yes.

Q And could you describe what that looks like in volume? That when you went to that thing you got from CDCR to get that kind of information you described, we are talking about a physical object.

Can you describe it?

A Sure. It was about 20 pages, and it would list the cases in our sample and the crime of conviction reported by the Department of Corrections.

Q Was it in spreadsheet format?
A No. It was just a word document we created.
Q That you created?
A Well, it was created from the database maintained by the Department of Corrections. That's a massive 27,000 document database.
Q That's why I asked. I need to know what the protocol consisted of.
A Richard Newell, my data manager, was instructed by me to find out what the crime of conviction was for all of the cases that -- I think it was actually in about 5800 of the cases that list what the crime of conviction was, and that's what he did. He listed it, and we put it in a word document, and it was part of the coding protocol.
Q And it was given to all of the students?
A Yes.
Q Anything else?
A No.
Q In paragraph 23 you talk about this process, and you testified to this as well.

When a legal issue would come up you would as you put it certify the legal question to HCRC. And I think you described that what that really entailed was an exchange of e-mails where you identified the question you had and awaited some sort of response from HCRC to assist you out of the --

whatever uncertainty provoked the question in the first place; correct?

A Yes.

Q And when you say that the answers provided by HCRC were then added to the protocol, what does that mean?

A Those memoranda that we got were added to the protocol so the students would regularly get copies of these updates so they would be informed of the new understanding of the law. That would be a supplement to this document of names you just read off.

Q So it would be yet more paperwork?

A Yes.

Q When you say "it would be added to the protocol," you don't mean protocol 0001 through 28 were revised in light of HCRC's answers; you mean that HCRC gave you additional paperwork that became like appendices?

A Exactly. Exactly.

Q So the document just kept growing?

A That's right. It's my understanding that you have copies of all those.

Q They haven't been described to me as part of the protocol. That's what I'm -- the protocol also includes the e-mail exchanges, every copy of which was given to the students.

A Yes.

Q During the course of the coding process?

A Yes.
Q So needless to say, at any given moment not all of the students didn't have all of the protocol because some of protocol wasn't developed until the coding process was entered near completion?
A Yes.
Q If you would, please turn to page 14 of the protocol.
A (Complies.)
Q And this is the portion that you said you wrote?
A Fourteen?
Q Page 14 of the protocol. 0014. Protocol 0014.
A Okay.
Q Now, looking at that and what appears on 13, and you might as well look at 15.
A Can I just clarify that what we are looking at is Protocol 0013, which lists the death judgments and death row population?
Q Correct. Correct. And that's mostly important only because of what appears on 0014.
Now, does that appear to you to be somehow incomplete?
A Yes.
Q You wrote the protocol so you would know -- and even if you didn't you would know, because it looks like it's in the middle of a sentence; right?

A Yes. The typo of some kind, yes.
Q Can you tell me what is missing?
A No.
Q All right. Would you look at the lower right-hand corner?
Do you see the pagination system that -- where it's called Protocol 0001 through 28?
Is that something you installed or something HCRC installed?
A What page?
Q The entire document, the pagination system I understand that you wrote it. I'm guessing that that pagination was accomplished by HCRC, but only you could --
A I think that's probably right. I don't recall having put in that protocol numbering system.
Q You can't tell me what should precede page 14 to make that a complete sentence?
A No.
Q And you can't tell me how many pages are missing between what's labeled 13 and what's labeled 14, but obviously content is missing?
A It's not important. These are just descriptive statistics that really provide no information that are important to the students in doing the coding. This is just a little background information for them to get an overview of how many

death sentences there are imposed in the state --

Q The 28-page document you wrote is not important?

A Parts of it are. They vary. Some of it is background information for the students. Everything is not of equal importance here by any means.

I wrote this three years before the data collection even began. This was just to provide an overview of what we were doing and where we were headed. This is not a bible we were looking at here. The only bible was the material that was provided by HCRC and what the law of the state was.

Q If we could get back to this process of certifying legal questions to HCRC, did you ever consider referring your legal questions to some entity other than HCRC, perhaps someone with less interest in the outcome of the study?

A I think that was discussed at one time, but the logistics of it overwhelmed us and we sent it to HCRC.

Q If you would look at the protocol, and again, when I say "protocol" I mean the document paginated Protocol 00-something --

A Okay.

Q -- also known as Triple W, if you would look at page 23 of that document, in the last paragraph you describe the purpose of the thumbnail sketches.

A Uh-huh.

Q And you say, "The thumbnail provides an overview."

Next sentence, "It's used by the investigators to identify." Third sentence, "It also provides certain things." Next sentence, "Thumbnails are our window on the world. They may be the only raw material from this study that the court will see."

Backing up two sentences where you describe:

"It also provides us with the capacity to develop legal and factual issues for which we can attain advice from counsel and a special advisory panel in California."

I take it that that special advisory panel was also aspirational, and, in fact, no such entity was ever impaneled, nor were any questions ever referred to it?

A That's right. The magnitude of the project overwhelmed us, and that was one thing that would have been nice to have but we didn't have it.

That's true. This was written five years ago, and that was an aspiration that we had just like we were going to consult all the judicial opinions of every case where a special was found. There was just a limit to what we could do, and this was one of the things that we scrapped.

Q I appreciate the limitations.

You predicted that the court might never see the probation reports but might see the thumbnails.

I'm just kind of curious on what basis you made

that prediction to the students?

A On the basis that I thought that those thumbnails would be an authoritative record of the facts of the case and the classifications.

It turned out they were not authoritative. There were too many problems with them. And that's why I developed this cleaning process over the summer of 2009 to review all of those and modify them and clean them so that we would have a factual document that listed what we considered the correct coding of the case.

Q And when you described that cleaning process with the five students, did I understand you to say you went over all 1900 cases?

A Yes.

Q And you developed for each one a narrative summary?

A No. I didn't develop. The students developed the narrative, and then I would sign off on it.

Q The people involved with the project created a narrative?

A That's right. And a narrative based in part on the thumbnail that we corrected to overcome any errors that we saw in the thumbnails.

Q For all 1900 cases?

A Yes.

MR. MATTHIAS: Your Honor, this is exactly the kind of

material that I asked for, and I was given 1900 thumbnails. I realize now the thumbnails were at best early drafts of final coding narratives. It was never provided, because I never heard about this cleaning process until this morning. I never heard about these narrative summaries, which appear from Professor Baldus's discussion to supersede and at least in part correct the discovery that I had been provided.

THE WITNESS: May I speak to that comment?

THE COURT: Do.

THE WITNESS: You had a listing of our classification of death eligibility and the presence of the special circumstances that exist in each case.

BY MR. MATTHIAS:

Q You are every referring to the spreadsheet?

A Yes.

Q Okay. Well, since you've obviously had a discussion about what I've been given let me ask you this.

You know I have not been given the narrative summaries you referred to as being generated during the cleaning process; correct?

A Correct.

Q You know that because you've been told that --

A Yes.

Q -- by Mr. Laurence?

A Yes.

MR. MATTHIAS: Your Honor, I can't understand why I wasn't given that information. I'm just utterly baffled by it.

MR. LAURENCE: Your Honor, Mr. Matthias asked for the thumbnails. I made very clear to him in several conversations and in letters that the thumbnails were not the final arbiter of what was going to be death eligible, that Professor Baldus was using the probation report as the final decision-making document.

He never asked for any additional information, and I certainly provided thousands of pages without any requests for discovery motion whatsoever.

And your Honor, you can look over here and see the amount of information that we've given over in discovery, 'cause it's sitting right here.

MR. MATTHIAS: Your Honor, I couldn't possibly ask for the superceding narratives generated during a cleaning process because that cleaning process had never been described to me, and Mr. Laurence must have known that if I was asking for the thumbnails, which are described in considerable detail in the declaration that I would be entitled to documents that would be corrective thereof. I just don't understand this.

THE COURT: I'm curious. If you gave him more than he asked for voluntarily, why didn't you give him these --

MR. LAURENCE: I actually never had the narratives. I never thought them to be important. And we did not, in fact,

obtain the narratives until 2010. And, in fact, I don't even think we reviewed the narratives other than to create some types of information to be able to have Professor Baldus testify about individual cases.

They were never to me that important, given that Professor Baldus was using the probation report as the primary source of information for coding.

MR. MATTHIAS: Your Honor, I think we should take this up at another time. It's obviously going to impede the examination some, but I'll muddle through.

THE COURT: Okay. Let's take it up at another time and decide what we can do. Okay. Proceed.

BY MR. MATTHIAS:

Q Professor Baldus, which are more important, the thumbnails or the narratives that supersede them?

A The narrative is a more accurate statement, a more accurate summary of the facts. But the basis of our decisions are the probation reports. They are not the narratives that we created. They reflect the decision. They aren't the basis of the decision.

Q I understand. Did you read all 1900 probation reports?

A I didn't read all of them. I read a probation report when I saw that there might be an issue based upon what was in the thumbnail and what was in the narrative that was created

during the cleaning process.

I mean, there are many cases that involve first-degree murder -- sorry -- involve 17(a) armed robbery, special circumstance. I didn't think it was imperative for me to read the probation report for all of those cases.

But for the torture cases and the lying-in-wait cases I read most of those cases unless it was really clear those were slam-dunk lying-in-wait or torture cases.

Q Could you estimate how many of the 1900 probation reports you personally read in connection with making the final coding decision?

A Yeah. I would say I read three quarters of them, ones that were deemed to be death eligible.

Q Three quarters of those that were deemed death eligible?

A Yes. And I didn't read them all in incredible detail. Very often I would just consult them to make sure that the convictions were right and that the core facts were correct.

Q Now, remind me again how many of the 1900 were death eligible?

A I think it was 1240.

Q So it's 75 percent of 1240?

A And I read a fair number of those that were deemed not to be death eligible, too. We wanted to make sure that those were correct.

So when the students would raise issues about the individual cases I would check those. It's an ongoing process.

Q Was there anything else provided to the students other than Protocol One through 28, the four documents that I read into the record, the material that you described as being distilled from some CDCR records and the e-mail exchanges between yourself and HCRC?

A Yeah. There was one other document that was part of this that was created by HCRC that compared for each special circumstance how the law has changed between 2000 -- sorry -- between *Carlos* Window and 2008. That was one additional document that the students had.

Q Did that document have a title?

A Differences between the *Carlos* Window and 2008 law was an attempt to just try and sharpen the differences in these documents listing the law of the two periods.

Q In terms of format and content it was much like the four elements that we went through together?

A Yes.

Q So it's just another one of those?

A Yeah. It was about 10 pages, I would say.

Q Okay. If you -- if you could rewrite this protocol all over again would you change some things?

A Well, I would change the things you've mentioned that

didn't come to pass.

Q How about some things I didn't mention?

A I don't think so.

Q Have you ever heard of something called "observer bias"? Does that term mean anything?

A I don't know the literature on that.

If that means people are biased in their perception of things, then I understand that. I only know a commonsense meaning of that word.

Q That doesn't mean anything to you specifically in the context of setting up a study and having people responsible for accurately recording events for purposes of the study?

A It's a term of art of which I'm not familiar. I can grasp the -- if it means that people bring biases to their work and they might influence how they code in this case, if that's what it refers to but you're using a term of art that I'm not familiar with.

Q Well, that -- you know that it's a term of art, so I'm just asking if you've heard of it before.

A I can't remember.

Q Okay. Well, whether you heard of that by that label or not, you are certainly familiar with the notion --

A Sure.

Q -- that people who are responsible for doing work accurately might for any number of reasons by tempted to not do

it accurately?

A Well, whether consciously or unconsciously is where I draw that distinction. I mean, bias -- well, it seems to me it's useful to draw a distinction between consciously doing something and unconsciously doing it.

Q Well, it might be if you want to remedy it or prevent it. But I just asked you if you are familiar with the notion that people who are asked to do things accurately might for any number of reasons not do it accurately.

A Yes, it's possible.

Q And one reason might be a bias.

A Yes.

Q A bias that someone might intentionally act upon or something that they might subconsciously act upon.

A Yes.

Q Now, did you undertake any measures to ensure that that did not happen in this case?

A Our measures were constantly reviewing the coding and the narrative summaries and the probation reports to see if they supported the bottom-line findings in the report that you have -- the spreadsheet that you have. That's how we tried to correct that.

Q Do you think you enhanced the reliability of the study by telling your students what you hoped the study would prove?

A I didn't tell them what I hoped the study would prove.

Q Do you think you enhanced the reliability of the study by identifying who you hoped might benefit by the study?

A No. I told them, "Look, we are working on behalf of a client, but that should have nothing to do with the way you approach these issues. We are intellectually honest investigators and expect you to operate in the same way that Professor Woodworth and I have for many years. We look at the facts and that's what we go buy." I told the students that many, many times.

Q If you would turn to the Protocol, page 15.

A (Complies.) Very well. That's Protocol 015?

Q 0015 correct.

A Uh-huh.

Q If you would count down -- I'm in subdivision A, one, two, three, four, five, six paragraphs, which would be the second-to-the-last paragraph, you describe the plans for the study.

A Uh-huh.

Q And you say:

"It is currently planned to use the results of this study to support the legal claims of two death row inmates."

Now, you wrote this before the study even began?

A Yes.

Q Do you think inclusion of that kind of information

enhanced the reliability of the study, undermined it, or had no effect whatsoever?

A It had no effect whatsoever.

Q Why did you mention it?

A I wanted them to know what we were doing. It just wasn't going to be used as a Law Review article, that this was going to be something that was presented to a court, and that I expected them to take it very seriously in terms of what they did.

And I admonished them time and time again that this is serious business which we're involved in, and we have to do it as accurately as we can.

Q Did the thought cross your mind that when the study was all said and done it actually might undermine the legal claims of the two California death row inmates who were sentenced to death during the *Carlos* Window?

A Very much a possible. Very much possible.

We had no idea what we were going to find, and when we started this I didn't have complete control over the legal theory that has emerged in this case. I was unclear about what was needed, what would be -- what would occur. This was a total unknown.

It all seems very clear now that it's all been done, but at the outset, Counselor, you have no idea as an investigator what you are going to find and what the students

would understand and how they might react.

Q The purpose of this study in short was to ascertain death eligibility in California, come up with a number; correct?

A Yes.

Q Do you think you enhanced the reliability of the study by telling the students that Professor Shatz had already explored that question and come up with 87 percent?

You will find that on page 12. Protocol 0012.

A I tell you, the students didn't understand the legal theory. They didn't understand Professor Shatz' article. They are students that come in and are given a job to code.

The idea that this somehow or other was biasing whatever they were doing to me is a stretch in the extreme.

Q I'm just asking you whether you thought that inclusion of this kind of information tended toward enhancing the reliability, telling them that Professor Shatz had already found 87 percent, dropping a footnote to the NYU Law Review coupled with your other passage that you hoped their study would support their claim rather than simply illuminate it one way or the other. These are the features I am asking you about.

A It had no effect whatever. You asked me what effect it had? I'm telling you it had no effect whatever. The students wouldn't even understand what this is all about.

Q Actually, what I asked you was when you put it in did you think it would tend toward enhancing the study?

A It would enhance the students' understanding of what we were doing and the fact that other people had investigated this. It would make what they were doing more relevant.

Q Let me ask you now about the coding process itself and the criteria and the role of what you call controlling findings of fact.

A Yes.

Q And when they operated, when they didn't and whether there were ever any exceptions to them.

And this is all set forth, and you described it a little bit this morning, too, so I think I can do this pretty quickly but I do want to make sure that I understand it.

The first thing you did was you looked at the crime of conviction, and if the defendant pleaded guilty to murder one that case got automatically coded as a murder one case.

A Yes.

Q And if the defendant admitted a special circumstance, then it was also automatically coded as a special circumstance kind of case?

A Yes.

Q So there was -- in -- well, put it this way. It couldn't get downgraded. The student didn't have the discretion to look at it and say, "What? Are you kidding? This guy was never even death eligible in the first place."

That's how the CFF worked in this context. Pleas

or convictions for murder one and admissions or truth findings with respect to specials became conclusively and irreversibly authoritative for purposes of your coding?

A Yes.

Q Now, if there had been a trial and the defendant was convicted of murder one, same thing automatically murder one. Likewise, if there had been had been a special circumstance charged and it was found true and/or the defendant admitted it that was conclusive --

A Yes.

Q -- on its classification as a death eligible.

And again, no opportunity for that to be downgraded in the students' discretion.

A Correct.

Q But if the case went to trial and the verdict came back less than murder one, the case might still get coded murder one if your coder was convinced that the jury or even the court had engaged in nullification; correct?

A Yes. If it was charged as murder or first-degree murder and it came back with an M2 second-degree murder or voluntary manslaughter case, that would be a controlling finding of fact that would limit the judgment of the students to treat that as death eligible unless the exception of jury nullification existed.

Q Okay. So cases that came back either by plea or by

trial as less than murder one, there was a mechanism for them to become murder one under your protocol?

A Yes.

Q And that was in the case of a trial because the coder determined that the jury had engaged in nullification, and in the case of a plea because the plea is actually meaningless in your study, there's no -- no significance is ascribed to a plea at all, is it?

A No.

Q Except if it's murder one. Except if it's murder one. But if it's less than murder one it's meaningless. That's when you go to the probation report to see if it might be more than murder one.

A Factually it might be more than murder one, yes.

Q And so if a special had been charged but was found not true, your coder could still code it as a special --

A If there was jury nullification.

Q -- if there was an instance of jury nullification?

A Uh-huh.

Q Now let's talk about the group of cases that were disposed of without trial.

Those cases which -- well, actually -- well, let's talk about those that were disposed by plea alone in a way that made them not death eligible as a matter of law; in other words, M1 without specials, M2, or voluntary manslaughter. Let's just

talk about that unit.

A I have to clarify what you are asking me here.

Q I'm just identifying the sub-universe of cases I'm going to be asking you about.

A Could you classify them again?

Q Sure. Cases disposed of by plea and resulting in voluntary manslaughter convictions, M2 convictions and M1 convictions without specials, either because none was ever charged or if it was once charged it was dismissed in a plea bargain or otherwise. That's the universe.

A Very well.

Q Now, in all of those cases because they were disposed of by plea, the fact that they were actually not death eligible as a matter of law in reality counted for nothing.

A Counted for nothing. We looked at the facts of the case. Those plea agreements were relevant.

Q The plea -- the plea counted for nothing.

A That's right.

Q So in all of those cases the students were free to reevaluate the case in light of the probation report, and if the probation report mentioned what they regarded as legally sufficient evidence to support murder one and a special circumstance it got coded as an M1 special circumstance, i.e. death-eligible case?

A Yes.

Q And for purposes of the coding process the students necessarily assumed something contrary to fact. They assumed a death-eligible verdict sampling process, a murder one with special circumstances. They assumed it to have been found. They assumed it to have been the subject of a challenge in a non-existent appeal to a non-existent appellate court. And they evaluated under the sufficiency -- the legal sufficiency test whether it was death eligible.

A They didn't make any assumptions. They made a judgment. If this case had been convicted of M1 with a special circumstance would it have been affirmed by the California Supreme Court?

That's the empirical question that they asked.

Q That's what I meant by "assumption." They indulged a hypothesis that defendant had been convicted of something other than what he was really convicted of, and that there was an appeal to a court who evaluated the sufficiency of the evidence for a conviction that never occurred.

A That's right. I call that a judgment, not an assumption. And it's based on other appellate authority that the students looked at to determine that each case that didn't have a controlling fact finding was determined to be death eligible, could be sustained by virtue of some comparable case in the California Supreme Court.

Q Now, in the real word of criminal litigation what is

the sufficiency -- the legal sufficiency test used for?

A It's used -- a test used by appellate courts to evaluate claims of defendants who have been convicted that there was insufficient evidence in the case to support a conviction. That's what the legal sufficiency test is as used in appellate courts by my understanding.

Q Okay. Now, when a court performs that analysis, what body of evidence do they consider?

A They generally consider the incriminating evidence, and they generally paid little or no attention to exculpatory evidence offered by the defendant.

It's very rarely sustained. It's a very rarely sustained claim in information insufficiency, not only here in California but everywhere in the United States.

Q Do they look at probation reports?

A No, they don't. They look at evidence in the case in the record.

Q Well, that assumes that there's a trial.

A Yeah. But those claims would never be raised in a plea.

Q Exactly.

A So there would always be a trial.

Q But you undertook, or your students undertook to look for sufficient evidence in plenty of plea cases, and you didn't have the benefit of a record, and you didn't have the benefit of

arguments from counsel urging the proposition that the evidence is insufficient or contrary arguments urging the contrary, that it is sufficient. This was done without a record, probation reports without argument. That's -- I'm just describing the process.

A That's correct.

Q All right. And, of course, when a court undertakes to do substantial evidence analysis, the question before the Court is the substantial evidence to support a particular conviction, and that's the conviction that actually attained. Courts don't ever undertake to evaluate a record for legally sufficient evidence to support something other than what the defendant was actually convicted of.

A I agree with that.

Q And that's largely because records typically wouldn't illuminate the sufficiency of the evidence in support of a crime that wasn't at issue in the proceeding; correct?

A Well, the appellate courts only approve -- review convictions. So that's the only question that they would have in terms of legal sufficiency is when a conviction occurred and whether it was good or not. If there is no conviction there would be no basis for conducting a legal sufficiency analysis in the Court.

Q Right. It would be impossible and at least silly to look for sufficient evidence to support a conviction that was

never obtained.

A That's right.

Q Now, when a court does that, that process of applying the sufficiency of evidence test, did I understand you to say that it does not look at the whole record? It ignores those portions of the record that the defendant was responsible for tendering, or it ignores those portions of the evidence that that defendant provided?

A If it's exculpatory. If it's inculpatory they place a lot of weight on it. If it's exculpatory they don't pay any or very little weight to it. We disregard the exculpatory statements of the defendant.

Q We will come back to that inculpatory, exculpatory dichotomy in a minute.

Let me ask you this. When you designed the study you were aware that narrowing challenges had previously been brought against the California death penalty statute; correct?

A Only in the most general way. I had not read Professor Shatz' work at that time at all.

Q I was asking about legal charges, not scholarly --

A Oh, I really was unaware of those cases. I didn't -- I didn't -- counsel didn't bring them to my attention, and I never went out and found them. We were starting on a clean slate. Perhaps we should have, but we didn't. I didn't.

Q Well, did it occur to you that may another inmate, someone quite simply situated to Mr. Ashmus, might have hired his own version of Professor Baldus to do a Baldus-like study of California and had a hearing just like this one maybe nine years ago or something.

A Well, I knew that hadn't occurred. I knew that the claims had been raised based on Professor Shatz's testimony, that was the extent of what I understood it had done in the past.

Q And you were aware of the outcome of that litigation?

A Yeah. I was aware that they were unsuccessful. That's why we were engaged to try and support this litigation because those other claims had been unsuccessful.

But the details of Professor Shatz's work and the analysis of those opinions was something that I did not investigate.

Q But you did know the outcome?

A Yes. Yes.

Q And you knew that it was unfavorable --

A Yes.

Q -- to the inmate?

A Yes. I did know that.

Q And you were aware of the scope of his study and his sampling technique and his death eligibility definition and his method?

A No, not completely.
Q Were you at all familiar with them?
A Vaguely. Vaguely.
We were going to go in and apply the methodology that we thought was best, and my understanding was that he had a narrower sample. I didn't know what kind of test he was using to evaluate the sufficiency of evidence.
I frankly didn't understand fully what he had done, and it wasn't really all that important to us. We knew what had been done in the past and what we thought should be done in this case.
Q Well, weren't you concerned about not replicating whatever deficiencies proved fatal to the earlier challenges that rested on Shatz's study?
A I didn't focus on them specifically. Counsel probably knew what they were, but I didn't.
Q Well, you knew that a challenge had been made that rested on empirical evidence that was derived from the Shatz research.
A It was based on empirical evidence consisting of reading appellate opinions. We didn't consider that a very authoritative database to conduct this or any other kind of litigation.
Q Because probation reports are better.
A Well, you get a bigger sample. The Shatz study was

limited to appellate opinions where there was information. He didn't have information on voluntary manslaughter and murder two cases like we did. He didn't have a statewide.

We were advised that counsel wanted to do a study that was statewide that covered voluntary manslaughter, M1, and that's what we went along to design. How Professor Shatz had proceeded was not really all that important to us in terms of what we were doing.

Q And "us" you mean --

A George Woodworth and me.

Q Okay. How about HCRC? Was it important to them?

A I don't know whether it was important to them. Here's the way these things work. They come and say, "Here's what we want you to do. We want you to study a sample of these 27,000 cases, and here are the questions we want you to answer. Take it from there."

And then we would take it and design the study, and then we would find that we'd need guidance on the law. We needed guidance on stratification. We needed guidance from the lawyers and the people who understood the system far better than we did, and we would consult them on these matters.

But other than that, the constructing the design of the study was done on the basis of the judgments that Professor Woodworth and I made about what would produce a

reliable study.

Q And the idea of doing a study that could be distinguished from the Shatz study was never discussed?

A Well, it was distinguished because it was a bigger sample. It had -- it had a bigger sample. It had more cases -- the same thing. Yeah, it was a more extensive study.

Q And you hoped for a different outcome?

A I didn't hope for any outcome.

Q Now, some -- does the as applied facial distinction mean anything to you in the context of this study, or this challenge that you attempted to develop this study for?

A Yeah. Yes.

Q And what is that distinction, if you could?

A Well, I'd say in terms of this narrowing distinction that if you look at this California statute on its face, you can't tell the extent to which it narrows at all. The only way you can tell the extent to which it narrows is by looking at the cases that have been processed through the system.

Q We are into terms of art here, but fortunately for both of us it's a term of legal art, not a term of statistical art. So if I understand what you are saying a facial challenge is one that rests entirely upon how a statute reads?

A Yes.

Q And an as applied challenge somehow does more or something different.

And what is that more or different? What might that be in this context?

A Oh, in this context it would be, if you look at 27,000 cases how many of them would be death eligible under those statutes? That's an applied approach.

Q Do you think one of the earlier challenges that had proved unsuccessful but rested on Professor Shatz's research, was that a facial or an as applied challenge?

A I tell you, I can't give you a detailed analysis of Professor Shatz's work or the cases in which he introduced it. I was not involved in that litigation and I have not studied it carefully.

Q But wouldn't the fact under my hypothesis that a challenge rested on his research, wouldn't that make it definitionally as applied?

A Oh, I agree with that. It would be applied. To the extent that he was making the same kind of arguments that are being made here, that you have to actually look at the cases and find out how many of them are death eligible, his methodology and ours would both be applied; yes.

Q In the real world when the death penalty statute is applied, who is the first person to do the application?

A The prosecutor.

Q In your study and as applied study, as I understand it, or a study in support of an as applied challenge, the death

penalty of California is really being applied by your coders. That's where the application is occurring.

A Well, you know, you can talk about the application of the statute by looking at the actors who administer it. You can also look at a statute and determine the extent to which it -- the cases to which it applies.

So in that regard our judgments, and to the extent that you say they were made by students, initially that's true.

Q All right.

THE COURT: Excuse me, Professor. Let's plan to have a lunch recess about one o'clock, Counsel.

MR. MATTHIAS: Okay. In six minutes?

THE COURT: Yes.

MR. MATTHIAS: Okay. Thank you. I don't want to waste time figuring out when is a good time to break.

THE COURT: If you need a little bit more time than that, fine.

MR. MATTHIAS: Okay. I'll be mindful of it, but I'm likely to forget, and I apologize in advance.

BY MR. MATTHIAS:

Q If you would, please, look at paragraph 26 of your declaration.

A (Complies.)

Q And I'll give you a second to read the whole paragraph because it's the subject of what I'm going to ask you about.

MR. MATTHIAS: And then I'll make that the last question, your Honor.

THE COURT: Okay.

THE WITNESS: I think I understand the distinction that's being drawn here.

BY MR. MATTHIAS:

Q Okay. Well, what I would like you to focus on is this sentence where you say:

"In this research prosecutors are not viewed as controlling fact finders in the same way as jurors and judges in trials."

In fact, prosecutors aren't viewed as controlling fact finders in any respect in your study, not just they are not on par with juries and courts.

The charging decision is completely irrelevant to your study, isn't it?

A Only to the extent that it informs the cases that finally advance later in the system.

Q Well, it certainly sets up certain parameters.

A That's right.

Q You can't be charged of more -- you can't be convicted of more than you are charged with?

A It's relevant in terms of death eligibility because for the cases that were charged capitally and a special was found the prosecutors played a key role in that obviously. But

they are making recommendations. They aren't decisions even in that context.

Q Well, you would agree that the role of prosecutorial discretion is irrelevant to your study. It does not figure in your study.

A I'll just state again, to the extent that those decisions advance cases in the process and we are studying the movement of cases through the process those decisions do have an effect in terms of the charging and sentencing outcomes.

Q Well, just to give a hypothetical, in a case where a prosecutor only charges murder two or charges only voluntary manslaughter, those cases still have a very fighting chance to end up as death eligible according to Dave Baldus; right?

A Yes.

MR. MATTHIAS: Thank you, your Honor. I think this is probably a good time.

THE COURT: Thank you, Counsel.

Let me inquire of both sides, how are we in terms of our schedule and how are we going? That will determine whether we take a one-hour lunch or more.

MR. MATTHIAS: It's a little difficult to say. First, the good news. When Professor Woodworth gets on the stand, lickety split. I think maybe 15, 20 minutes, something like that. I think I'm probably somewhere about half way with my cross of Professor Baldus.

THE COURT: Okay.

MR. MATTHIAS: I'll do my best to pick up the pace.

THE COURT: Yeah, yeah. I don't want to change anything you are planning to do or need to do.

So half way, we've had roughly two-and-a-half -- two hours and 20 minutes of cross so far. So it would be another two-and-a-half hours?

MR. MATTHIAS: I'm afraid so. I'm afraid so.

THE COURT: Okay. Let's take an hour just to be safe.

MR. MATTHIAS: Thank you, your Honor.

THE COURT: The Court's adjourned for an hour.

(Whereupon, there was a recess in the proceedings from 12:58 P.M. until 13:58 P.M.)

THE CLERK: The Court is back in session.

MR. LAURENCE: Professor Baldus is in the restroom.

THE COURT: Okay. We'll wait.

MR. MATTHIAS: I'll use this downtime wisely to set up.

THE WITNESS: I apologize for the delay, your Honor.

THE COURT: No problem. No problem. The worst thing a judge can do for people is to be on time.

You may proceed when you are ready, Counselor.

MR. MATTHIAS: Thank you, your Honor.

CROSS-EXAMINATION CONTINUED

BY MR. MATTHIAS:

Q Welcome back, Professor.

A Thank you.

Q If you could look at paragraph 27 of your own declaration.

A All right.

Q Are you with me?

A I'm with you.

Q I'm focusing primarily on the last sentence which we know from that sentence that one thing -- one thing that did not figure in your coders' analysis was how a reasonable juror would decide factual issues in a case; right?

A That was not the test.

Q Well, that's -- it didn't figure in their analysis at all.

A That's right.

Q Do you think that how a reasonable juror would view a case is very important to a prosecutor who would need to make a charging decision in the real word?

A I don't have any factual knowledge of that, but I would assume that's the case.

Q You'd probably hope it was the case. I think we all would hope.

Well, on that point then, let me ask you this, and if

you could turn to footnote -- just turn to page one and take a look at the footnote 18.

And my question is, how likely do you think it is --

A Page one?

Q No. I'm sorry. It's footnote 18 which begins on page 10 and spans over to page 11.

A Okay.

Q And I'll wait until you look up, so I don't want to start.

A Okay.

Q Now, my question is, how likely do you think it is that a prosecutor would charge multiple special circumstances for which there was no persuasive evidence and yet fail to charge the only one for which there was legally sufficient evidence?

A I don't know how often that happens but it happens. That's what I can tell you from our findings here.

Q So it certainly was a hypothesis that you entertained in that footnote.

A We looked at the facts and we found that sometimes.

Q And so you found the situation where the jury had rejected the specials that the prosecutor thought were there but the prosecutor had somehow overlooked a special circumstance that you found.

A Yeah. I think it would arise when you have a clearly obvious special, like an armed robbery, and there is also lying in wait in a case and the prosecutor -- I'm speculating here as you are -- and the prosecutor says, "Well, let's just charge the armed robbery because it's a slam dunk," but the jury doesn't believe it is. That's why lying in wait was not charged.

Q Do you think a prosecutor who goes through the mental process you just described is somehow impairing the constitutionality of the state's death penalty statute?

A No. I don't think it has anything to do with it.

Q But it certainly hurts the death-eligibility rate, doesn't it?

A It could.

Q Well, it would by definition. You think it's death eligible. The prosecutor says, let's just grade it as something else, either as a display of largess, or the prosecutor doesn't have any money, or they know something about a witness. They -- it's too expensive. They can't get the witness back from out of town. There's a thousand reasons.

Every time a prosecutor makes a choice like that it hurts California's death-eligibility rate, doesn't it?

A Well, it's the -- it's the failure of the jury to make a finding that hurts the death-eligibility rate, not the prosecutor. The prosecutor is acting on the basis of his or her perception of the case.

Q Well, I guess, actually we're getting a little bit ahead of ourselves. But it ends up hurting the prosecution in your analysis, because that ends up being by your definition a non-capital case, and then we get underneath that 15 percent figure that you attach such significance to from your reading of *Furman*.

A I'm sorry to be asking a question. I'd like a clarification.

Q Sure.

A Are you talking about death eligibility or rates of death sentencing?

If you are talking about death eligibility, when the -- we enhance the death-eligibility rate according to note 18 because we are coding it as factually present even though it was wasn't charged by the prosecutor.

Q I understand. I understand.

A All right.

Q And we had moved actually beyond that a little bit to this notion of cases that are arguably or absolutely in your view death eligible because of your understanding of the facts, which end up not being death cases because of the exercise of prosecutorial discretion.

Every time the prosecutor does that and every time prosecutors across the state do that in any kind of substantial number, we end up with a situation where a whole

bunch of people who could have gotten the death penalty, as you put it, don't and we come dangerously close to that 15 percent figure that you ascribe such significance to.

So the solution is the prosecutor to charge every special circumstance case and seek death in every one of them at the risk of being criticized by Professor Baldus.

A Is that a question?

Q Well, that's a situation I'm asking you about.

Isn't that the implication?

When capital cases aren't treated capitally it contributes to what you understand to be the state of affairs that *Furman* was designed to prevent.

A Again, we need to distinguish between the low death-sentencing rate and the low rates of death eligibility. And you are speaking now to the death-sentencing rate.

Q Actually, I'm speaking to both, because at the end of the day that's really what your final analysis is.

I'm talking about that portion of your declaration that begins on page 27 forward. You end up comparing -- maybe -- I don't know whether this is provable, but let me give it a try.

I visualize this as a Venn diagram, the outermost circle, the largest circle is your 27,000 universe. Okay. And then there's a circle somewhat interior to that but wholly subsumed within it, and those are all the cases that you and

your coders determine upon analysis to be death eligible because of their factual character as you understand it.

And then inside of that is this tiny little circle of people who actually get the death penalty.

And the problem, as I understand it from your point of view, is that that middle circle is too much like the outer circle. It's -- there's not enough daylight between the middle circle and the outer circle, and there's entirely too much daylight between the tiny little circle and the intermediate circle.

Another way of putting that is too many of the universe are death eligible and too few of those who are death eligible get executed or even sentenced to death.

A That last statement I can understand what you are saying. That's what the data show.

Q So is that three-circle Venn diagram, is that helpful?

A Yes. That's helpful, particularly when you translate into your assessment of how the situation works.

Q Okay. So if every death-eligible case were prosecuted capitally, every death penalty, death-eligible case as you define it were actually prosecuted in accordance with your view of it, and a death verdict were attained that third circle, the smallest of all circles would actually not be that much smaller than the intermediate circle.

A Yes.

Q The states --
A Sorry. That would depend upon how the juries felt about imposing death sentences.
Q Right. I understand. One way to enhance the likelihood that that smaller circle would be as large as possible which would be approaching the size of the intermediate circle would be to never fail to seek death.
A That's right. You would reduce the risk of that --
Q Right?
A -- that way.
Q And is that what prosecutors have to do in this state to get out from under this what you see as a problem?
A I don't know what prosecutors have to do.
Q When you recruited the students to work on this project, did you -- you sort of touched upon this before but I want to return to it.

You looked at people with attention to detail. You wanted them to have a decent academic record, but there was no GPA cut off, at least not as a hard and fast rule.

What did you ask yourself though about each of them to satisfy you that they possessed the ability and the experience to apply the substantial evidence rule with intellectual rigor?
A I asked mainly the instructors that they had. Each student had a small section instructor on which they write papers. I consulted them and told them what I planned to have

them do and asked them their opinion of whether or not they would be up to the task.

I didn't hire anyone if the instructor said no, I don't think so. There weren't that many of them really.

Q I assume you never -- you were never satisfied with their ability and experience to the degree that you thought it was equal to that of an appellate judge?

A No.

Q Who normally is the one who applies the substantial evidence rule in the real world?

A Correct. They are not judges.

Q Do you think their ability, your students that is, their feel for evidentiary strength, do you think that was as well developed and highly attuned as that of say an experienced prosecutor?

A No.

Q How long do you suppose each student spent coding the case?

A Two to three hours. Two to four hours I would say is better.

Q All right. We've got 1900 reports. We've got 21 coders which breaks out to about 90 cases per student, two to four hours.

A Uh-huh.

Q Well, I've exhausted my statistical skills, and we

should ask Professor Woodworth if he's been paying attention. That's quite a bit of time. I'm just trying to get a feel for the cost component of this for your overall budget.

A Well, the cost component was, you multiply the eight -- let me put it this way.

I know what the students cost the school, because they were under contract. They had in-state tuition, which was 15,000 each, and then they get paid seven dollars an hour up for 300 hours of work, and then I don't know what the amounts were that were paid to the former law students. I didn't keep those records. They sent their bills to the HCRC and to the federal defenders in Oakland.

Q And you mentioned -- whatever the multiplier is we don't know. But you mentioned this morning that the rate was 30 some-odd dollars an hour?

A Yes. 37.50 I think it was.

Q That would parry with first-year students in Iowa City.

A Yeah. First-year law grads. Yeah.

Q Okay. Now, when you were selecting students and you considered all of the things we've been talking about, did you consider whether any of them harbored views about the death penalty that might impair their ability to perform accurately and reliably in this project?

A No.

Q No, you didn't?
A I did not ask. I did not question the students' attitudes about capital punishment.
Q Okay. Then I think I know the answer to this question -- well, maybe not.
To your knowledge -- to your personal knowledge were any of your coders closely affiliated with any organizations that advocate the abolition of the death penalty?
A I have no knowledge of that.
Q If you would, just a moment, take a look at footnote one again and kind of run those names through your mind and let me ask if your answer is the same. Footnote one is on page three.
A Yeah. These are unsophisticated students. They aren't affiliated with political action groups as far as I know. We never even discussed the desirability of the death penalty. That issue never came up in our hundreds of hours together.
Our job was to focus on these probation reports and to code these things accurately, and that was the extent of our interaction.
Q To your knowledge none of those students had an affiliation with any anti-death penalty organizations?
A Yes.
Q How about yourself? Let's ask -- let me ask you about

your own objectivity in this. I know you've written a lot about the death penalty and I know you've been involved in death penalty litigation in a post-conviction context.

But would you describe yourself as someone who has taken sides in the ongoing public debate over the death penalty?

A Yes.

Q And, in fact, you've received awards from your anti-death penalty advocacy, have you not?

A Yes. But may I elaborate on which side I'm on?

Q Absolutely.

A I'm on the side of people who oppose the death penalty because of the way it's applied in practice. If we had an even-handed death penalty system I would not be opposed to it.

Q I appreciate that, and you have been -- you've received an award for your anti-death penalty advocacy. I mean, the award giver gets to decide why you're getting it. I mean --

A Can I tell you what I got the award for? You said "award for death penalty advocacy." I'd like to do tell you what I did to get the awards.

Q Sure.

A I wrote amendments in use in the Iowa legislature. Period. That's what I did.

Q And --

A Those are amendments that I thought would enhance the

fairness and the quality of the death sentencing statute that was ultimately to be adopted.

Q What is the name of the organization that awarded you this award?

A The Iowans Against the Death Penalty.

Q And they said something in connection with the giving of the award identifying why you were getting it.

A Yeah. Because I helped them focus the legislature on these issues, and that slowed down the process and made it less likely for the bill to be adopted. That's what the effect of my participation was. I was a technician writing amendments for the legislators.

Q Would it be wrong for them to say publicly that they gave you that award -- and again, they were speaking of their purpose in giving you the award -- it was an award for your anti-death penalty advocacy?

A Well, they can say that. I wasn't advocating anything. I was writing amendments. Period.

Q Whether it's right or wrong that's why they thought they were giving you the award. That's all.

Okay. If you would, turn to paragraph 28, and we're going to have to do -- we're going to have another definitional discussion. I'm going to ask you to explain some terms to me.

My focus here is on the last sentence. I'm sorry. I sent you to the wrong place, or maybe I didn't. If I said

footnote I meant paragraph.

A Paragraph 28; yes.

Q I sent you to the right place and didn't know it.

You are describing the legal sufficiency standard, and you said in your application of this principle, exculpatory evidence offered by the defendant as reported in the probation report is given no weight, but incriminating evidence offered by the defendant is credited.

Now, this is something we touched upon very, very briefly before lunch, and now I'd like to return to it, and what I'd like to do is first, let's focus on that very last word "credited."

When you say "credited," you mean treated as credible? Is that what you mean by "credited"?

A I take it as true.

Q Take it as true. Okay. And as contrasted with the phrase in the immediate preceding clause, given no weight that's the equivalent of completely ignored?

A Yes.

Q Is that your understanding of how an appellate court applies the substantial evidence test?

A Yes. That's on the basis of my study of teaching criminal law for many years and having read hundreds of legal sufficiency cases. That's what I infer, and that's the general perception of lawyers that practice criminal law that I know.

Q And that's why I asked you about it. You said "completely ignored," and this morning you said it was your understanding that appellate courts give little or no weight, and I'm just trying to be precise.

A I'm not going to quibble about that. I haven't done enough study of it to be able to quantify the extent of what weight might be given to it. It may be in some cases, but it's very rare, and every practicing criminal lawyer knows that.

Q Well, you had to instruct your students whether to give it little or no or none at all.

A I told them none at all.

Q Now, let's look at some other words in that same paragraph, "exculpatory" and "inculpatory."

I'd like to know a little more about how you use those terms, and specifically, when you say "inculpatory" and "exculpatory," you mean inculpatory and exculpatory as to what crime?

A It would depend upon M1 liability and the presence of a special circumstance. That's what that relates to.

If it's exculpatory, that would mean if you credited it that would reduce the likelihood of a court finding M1 there, if it was focused on M1.

If it was focused on essential special circumstances it would reduce the chances of the fact finder finding the special circumstance present. If it was

inculpatory, just the opposite would be the case.

Q I think you've answered my question. I want to make sure. My question was, you considered the inculpatory/exculpatory dichotomy in regard to an offense, and the offense is not necessarily the charged offense, it's not necessarily even the convicted offense, it's the hypothesized offense with first-degree murder with special circumstances?

A Yes.

Q All right. Now, I'm just curious if you can understand, or you've had experience with the same piece of evidence being both inculpatory and exculpatory with respect to one crime as opposed to another.

A No. I'd have to give more thought to that. I can't give you an answer off the top of my head.

Q All right. Let me give you an example. A confession, words which are uttered by the defendant. Let's say the defendant confesses as follows:

> "Yes, I killed him. I built up the courage by drinking a case of beer and doing three lines of coke, and then I killed him."

Now, we all can see I think the exculpatory quality of that -- pardon me -- the inculpatory. Maybe less easy to see is the exculpatory quality. I'm just wondering how attuned your students were to a more nuanced statement like that.

Were they instructed to focus on, "I killed him, I killed him," and ignore all the part about the case of beer and the lines of coke?

A Yes.

Q Okay. I got the idea.

How about this?

"I killed him. Of course I killed him, and I'm damned glad I did. After all, I caught him in bed with my girlfriend."

Is that inculpatory, exculpatory, both or neither?

A I'd say the first part that he killed him would be the only part you would take into account. The latter part would tend to be a mitigating factor, and we aren't taking that into account.

Q It would negate malice?

A No.

Q It wouldn't? It might?

A Well, it might. That's if you wanted to credit it. We didn't credit it.

Q Right.

A That's a perfect example of when we ignore what the defendant's offering up as exculpatory evidence. That's a perfect example, because if you read those probation reports they are rife with statements like that.

Q Let's just continue this pattern. I think I get it.

"I shot him. Damn right I did. I shot him twice right between the eyes. I thought he was reaching for a gun."

A Same --

Q It's all incriminating --

A We just take the incriminating --

Q -- and we just ignore the part about reaching for a gun?

A We ignore it just like the probation officers ignore it.

Q I'm sorry?

A You read the probation reports. They ignore it as well, believe me.

Q All right.

"Yes, I killed her. You see, we had sex that night, and just like -- it was just like we'd had sex a hundred times before. But this time she told me she was going to claim I raped her, so I had to kill her because I just went nuts. I lost control at the thought of having to face a rape charge."

Kind of a mixed bag isn't it?

A Yeah. I'd have to think a little bit more about that

one. That's a little more complicated.

Q Well, other than exculpatory evidence, what else in the probation reports did you instruct your students not to credit?

A Nothing.

Q All right. So you didn't tell them to ignore inadmissible evidence?

A No. We did not focus on the admissibility of the evidence that was reported in the probation reports.

Q So --

A All the evidence that -- I can say this, that I can't think of a probation report and a final narrative statement that rests on inadmissible evidence. There may be some, but there are very few.

Q How would you know?

A Because I know the law of evidence.

Q You think a Miranda violation would ordinarily appear on the face of a probation report?

A No.

Q Let me try this. What if the entirety of the evidence supporting murder one liability and special circumstances was based on inadmissible hearsay? Legally sufficient in quanta to be sure, but totally inadmissible.

That case would get coded as a death-eligible case, would it not?

A It could be. That could happen.
Q Well, why wouldn't it be?
A Well, I don't know. I'd have to tell you the facts of the case, if some issue like this comes up -- look, these issues didn't arise very often. I can assure you of that. These were people who were convicted of crimes, and very rarely would you find the case parsing with evidence in that kind of way.
Q When you say the case parsing --
A That is the probation report, the probation report. These probation reports have been written by probation officers who are really kind of down to earth people, and they report the facts as they understand them to be in the case, and that's what we went by.
Q So you made no effort to educate your coders on the California Evidence Code?
A No.
Q Did you make any effort to edify them as to California corpus delicti rule?
A No.
Q Did you make any effort to acquaint them with the constitutional rules that govern the admissibility of an accomplice's statements?
A No. We went by the facts as reported by the probation officer.
Q So the Fourth Amendment made no difference?

A No.

Q So if illegally-seized evidence was the support for murder one liability or a special circumstance, and the underlying Fourth Amendment violation was miraculously omitted from the probation report's description, that case got coded as death eligible?

A That's too hypothetical a case for me. I can't tell you. We did not go into all these subtilties of the law.

We took the cases as the probation officers presented them, and my suggestion is, if you find that that is unacceptable, then that's a position you can take.

I'm telling you what the basis of the judgments were and what the probation officers reported. Period. Full stop.

Q Back to the probation reports. Is it your understanding that the information in the probation reports comes somewhat from, substantially from, exclusively from police reports?

A Well, also interviews with the -- that's the best evidence, the stuff that's coming from the police reports.

But often there would be independent witness statements that might not have been in the report, but also the statements of the defendant and the statements of the victim -- the non-decedent victims in the case. The probation reports would often include that kind of

information.

Q And it might or might not shed any light on the factual circumstances surrounding the crime?

A Yeah.

Q I mean, certainly comments from family members speaking about what they thought was appropriate punishment --

A Oh, no, no --

Q -- had no bearing on --

A I'm talking about the witnesses --

Q I understand.

A -- the statement of witnesses, by non-decedent victims, for example, and those were all very valuable pieces of information.

Q Whatever it's admissibility?

A Yes.

Q And with respect to -- well, police officers who extract involuntary confessions rarely describe the involuntary circumstances in their police report.

You think that's fair to say?

A I don't have any knowledge of that.

Q Well, let's assume they don't.

A Okay.

Q And if that's the case, and the principal source is the police report, an involuntary confession, therefore an inadmissible confession, would still -- the involuntary

character of it would not appear in the probation report?

A That's true.

Q And if that's what was used to support M1 liability with special circumstances, that case would get coded as a death-eligible case?

A It possibly could. We just don't think there are --

Q Even if in the real world a proper judicial ruling would exclude that and maybe even make the case wholly unprosecutable, not just death eligible, not even prosecutable at any level?

A Well, they all resulted in a conviction.

Q Well, I'm asking a hypothetical.

A Well, but the hypothetical is not applicable because every case resulted in a conviction and has a probation report associated with it.

Q Right. I'm not talking about your sample. But I'm discussing a probation report that would not reveal the nature of the involuntary circumstances surrounding the extraction.

This may not have been a probation report you would encounter. I appreciate that.

Let me ask you this. Did you give your students any instruction regarding the defenses at all, any defenses at all? Self-defense, the role of voluntary intoxication, partial defenses? Was that covered in any of the materials?

A Yes. We talked about defenses, but normally the

evidence of the defense was coming from the defendant, and we discounted it.

Q Okay.

A Remember, these people were all convicted.

Q I understand.

A Okay.

Q How about in the felony murder context? How much time or paper was devoted to edifying your student coders about defenses to the underlying felony to a hypothesized felony murder special circumstances?

A We instructed them to code what was charged, and found with respect to the underlying felonies. That's what they did.

Q My question, though, is -- may involve a hypothetical where there was no felony murder charged. There was no separate felony murder, special circumstances, and there was no underlying felony charged, but the facts in your coders' estimation appear to support it.

My question is, how much did your coders know about defenses to the underlying felony?

Let me give you an example to make it easier.

Let's suppose the underlying felony in a felony murder case is rape.

What, if anything, did your coders know about the effect of a mistaken but good faith and reasonable belief that the victim had consented?

A Oh, they would know that from having taken criminal law. They would know that much.

Q Were they -- they would know that --

A They would know that that could possibly be a defense.

Q Mistaken but good faith and reasonable belief?

A Yeah. And they would understand. Those would be the kinds of issues they would bring to me.

Let me tell you, when any of these subtle issues of law came up they brought them to me to resolve. They didn't just do it on their own.

So that if there was clear evidence in the case that there was a strong defense that you could really credit, which is very rare, on the facts as they were given by the defendant, then we would take that -- we would take that into account. But that's a very rare circumstance you are talking about.

Q I thought you ignored stuff that came from the defendant.

A No. The -- if we saw -- generally, we ignored it. But if we saw that there was clear evidence and the state admitted that there was a defense and the probation officer said that we think there's a defense here, then we would credit it; yes.

Q How does the prosecution evince their belief that a defense may be viable except by not charging it?

I mean, do you see recitations in probation reports by probation officers explaining why they didn't charge it at a higher degree? Have you ever seen that?

A Not in a probation report, no.

Q Did you see it in any of the materials? In any of the cases, any of the 1900 cases, was there some description from the prosecutorial agency that explained why they didn't charge a special that you thought was there, for example?

A No.

Q Now, how confident are you that for purposes of California's felony murder special circumstance that your coders were mindful of the distinction between a murder committed in the course of a robbery and a robbery committed in the course of a murder?

A We spent a lot of time on that.

Q 'Cause one of those is death eligible and the other one isn't.

A Yes, I understand that. That was one of the issues that was highlighted in the HCRC legal materials, and we went at length on that.

Q Now, credibility did not figure in this at all -- credibility of determinations. Your students were not asked to assess the strength of evidence except to the extent that it bore on the legally sufficient evidence standard; is that correct?

A Well, credibility of witnesses would depend on whether it was a defendant or somebody else. We wouldn't give any weight to the testimony of -- the exculpatory evidence of the defendant.

Q Well, other than that absolute rule of not believing anything a defendant ever says, did you ask the students to assess the strength of the prosecution's case?

A Yes. Yes.

Q In any way?

A How much evidence was there? How strong was the evidence that they had? How many witness were there? What was reported in the probation report?

Very often there wasn't much information, but in other cases there was an enormous amount of information.

Q Did you evaluate the strength of the evidence for any purpose other than answering the question posed by the substantial evidence rule?

A No.

Q So, in a particular case, let's say the sole witness to the events establishing a special circumstance was an alcoholic with 20/60 vision and 12 felony convictions, but the refuting evidence, refuting the special circumstances that is, were independently cross-corroborative accounts of exactly the same event from 12 Eagle Scouts and the Dalai Lama, that case would get coded as death eligible?

A So you are saying we had an alcoholic and then Boy Scouts? They are the ones offering the testimony? Is that it?

Q The special was supported by an alcoholic with bad vision and many felony convictions.

A Okay.

Q Negating that -- by the way, the former is legally sufficient. Negating that are 12 Eagle Scouts and the Dalai Lama, who undermined the special circumstance.

The special alcoholic with the felonies, incredible though you may think he is, is legally sufficient.

And it's for that reason that that case would get coded under your system, I think, tell me if I'm wrong, as death eligible?

A I don't see where you are coming up with this. We have -- that's the kind of situation where we would weigh the credibility of the witnesses. If the inculpatory evidence is coming from somebody who was totally unreliable and the exculpatory was coming from people who were reliable, we would be inclined to follow the exculpatory evidence.

Q I thought credibility only mattered, or weight, strength of evidence only mattered -- it's a binary question.

Does it or does it not meet the legal sufficiency standard? Isn't that right? Isn't that the way you've designed your --

A Well, what I'm saying is you use your sense when you

look at a record. If you look at that record you would say if the witnesses were all the Boy Scouts and they said there was no special and the alcoholics said there was, we would be inclined to go with what the Boy Scouts said because they were more credible witnesses. That's just a practical thing that anybody would do in reading a report.

Q Where in the data collection instrument is there a place to code very credible, slightly credible, more credible than not? Where does that come into your analysis?

A Close call. Close call.

Q Close call on what?

A On the presence of the special or the M1 liability. There's are a whole series of close-call issues we have throughout DCI.

Q And the close call is close call on whether it's legally sufficient?

A The close call is on whether or not you think that the evidence would support this finding and would be enough to persuade an appellate court; yes.

Q I thought that's exactly what you told your students not to consider?

A We are not talking here about statements of defendants. I thought you were talking about the statements of an alcoholic who -- are you talking to the alcoholic? Was he the defendant or a witness?

I misunderstood your question, sir.

Q If you would take a look at paragraph 27.

A Yeah.

Q All right.

"The second core principle of interpretation applies when the factual M1 status of the case or the presence or absence of a special circumstance in the case is not determined by a CFF. In these situations the issue is not what the coder believes would be the quote, correct, unquote, factual determination given the conflicting evidence in the case, nor is the coder's -- nor is the test a coder's assessment of how a reasonable juror would decide the factual issues in the case."

A Right.

Q The issue is, is there legally sufficient evidence -- you've gone to great lengths to tell me that was the standard.

A Let's take your hypothetical.

Q Okay.

A And the question would be, if the jury found this guy guilty and found a special, would it be affirmed by the Supreme Court of California? That's the issue.

Q Actually, let's say in my hypothetical the defendant

was accused -- he was convicted of voluntary manslaughter, and the task before your coder is might this be a special circumstance? Might this be murder one with special circumstances?

A Yes.

Q And if you pay attention to the testimony recited, or the account recited in the probation report attributable to the alcoholic with poor vision and felony convictions, it is a murder one with specials.

But if you look at other evidence in the record that undermines it and the source of that is the 12 Boy Scouts -- forget the Dalai Lama -- that case would get coded, even though the jury returned a verdict of voluntary manslaughter or the defendant pleaded to it more correctly, that would get coded as death eligible.

And it sounds to me -- if the answer is no, it's only because you are engaging in credibility determinations, which is the one thing you told me you weren't doing. So straighten me out.

A Okay. The credibility determinations relate to the defendant. We don't believe what the defendant says. He has no credibility in our eyes, just like defendants have no credibility in the eyes of appellate courts. That's the rules that we are applying with respect to credibility.

All the other things you take into account and you

put them in the mix, and you say, if this guy was convicted how would the Supreme Court of California respond?

And under those circumstances if we look -- if we make a determination that we think a jury would find it to be a death-eligible case we look for authority to establish that.

That's -- these are not just guesses. We are looking at appellate authority to support the judgments that this case is one that would be sustained by the California Supreme Court.

Q So if the source of the evidence establishing M1 liability and special circumstance is a hopelessly incredible person, that case would not be coded as a death-eligible case even though the hopelessly incredible testimony is legally sufficient?

A I think in this case what the students would do is code this as a close call.

Q Then what would you do?

A I would make a determination of whether or not I thought that this would be sustained by the appellate court. If there was a conviction I would need to find some authority to support that position one way or the other.

I would like to find some evidence that if there were a conviction in this case, a case that said, "No. This was inadequate," the presumption is that whatever the finding

is of liability that that's going to be sustained.

Q Let's assume this was in a case where there was a plea of voluntary manslaughter so there is no --

A No, no. What I'm saying is we look for other authority, Counsel. We look for other cases that had facts similar to this that did result in a murder one conviction.

Q You know that appellate courts do not reweigh the evidence and make credibility determinations?

A They make a determination, sir, of whether or not the evidence was sufficient to support the finding of liability. That's what they do.

Q And in doing that they do not reweigh the evidence. You know that.

A They do not formally reweigh the evidence. They ask, is this a credible finding?

Q They do --

A Could juries -- rational juries reach this determination and if they say, "Yes," then that's sustained?

Q And a rational juror could be an alcoholic.

A That's right.

Q And they are not always wrong. They are not always wrong.

A That's right.

Q So this case would get coded as death eligible?

A This case could get coded as death eligible, yes.

It -- not in the abstract, Counsel. The thing that you are overlooking I think is that we look to authority on the basis of decisions of the appellate courts to make these judgments. They weren't made in the abstract.

Q Does the DCI contain quantifiable measures of the strength of evidence?

A No.

Q It would have been possible to include that feature, would it not?

A It could have been.

Q In fact, you developed those very features.

A Yes.

Q And used them. They were available to you. You could have accounted in this study for the strength of evidence and you chose not to.

A We chose not to. What we chose to do is rely on our individual assessments of the cases and to take that into account in that context.

Those other studies were involved in quantitative measures of race effects where strength of the evidence was considered to be important for that judgment.

Q If you would please take a look at paragraph 32.

A (Complies.)

Q In that paragraph -- I'm focusing principally on language that appears in the third sentence where you talk

about:

"Close call classifications arise when a M1 liability or special circumstance classification is not determined by a CFF and the circumstances of the offense are sufficiently well understood to support coding."

Now, I'm going to ask you about that state of affairs.

A What line are you on, Counselor?

Q It's the third sentence. I'm actually looking at your fifth -- fourth declaration, not fifth, but I happen to know there's no difference in content in this paragraph.

A I've got to find what you are talking about. What footnote is it anchored to?

Q It's not a footnote. Well, footnote 19 and 20 appear in it.

Let's do it this way. Are you at paragraph 32?

A Yes.

Q You see the caption?

A Yeah. "Measuring death eligibility" --

Q First sentence begins "We measured."

A Yes.

Q Second sentence begins "Each of."

A Okay.

Q Third sentence begins "Close call."

That's the one.

A Okay.

Q Now, let's look at the last nine words.

A Yes.

Q Eleven words. Sorry.

A Yeah.

Q That state of affairs:

"Circumstances of the offense are sufficiently well understood to support coding."

That's a state of affairs you are describing.

A Yes.

Q And my question is, how do you know when that state of affairs is achieved?

A Well, we make a judgment as follows. We make a judgment as to whether or not there's enough procedural information in the case to apply the controlling fact finding rule, and we know enough about the nature of the interaction between the defendant and the victim and what was done to determine if there were special circumstances present in the case. That's what we characterize as sufficient information.

Q So as soon as you have enough to know it's M1 and special circumstances you stop. No need to look for more evidence, like evidence that might, say, negate malice and make it not M1? You know --

A We look at all of the evidence.
Q But you have to stop at some point, and you stopped --
A What I'm saying is that evidence of -- evidence that would negate malice, that would be part of the ball of wax so to speak that made the case sufficiently well understood to code.
Q Well, maybe not. That's why I'm asking. When is that state of affairs reached?
The circumstances of the offense are sufficiently well understood to support coding, and if it's sufficiently well understood to you to support the coding you want, M1 with special circumstances, you stopped. Once you get enough --
A Sir, that statement is completely incorrect. It's not the coding we want. We go by what the facts tell us. We don't have a desire one way or the other in any of those cases.
Q I appreciate that. I will rephrase it. I appreciate that.
Not the coding you want, but M1 special circumstances. If that point is reached the search for further evidence is suspended.
A No. No. You look at all of the evidence.
Q Okay. I'm asking about what's before you, because your describe this dynamic where you look for evidence and you think you have enough and you make a coding decision, as contrasted with the situation where you look at the evidence

before you and you feel maybe you don't know enough about the case and you have to go to other sources.

A That's right.

Q And what if it's those other sources that contain the evidence that indicates malice. You won't find them, will you?

A Well, we make a judgment on the basis of whether or not we have enough information here to make a sensible evaluation of the whether or not a finding of M1 would be sustained by the appellate court. That's the only question we are asking.

And it's true, if we found that there wasn't enough evidence to be able to have confidence in that judgment, then we would code it as a case where we would need to get additional information.

Q Have you ever heard the expression "less is more"?

A Yes. I'm not sure how it applies in this context. Perhaps you can help me with that.

Q I'll give it a shot. Sometimes a manslaughter is something that looks very much -- very much like a murder until you know more.

A That's right.

Q It is a lesser crime but a richer and more complex fact pattern, and if you stop when you decide it's M1 you very well may not know why it's not M1 but VM.

And I'm asking you in the face of a statement that

says we code when we've reached the point where the circumstances of the offense are sufficiently well understood to support a coding, and you tell me the coding you would make is M1 with special circumstances, you are blinding yourself, maybe not willfully, but in effect to evidence from other sources that would mitigate malice and reduce what looks like an M1 with special circumstances to a voluntary manslaughter?

A Counsel, you are raising two issues. One is, do we have to always consult additional information beyond the probation report to make a valid judgment? That's one question. That's a question about the methodology.

The second question is, when you look at a case that resulted in a voluntary manslaughter conviction with intentional killing, we would look at the additional information in the probation report to see if that really constituted a first-degree murder case or a voluntary manslaughter case.

It seems to me you are talking about two different things, if I'm reading your questions correctly.

It's true that in most of the cases we did not consult or have access to richer, different information. We were restricted to the probation reports. And if the probation report didn't have evidence that would allow you to assess whether or not this was a voluntary manslaughter

conviction we would have been mislead.

But that is not the typical case by any stretch of the imagination.

Q Now, before you decided to structure this entire study around your definition of death eligibility, which is this factual assessment by reference to the legally sufficient to support a conviction standard, did you undertake to learn or research how the United States Supreme Court has used that term in the years since *Furman*?

A Legal sufficiency?

Q No. Death eligibility. Again, it's a term of art.

A No. I understand the term.

I can't say precisely that I did a separate investigation of that. But what I did do is the following investigation.

I looked at the study that we did for the New Jersey Supreme Court where we used precisely this methodology, and these very issues were brought before the New Jersey Supreme Court as a body, and they instructed us to apply the methodology that we are applying right here. That was the legal authority that I was relying on in this case.

And a similar situation happened in our study of Nebraska, where the prosecutors objected to our use of this methodology, and it came before the crime commission, and they said, "We think this is an appropriate methodology." That's the

authority that we were relying on that arose in the conduct of empirical studies.

Q If it's clear from Supreme Court decisions that death eligibility means something to them, do you think that's irrelevant to how you define --

A And I think it means that a case is death eligible if a case has elements of the murder one liability and the special circumstances present in them.

Q I realize that's your definition.

A Let me try Justice White, Justice White --

Q My question was, did you edify yourself as to how the United States Supreme Court uses the expression "death eligible" since *Furman*?

A Yes. That's what I'm coming around to.

When you look at the cases, for example, Justice White in a case -- I think it was the Georgia case that sustained the "hack factor," and it is either -- he was quoting Justice White, but maybe the decision was written by Justice Marshall, that there are many, many cases comparable to this where death sentences are not being imposed or sought. That was clearly what he had in mind, that those are the death-eligible cases that aren't being prosecuted. That's what informed me.

And that idea came from *Furman*. It came from the opinion of Justice White in *Furman*, and is echoed in a number

of Supreme Court decisions. That's my understanding of what their notion of death-eligible cases.

Q Do you recall whether that phrase was used, "death eligible"?

A I don't know that they used that exact word, but that's the concept that has been imposed in this case under the law.

Q I understand the concept.

A And that's --

Q If we could look at Table One, please.

A Yeah. (Complies.)

Q Now, earlier today you acknowledged that people who are convicted of first-degree murder without special circumstances have a zero-percent chance of getting a death sentence in California.

People convicted of second-degree murder and necessarily without specials, there were never specials associated with the second, they also have a zero percent chance of being sentenced to death.

Likewise, if you are convicted of voluntary manslaughter, chance of death zero.

And even first degree with specials but the prosecutor doesn't seek death and so no penalty phase is ever convened, chance of death is zero.

I'd like you to look at line four, column B, in part

one, where you've got that 55 percent rate calculated by 15,013 over 27,453. I want to focus on the numerator.

How many of those 15,013 had a zero-percent chance of being sentenced to death?

A Well, yeah. Clearly all of the cases that resulted in second-degree murder and voluntary manslaughter had a zero-percent chance of being sentenced to death.

Q So that's about 6,000?

A Yes.

Q Or a little over maybe. Yeah. Not quite half?

A Right. They had a zero-percent chance of being sentenced to death given the way it was charged by the prosecutor.

Q All right. And let me make sure I'm reading this right. If you would look at line three, your study shows that 41 percent of the people who had their cases disposed of as voluntary manslaughters could have and should have been prosecuted capitally?

A It's -- I'd say they were death eligible according to our definition. I'm not saying what should have been done at all.

Q If you would look at part two.

A Yeah.

Q Line one, column B. You've got your 80 percent figure. The numerator is 15,013 again. We've seen that number

before. We know what that is. That includes all the seconds and all the voluntaries. It also includes firsts without specials, and it includes firsts with specials where death was not thought.

A Yes.

Q We really can't refine that number down. We can subtract the 46/42 seconds, and he can subtract 44/53 voluntaries, but we don't know how many of those first-degree murders were without specials, and we don't know in how many of those first degrees with specials death was not sought. But suffice to say that the number would be less than the total. We would have to subtract four separate elements to get that number.

A That wasn't the issue that we were addressing here, sir.

Q I know.

A The issue here was --

Q It's the subject of my question.

A Pardon me?

Q It's the subject of my question. I know this -- I'm trying to distill from your information some information that I'm interested in.

A Okay.

Q If you would jump to Table Three you will find this on page 18.

A (Complies.)

Q Now, here we've got similar kind of data, but this is where the comparison comes in. In Part One we are seeing a comparison with New Jersey and Maryland, and in Part Two the comparison is done to Nebraska with a slightly different mix, because in Nebraska you are throwing in the voluntary manslaughters as I read this.

A That's right.

Q Okay. Now, if we were to look -- first let me ask you this. You wouldn't have done this unless you thought there was some significance to how California compared to other states, and if you could take a minute to explain to me why that matters in light of *Furman*.

Why does relative breadth matter as opposed to meeting or not meeting that 15 percent magical number?

A The issue is not the 15 percent. The issue is what is the rate of death eligibility? The 15 percent has nothing to do with that question.

Q Well, what does it have to do with other states?

A It has to do with the following. The first threshold issue that we were asked to address here was, what's the rate of death eligibility among M1, M2, voluntary manslaughter cases?

And when I was analyzing that it occurred to me I did the very same thing before. I did the same thing in Nebraska and did the very same thing in Maryland -- sorry --

in New Jersey.

And therefore I thought since we used exactly the same methodology it might be useful to compare the rates of death eligibility that were generated there with what they are here in California as a point of comparison.

Q I understand. I'm saying why does the comparison matter? Why is the state at any given moment with the broadest death penalty always unconstitutional?

A No, I'm not -- that's a legal issue. That's not my department.

Q I'm just wondering why it matters. I mean, New Jersey and Maryland are better than California.

A They are narrower. They are narrower.

What we were trying to do is show that this state's death-eligibility rate is far broader than other states --

Q Right.

A -- that we have comparable information. It's all a comparative matter.

Q Okay. Well, the next broadest state behind California, if California were to the repeal the death penalty tomorrow -- make it Monday -- on Tuesday would the next broadest one become unconstitutional?

I just want to appreciate why relative comparison matters.

A It's a combination of two things. It's not just

strictly the issue of death eligibility. What I'm giving you now, I'm giving you my thoughts about the legal theory in this case, which I'm not an expert on.

But what I'm saying is the two dimensions that are of importance here are the rate of death eligibility and the death-sentencing rate among death-eligible cases, and I don't know what the rate of death eligibility is among the next in line.

For example, if you want to look at the next case. Take your situation --

Q New Hampshire.

A Yes, New Hampshire.

Q So if California repealed the death penalty because its 37.8 is just way too big, it's way too broad, does that mean New Hampshire is now in worse trouble because California is no longer there to be the loss leader?

A Well, that would raise an interesting issue about New Hampshire because they have one sentence -- or perhaps two. They have one or two. I can't recall -- which just recently -- and you'd have to do -- if you did a comparable study we don't know what you would find.

Q Let's turn back to Table Three, where we -- where you talk about New Jersey and Maryland.

Now, the numbers that you provide there for New Jersey and Maryland these were derived from studies that you

concluded before you even started your California study; correct?

A I didn't do the Maryland. That was done by another criminologist.

Q New Jersey was yours?

A I did New Jersey.

Q And Maryland was Paternoster's?

A Paternoster's. Yes.

Q Paternoster's.

Now, you say in paragraph 43 and you've said several times today that the methodology used in the New Jersey and Maryland studies were you say similar to, in the declaration you said identical at one point this morning and then you said comparable at one point this morning.

They were not identical, are they?

A Frankly, I find it very difficult to see the difference.

Here the difference is that when we did the New Jersey study we didn't use a legal sufficiency test that we are using right now. We used the test of whether or not reasonable jurors under the circumstances would find death eligibility in this case. That was the test that we used.

Q And not to interrupt you but that's a test that you have eschewed in this study?

A That's right. And the reason for it is that I think

there's less legal authorities to support it.

Here in the methodology we are using here you can look to other appellate decisions in California to validate the judgments that you are making.

Under the New Jersey procedure you couldn't do that, but what we got was the imprimatur of the New Jersey Supreme Court. They said, "We agree these are death-eligible cases."

Q Not to jump ahead though, you used a different standard, but then you ranked them for purposes of comparison.

Isn't that what's loosely known as an apples-to-oranges problem?

A Compared them to what?

Q Take a look at Table -- the table -- pardon me. Yes, Part Two of Table Four.

A Those had nothing whatever to do with the kind of methodology that we used in New Jersey --

Q Because this is from the supplemental homicide reports.

A That's right. That's right.

Q But looking at Table Three --

A Yes.

Q -- where you compare New Jersey to California --

A Yeah.

Q -- those two studies, the New Jersey standard, as I

understand it, was not legally sufficient evidence but persuasive evidence?

A Yes.

Q So --

A Highly persuasive.

Q So --

A And we got the imprimatur of the New Jersey Supreme Court on it, that they agreed with our assessments. They were all challenged.

Q I appreciate that they agreed with your assessments, but the assessment was of a different question.

A They are essentially the same. There is very little difference between the two. I can tell you from having done it many, many times on many, many cases it really -- it comes up with the same results. Very little difference.

The one provides you with more authority when you don't have a court there to put its imprimatur on it, which we didn't hear. We wanted to be able to make findings that we could then seek out authority among the appellate decisions of this state to validate what our judgment was. That's why I like the legal sufficiency test in this jurisdiction.

Q In New Jersey -- in the New Jersey study, the coding was not done by students. It was done by judiciary personnel, was it not?

A Recent law students. They were recent law grads.
Q They were all employees of the administrative office of the courts?
A Yes.
Q Of course, the New Jersey study was also reviewed, maybe not in its entirety, with 50 experienced judges who participated in a culpability ranking survey?
Isn't that right?
A No. That was done later.
Q Later than what?
A Than my study.
Q I'm sure. That was the study they were validating.
A No. They validated the study that I created from my first reports with them. There's no question about that. The -- Judge Baime took over after I left as special master, and what he did in terms of getting input I don't have knowledge of frankly.
Q At all?
A I have a vague memory.
Q Let me -- do you know the results of the culpability ranking survey that was conducted by the 50 experienced judges?
A I have a general memory of it. I have not read it recently.
Q Would it be fair to say that their findings called into the question the accuracy and reliability of the

statistical models that you used?

A Not all of the rankings. They weren't questioning the rankings. That's not what they were questioning. They were questioning the validity of the statistical models. This had nothing to do with the ranking of the cases.

Q That's what I asked you about was the statistical model.

A Yeah, the models. It's the kind of models that George Woodworth produces, not the question about whether or not the individual cases were adequately coded.

Q Do you know who Professor Weisberg and Naus --

A Yes. They are consultants to the New Jersey Court.

Q And they found flaws with your statistical model as well.

A Yeah, but they -- Counsel, let me explain something to you. There's a difference between finding a flaw in a statistical model and drawing inferences from it and finding flaws in coding of individual cases as death eligibility. Those are completely different things, and Weisberg and Naus never made any judgments about that at all.

Q About that, being the coding?

A The coding.

Q Just the statistical models?

A Yes.

Q Which is what I asked you.

A Yes.

Q Thanks. And did Judge Baime make the same conclusion? He abandoned your statistical model; right?

A He did not abandon the statistical model. In fact, Judge Baime validated the method that we use to identify -- validated the method that we used to identify the special circumstances.

I stated very clearly in the "probation report" that he took over and used exactly the methodology that I put in shape, and he defined what the death-eligible cases were.

Q So Judge Baime did not write a report in which he questioned the accuracy and reliability of the statistical models you had developed?

A Now, you are -- again, you are conflating statistical model with the death eligibility of the underlying cases. They are not the same things at all.

Q I understand they are not the same thing, and I've only asked you about statistical models.

A Okay. That's a different question. That's a different question. And he did have questions about them and so did Naus and the other consultants.

Q Weisberg?

A Weisberg.

Q Now, of course, the New Jersey study was undertaken for a completely different purpose from the study that you

undertook in California; right?

A Yes. The predicate to it was, but you had to identify the death-eligible cases to make it valid.

Q But the purpose of the study was different.

A It was not to define the scope of death eligibility. That's right. It was to assess comparative excessiveness and race effects in the system.

Q And that's because New Jersey is what is called an "appellate proportionality review state." The Appellate Court actually performs a form of proportionality review.

A That's right and --

Q And this study was developed in an effort to assist in that effort; right?

A That's right.

Q Now, in the Maryland study the researchers, which I understand you did not do --

A Right.

Q -- that's Paternoster -- you had the benefit of a -- pardon me.

They had the benefit of a "substantial file of information."

That's a quote.

A Yeah.

Q Do you feel that you had a substantial file of information in all 1900 cases in California?

A Yes. Probation reports are considered high order of levels of information in this field of research.

Q Now, the information that appears in Table Three on Part One, line two for Maryland, none of that is your data. I mean, that's all Paternoster?

A Yes.

Q And he just gave you those numbers so you could plug them in?

A He didn't just give me the numbers. They were in his article. He didn't just pull them off the top of his head. They were reported in his study in a journal called "Margins," M-A-R-G-I-N-S, and that's where I have them, and there's a citation to it in footnote -- let's see, where is -- the citation to it in is Table Three, Part One, note two.

Q Okay.

A And I give the exact page numbers where those data are found.

Q So it came from a published report.

A Yes.

Q If you would, please, turn to page 17 and look at footnote 28 --

A (Complies.)

Q -- where you describe the Paternoster study --

A Uh-huh.

Q -- and jump all the way down to the bottom, to the

second-to-the-last sentence. And when you say, "Professor Paternoster provided me with the more precise numbers of cases screened," that is reported in Table Two, that is not information you got from his report or from his article but from him?

A No. That was the number screened. It wasn't the rate of death eligibility. The rate of death eligibility I got from his article.

See, that's a different issue. That's an issue of how many cases they've screened, and he -- 'cause I didn't know exactly how many they had.

Q Just do this for me --

A He said about 6,000, and I said, "Could you be a little more precise, Ray" --

Q Right.

A -- and this is what he came back with.

Q And that number is somewhere in Table Three -- pardon me -- Table Two? Table Two. I'm sorry.

It's in Table Two, is it not? No. It's in Table Three?

A Yeah, that's right, the 6,150. I asked him to clarify that.

See, what his report shows is here's how many we found were death eligible. And I said, "Ray, tell me what the population is that you screened?"

He said, "About 6,000." I said, "Can't you be a little more precise than that?" And he came back and said it was 6,150.

Q My question is, are the numbers for Maryland in Table Three derived from a published article or from -- is it unpublished data?

A The difference between the 6,150 is unpublished. He gave me that additional number. He had it reported as 6,000. I thought that was a little bit imprecise, so I asked him for a little more detail and he gave it to me.

Q And you did verify his research or his data?

A No.

Q You don't even know whether he did his own coding?

A I know he did his coding in collaboration -- he supervised the coding of graduate students that he had.

Q Do you know that from anything that appears in the article that you reference in footnote 28?

A Oh, yeah. He talked about who does the coding, is my memory of it.

Q In the article?

A I think so; yeah.

Q Let's look at Table Three again, and look at column B, line 3A. This is the *Carlos* Window law. Again, we see that numerator.

Can you estimate for me how many of those 10,516

cases involve cases in which the chance of being sentenced to death was zero?

A No.

Q Can you estimate?

A No. I could go back and do an estimation of that, but I hadn't done it for the purpose of this analysis, no.

Q Okay. But in order to reach that number we would calculate it by subtracting first degrees with specials where death was not sought, all seconds, all voluntary manslaughters?

A Yeah. That would not constitute a death-eligibility rate in my opinion. That would completely confound it what we are representing here.

Q Right. In order to get a true death-eligibility rate we have to plug into the numerator of people for whom the chance is zero?

A No. I think I've defined how we explained death eligibility. Either a special was charged and M1 were charged and found, or in the absence of controlling fact-finding they could have been charged and found. That's the way we defined it.

Q Part Two, Nebraska.

A Yeah.

Q And again here, same sort of analysis, comparative analysis to California in Part Two that you did comparing California to New Jersey and Maryland in Part One, the

difference being now it's Nebraska, and now we are throwing into the mix the voluntary manslaughter cases; right?

A Yes.

Q Okay. I don't suppose you could do this without researching it, but if you would look at line 2A, where you -- in the *Carlos* Window where you end up with 55 percent, the numerator in that fraction causing -- resulting in that percentage is 15,013.

You don't know how many of those were cases in which the chance of death was zero?

A No.

Q The California and Nebraska methodologies were also not exactly the same, were they?

A No. Different cases were screened.

See, in Nebraska and California they just screen first-degree and second-degree murder, but in Nebraska we also screen voluntary manslaughter probation reports. That's the only difference.

Q That's the only difference?

A Yes.

Q So when you say in paragraph 48 that they were the same, that's not quite correct?

A Wait a minute. I draw the distinction in here very clearly, the differences between them.

Q Let's look at paragraph 48. I could be wrong. I

thought you said they were the same.

A No. It says here on paragraph 48, it says:

"Both the death-eligibility rates are based on a screen on a death-eligible M1, M2 and voluntary manslaughter cases."

That's the distinction. That wasn't the case under the New Jersey and Maryland study. That's the point I'm making here.

The screening process was the same, but not the population of cases that were screened. That was the difference.

Q Well, the probation reports that you looked at in Nebraska were always prepared post-conviction, weren't they?

A I don't know that, frankly. I don't know that. I delegated a lot of that coding process to my co-author, Attorney Lincoln.

Q So if the Nebraska Law Review article says that it's true?

A What does it say?

Q That the reports were prepared following conviction.

A Well, I guess that would very likely be true, then. I don't recall that detail frankly.

Q Whereas in California the reports were often prepared pretrial, which is what you say in paragraph 16 --

A Yeah. I'd say about a quarter of them were; yes.

Q So when you did the California study you did not always have as you ordinarily did have in Nebraska the benefit of information gleaned from a completed trial record?

A That's right. The probation report was often not based on a complete trial record in about a quarter of the cases I would say.

Q Now, last week, as I know you know, Mr. Laurence asked me if I was going to -- actually, months ago he asked me if I was going to ask you about specific cases --

A Yeah.

Q -- and I told him I would. And then last week he asked me if I would be willing to identify them in an effort to expedite this proceeding, and I said I would and then I did, and I identified 10 cases, and I understand you've had a chance to look at all 10 of them --

A Yes.

Q -- and discuss them.

A Certainly.

Q I'm sure you are relieved to know that it's not going to be 1900 cases. It's only going to be 10.

A Yes.

Q And I'm going to go through this, and I'd like to do it very quickly, so this is a little unorthodox, but let me tell you something in advance.

I'm not here to argue with you. I just want to

know what it is about these cases that makes them death eligible in your view, and my purpose is not to quarrel. My purpose is to learn.

A Okay.

Q Now, before we do that --

MR. LAURENCE: Counsel, do you mind? I have his materials here.

THE WITNESS: All right. I have them right here, Counsel.

BY MR. MATTHIAS:

Q Okay. You're going to need one other thing as well, and it's Exhibit Triple X.

A That's in your case?

Q Which sounds like an exhibit in a First Amendment case, but --

A You are going to have to help me here, Counselor. I can't find my way.

MR. LAURENCE: I think they are the thumbnails.

MR. MATTHIAS: No, no. That's Triple Y. The Triple X is the spreadsheet that you generated, as I understand it.

Where are our witness exhibits?

THE WITNESS: Counsel, can I ask you; is the spreadsheet this document here that you are referring to (indicating)?

MR. MATTHIAS: Yes. It sure looks like it.

THE WITNESS: I have it here as well.

MR. MATTHIAS: He has a version. That's fine. We are all good. Thank you.

MR. LAURENCE: They are the same.

MR. MATTHIAS: They're the same. For our purposes they are the same.

BY MR. MATTHIAS:

Q All right. The first thing I'd like you to do, if you would, we know it as Triple X, but you know it as your spreadsheet. Just tell us what that is.

A Yeah, this is a listing of all the cases -- 1900 cases that are in the database, and the first column gives a project number, the second a name, the offender, and the third the special circumstances that were present under *Carlos* Window law, and the third under 2008 law.

Q The fourth?

A Oh, I beg your pardon. Fourth. That's right. Excuse me.

Q Okay. And to make sure I understand this, if some notation appears in columns three or four that notation corresponds to the special circumstance that you ultimately determined was factually supported in the materials before you --

A Yes.

Q -- for that case?

A Right.
Q And if no entry appears it means it was determined not to support a death-eligible situation?
A Yes.
Q Okay. And so I can reliably thumb through this document, and by correlating an entry under column one with a probation report I could be confident we are talking about the same case?
A Yes.
Q And we are doing just 10, and you know what they are, so let's go through them if we could quickly.
The first one is number 17.
A Okay.
Q Now --
A You want me to just proceed or --
Q Well, what I'd like to do is proceed this way.
What materials did you examine in your effort to prepare for what you knew would be questions from me on this case?
A I prepared the thumbnail that was created. I prepared the factual summaries that the students had created, and I had the added assistance of HCRC personnel yesterday, who helped me identify additional authority that we thought was controlling on this case.
Q That was authority that did not, in fact, affect your

coding decision but it was authority that was developed in the last few days --

A Well, look, put it this way. We had some authority for all these cases, and what HCRC personnel did was to see if they could find any more, and that's what they did.

Q They did not figure in the coding decision --

A Some of them did. There was always one authority that supported the coding decision.

Q So in the last few days research has been done to shore up these codings; is that --

A Not shore up the codings, but to provide additional authority for them. If you want to call that "shoring up," then yes, I would agree with you.

Q Now, you said you had the thumbnail, and then you said you had the thumbnail twice?

A I meant probation report.

Q Where do those narrative summaries that were -- that superseded the thumbnail and which I never heard about until this morning, do you have those with you?

A I have one right here.

Q Do you have one for every case?

A Yes.

Q I don't have the benefit of that, so I'm not going to ask you about it. If you want to refer to it I suppose you can.

A Well, all the facts that are in the little narratives

are also in the probation report. This is just a synopsis of what's in the probation report.

Q Well, I have to work off the thumbnails. Even though they have been superceded that's all I have. I have the probation report but I don't have this -- the superceding narrative that you would call it.

And the first thing I want to ask you about that, and I know you have them segregated out as a handy little package for yourself, I've done the same but the Court hasn't. So I'm going to refer to them by a document number that means nothing to you I don't want you to be distracted by it.

But this is Exhibit Triple Y, and it's page 001, and the nomenclature that's used in this in the lower right-hand corner is "Thumb 0013," and that's the thumbnail sketch for Case Number 17.

Do you have the thumbnail in front of you?

A I do.

Q At the very top on the first lines centered is what appears to be a date, October 31st, '08.

What is the significance --

A Wait. I'm sorry. We are on Case 17?

Q No, 17.

A Yeah, 17.

Q Yes. You don't have --

A 7/3/82 is the date I have of the offense.

Q No, no. Not the date of the offense.

At the very top almost in the margin, almost like it's the title of the document so to speak?

A Oh, I'm sorry. That's the date it was coded.

Q By a student?

A Yes.

Q Okay. So if I went and looked at the state of the protocol on that date -- you described earlier how this is sort of an organic document that was regularly, repeatedly supplemented with new materials -- if the supplementing materials are all dated I'll be able to know from that reference what the protocol looked like on the day that it was used to make this coding decision; is that correct?

A Yes. And I will advise you again that the coding -- the thumbnail sketch is not our judgment of the authority of coding in this case.

Q I understand. I just want to know what that date means.

And remind me: Is 10/31/08, is that pretty early in the coding process, toward the middle or toward the very end of it?

A This is fairly early on. It started in August '08.

Q Okay. Now, my question is really very simple, and I promise to keep my promise.

Can you tell me what it is about this case that makes it death eligible?

A Yes. There was M1 liability that would arise from either a premeditation and deliberation or the presence of torture.

There was also the presence of the torture, special circumstance, based on the fact that this victim was held down and attacked by the victim, stabbed 38 times as the victim lay on his back secured there by a co-perpetrator.

I also think that even though it is not so coded this is a lying-in-wait case, because the defendant lured the victim to a corridor in the prison. And that's -- the watching and the waiting is ignored in there and then he attacked him.

So I think it's supported by both the torture and the lying-in-wait special circumstance.

Q Do you have any factual material in connection with this case other than the probation report?

A No.

Q And it's your understanding that a second perpetrator was involved in this melee?

A It says "where another inmate held the victim down" --

Q That's in the probation report?

A Yes. I don't know where it would have come from except there.

(Pause in proceedings.)

MR. LAURENCE: In the interest of time, can I suggest it's on page five at the bottom of the probation report?

THE WITNESS: Yes. There it is, Counselor, the last couple of sentences there. That's where he was lured to a portion -- that's the lying-in-wait component, and that the other inmate held him down.

BY MR. MATTHIAS:

Q And that establishes torture?

A That is not what I said. I will say it again.

Q That was the question.

A What establishes the torture is that with a man held down on the ground, the victim stabbed him 38 times, the upper body with multiple wounds, and making statements he indicated he hated his guts while he was on the ground, those are the factors that make it death eligible.

And they are supported by a case called *Martin*, M-A-R-T-I-N, a 2000 Westlaw 22481524, where there were similar situations where there were 40 stab wounds, and another case called *Chatman*, C-H-A-T-M-A-N. It was similarly involved 51 -- sorry -- 51 stab wounds.

So those cases lead me to believe that had this case been charged capitally and he was found guilty of M1 with a special circumstance that the Georgia Court would have sustained that finding.

Q That Georgia --

A I'm sorry. The California Court. The California Court would have sustained the finding.

Q Understood. If you would look at the section of the thumbnail sketch that is called Section One. There's a lot of coding in there and I want to make sure I understand it.

But rather than have you go through it meticulously identifying every coding entry, let me just ask you this.

In gross, do these entries confirm that the coder believed this was not a death-eligible case and that it got changed?

A Yes.

Q And it got changed in that cleaning process that you described earlier this morning?

A Yes.

Q And that is reflected in that superseding narrative that I haven't seen?

A Superseding narrative.

Q You said that the -- occasionally the thumbnails contained errors and that you got together with your group of five students --

A Oh, I beg your pardon. Now I understand --

Q -- and you reviewed them and generated another document similar to but different from the thumbnail sketch which you called a narrative.

A Yes, it is.

Q And that is the report -- that is the document that explains perhaps in greater detail or at least evinces the so-called correction from non-death-eligible status to death-eligible status?

A So does this document, the spreadsheet. If you look at the spreadsheet --

Q I understand that.

A Very well.

Q That's how I called it to your attention. I see the 18 right there. It says "torture." I got it.

A Okay.

Q Does the narrative explain the rationale for that coding, that corrected coding, if you will?

A It just recites the facts and provides authority.

Q So it recites additional facts?

A I would not say they were really additional facts. It adds the fact that he was lured into a corridor, which really doesn't have to do with the torture. It has to do with the lying in wait. And that he was lying on his back -- a little bit more information. Essentially not different.

Basically, we came down to a difference of opinion about whether hitting the person multiple times that -- we have down here it was 38 times. That's what makes it torture.

Q Next case, number 79.
A Yeah. Okay.
THE COURT: Let's plan to take a break after this next one.
MR. MATTHIAS: Sure.
BY MR. MATTHIAS:
Q Now, this is another case that got coded as a torture.
A Yes.
Q And the materials that I received from HCRC show that no thumbnail was ever prepared. No thumbnail ever prepared.
I assume a narrative was during the cleaning process?
A Yes.
Q And it addresses the coding issues?
A Yeah. And the correct coding is stated in the spreadsheet.
Q And because I don't have the thumbnail, how did the student who took the initial cut at this case code it? As a torture under --
A I can't tell you how it was originally coded.
You know, we had 1900 cases. Sometimes the thumbnails were mislaid.
Q Okay.
A Every case had one created, but sometimes they got away from us.

Q Okay. Is it not reflected, then, in the narrative, which I guess you do have?

A Oh, yes. In the narrative. It's based on the probation report.

Q But that won't reflect how it was initially coded?

A No.

Q It also reflects the final coding, which is also reflected in the spreadsheet?

A That's right.

Q Can you tell me what -- again, you don't have to make reference to a legal provision. I got it. It's torture.

My question is factual.

A Okay.

Q What facts in this -- in the material before you make this a torture?

A Okay. The victim was bound, number one; had multiple wounds of different types. Those are the factors that implicate the torture special under the law. And manual strangulation.

Those all add up because of the different binding -- the multiple wounds, the different parts of the body, rib fractures, hemorrhages, contusions, abrasions, blunt-force injury.

So it's the number and the different types and the binding of the person and the method of killing that makes this a clear torture case in my judgment.

MR. MATTHIAS: Okay. Your Honor.

THE COURT: We are going to take a 20-minute recess. I want you to think -- when I get back we need to talk. I would normally stay as late as it takes, but because I'm not mobile I have a driver who's going to take me home and is going to pick me up at five, so we have that time. Let's talk about what that means when I get back.

MR. MATTHIAS: Okay. Thank you, your Honor.

(Whereupon there was a recess in the proceedings from 3:32 P.M. until 3:53 P.M.)

THE CLERK: The Court is back in session.

THE COURT: Okay. Had a chance to talk?

MR. MATTHIAS: Yeah, we did, your Honor. I think we are almost certainly going to go to just before you have to leave.

But Mr. Laurence and I discussed the possibility of picking this up tomorrow, but we don't know about your schedule. There are some extenuating circumstances that Mr. Laurence probably wants to explain that relate to Professor Baldus's situation.

THE COURT: Yeah. I don't know if I can get a driver tomorrow.

MR. LAURENCE: I'm sure we can find --

THE COURT: Well, can we -- and can we get a court reporter?

THE CLERK: I don't know, your Honor. I don't even know if the Court -- there's no security on this floor probably tomorrow either. I mean, it's Saturday.

THE COURT: Yeah. Well, let's go on.

Is Michael here? Let's go on. I think maybe our best bet is to just ask my driver to wait tonight and go as long as we need to. This is new to me, and it's a service that I think he'll do that. Let's go on.

MR. MATTHIAS: I'll try to pick up the pace a little bit.

THE COURT: Don't cut off anything that's important to your case.

MR. MATTHIAS: Thanks.

THE COURT: Let's go on.

CROSS-EXAMINATION CONTINUED

BY MR. MATTHIAS:

Q 140 is the next case. This was coded originally by the student, if I'm reading this exactly, and I think I am now since you've explained it to me, with no special circumstances, but in the final analysis at some point during that cleaning process presumably it became a lying in wait.

A Yeah.

Q So my question is as always, what is the evidence that supports lying in wait?

A All right. The defendant and the victim's wife had

separated, and she was coming back over to his home, and the victim, a non-decedent victim, arrived at defendant's home.

Defendant said he had said he had seen the victim and the non-decedent victim drive by the house three or four times. That's when the watching and waiting began.

This was a lying-in-wait case. He met the victim, the defendant, the non-decedent victim on the porch, invited them in into his house, and when they were in the entranceway talking he pulled out a weapon and attacked them.

To me that's a clear lying-in-wait scenario. And that's the way it's properly coded and that's the way it's coded in the database new.

Q Number 505, if you would.

A Number 505. (Stricken from the record.)

Q Excuse me. We are actually not saying names.

A Oh.

Q Okay. I probably should have mentioned that.

A I beg your pardon.

THE COURT: We will strike that from the record.

BY MR. MATTHIAS:

Q Just go by the number.

A Very well. Very well.

505 is another torture case, and that's the way it's coded in the database.

Here is where the defendant and co-perpetrator

found a thoroughly intoxicated man under a highway underpass. They inflicted on him multiple injuries, fractured mid sternum, hemorrhaging of different areas of the body suggesting external trauma, severe congestion. They beat him with karate-style attacks, knocking him into the ground, and then here's the payoff.

They -- co-perp tied the victim's hands, and together they placed a rope around his neck, and the defendant and the co-perp pulled the rope in different directions, strangling him to death all the while the defendant laughing real hard like he really enjoyed it, according to the probation report.

That's the basis for torture as a predicate for M1 and also support for the special circumstance.

Q Next one is 507.

A 507 is another torture case.

Q This was one, just to recite for the record, in which your coder found no special circumstance, as I read this. But that again was changed on further review during the cleaning process presumably.

A Yeah.

Q And my question is, as it always is, what is the evidence in support of death eligibility here?

A Okay. This is 18 -- special circumstance 18.

This has to do with the killing of a very young

child. Multiple injuries, different types of injuries, no help sought.

And the behavior was consistent with -- in the minds of the coroner "consistent with child abuse," and the head injury would have been amenable to prompt medical treatment, but the delay in seeking it was a major factor in irreversible brain damage, and let me tell you what the injuries were.

"Fracture of the right parietal region; fracture of left radius; fracture of the left distal ulna; fracture of metatarsus; possible fracture of right femur; rotation force injuries."

And even though one might view this as not establishing intent to kill, there is authority, and I can give you the citation if you would like, Counselor --

Q Actually, I'm just interested in the facts.

A Very well. That's the basis of it. That's the basis of it.

Q Thank you. 1178.

A Very well.

Q This is a case -- just to give a background on it this was coded originally by your student coders as a special circumstances case and therefore death eligible by virtue of a robbery, and upon cleaning the robbery was deleted and lying in

wait was found in its stead, if I'm reading the spreadsheet correctly and the thumbnail correctly.

A You are.

Q Thank you.

A And here's the reason --

Q So what is the basis for the laying in wait?

A The defendant stated that he saw the victim go to her car -- that's when the watching and waiting began -- opened the trunk, close the trunk and then gets into the car.

He then approached her and entered the car and assaulted her, and the victim fought the defendant and he stabbed her twice.

So there was the watching and the waiting, and it put her in a vulnerable position at which time he killed her.

Q 1682. This is a case in which there are more special circumstances found than you can shake a stick at.

Under the *Carlos* Window law this got coded as financial gain, multiple murder, lying in wait and robbery and the same under 2008 law plus carjacking, which was not in effect under the -- in the *Carlos* Window, and driveby, which likewise was not in effect during the driveby (sic).

So let's start off first with financial gain. What is the evidence of financial gain?

A There is none. That's a conflation.

There are five errors in coding in this case,

however it's still death eligible because in spite of those five errors it's factually lying in wait, and I can explain to you the errors if you would like.

Q Well, I think I know them. Whoever coded this got confused as to who the victims were.

A Yes.

Q And the entire scenario involving the robbery, which wouldn't support a financial gain special anyway, but it doesn't matter. It's the wrong victim. The person misread the report.

A That's right.

Q But you say there is lying in wait?

A Yes.

Q And so everything falls out because the coder was looking at the wrong victim. There's a second victim who didn't die.

A That's right.

Q So I think I know all that.

But you are saying it's still a lying in wait, so why don't you tell us why it's still a lying in wait?

What evidence from the probation report -- by the way, I probably should have asked this before, but in every case we've been talking about so far the entirety of the coding decision was made on the basis of the probation report --

A Yes.

Q -- correct? None of these were the subject of supplemental materials?

A That's right.

Q Okay. So I'll try to remember to ask that about the remaining cases.

A Yeah.

Q But you have the floor and it's lying in wait.

A The lying in wait is the defendant shot the victim in the chest, killing the victim outside a bar and fled the scene.

Here's an example of where the facts are insufficient to tell you whether it's lying in wait. However, the additional facts from the appellate opinion in this case provide the following:

> "Defendant waited outside the bar for approximately 10 minutes and then shot the victim in the chest from a distance of two feet as he left the bar."

A classic lying-in-wait case. To be sure those facts were not in the probation report. But nevertheless, in terms of consulting additional evidence the case, we believe, is still death eligible and should remain in the study.

Q I'm just curious, if the victim had decided to leave the bar nine minutes earlier would this not be a lying in wait? I mean, how long the guy is outside has got as much to do with how long it takes the guy inside to leave as it does have to do

with how long the guy outside wants to wait.

But you've explained why it's lying in wait, and I promised and have now violated my promise not to argue, so I withdraw my last question.

I understand your understanding of lying in wait.

Let's look at 1742.

A Yeah. 1742 is a --

Q Financial gain under both law --

A That's right.

Q And then more recent law you threw in the gang.

A That's right. The --

Q And let's take financial gain first.

A Financial gain has to do with the rivalry between gang members and seeking turf, and that that has -- we can construe that as a financial -- financial gain. However, the --

Q The turf is the gain?

A Yeah.

Q That has financial value?

A Yeah.

Q I want to understand.

A However, I'll have to say on re-examination of this case I think it's a stronger lying-in-wait case than it is a financial-gain case for the following reason.

Q Well, I didn't know you were going to say that, but go ahead and tell me why it's death eligible as a lying in wait?

A Yeah. Because it says:

"The 19-year-old defendant along with fellow gang members participated in an ambush" -- that's on page five of the probation report -- "of rival gang members and the victim was exposed and had no chance to escape."

And it says that "the defendant stated that his job was to wait for victims at a location away from the front lawn and to shoot the victims if they ran his way," which he apparently did.

So for that reason it would be a lying-in-wait case. If I were going to recode this myself that's the way I would code the case.

Q And that somehow evaded the attention of the initial coder as well as the coding -- the code cleaning process, and it was sometime between when Mr. Laurence told you I'd be asking you about this case and today that you decided that it's a lying-in-wait?

A Yes. There are other factors in here as well. I think there's sufficient support for the pecuniary gain, given the competition for turf on the part of the gangs, and also under 2008 I think 22 gang killing, a gang murder is present.

Q Actually, I'm not asking you anything about 2008 when

there's a difference.

A Oh, all right.

Q Mr. Ashmus was a *Carlos* Window defendant, as you noted in your declaration, so the scope of 2008 law, while maybe interesting as an abstraction and as an academic matter for you, it's irrelevant to the disposition of these proceedings because that's not the law under which Mr. Ashmus was convicted and --

A I understand. I understand.

Q Okay.

A Okay.

Q I think you know the next one because you have the list.

A 2217.

Q Exactly. Now, this is a case in which the -- this case was charged as a second-degree murder, was it not?

A Yes.

Q A slightly unusual quality about it in that regard.

A Yes.

Q But your coder decided that it's a clear lying in wait; is that right?

A Yes.

Q And the coder also found the jury nullification applies in this situation.

A That was an error.

Q That was an error. There is no nullification?

A No. Because the case was charged M2 and found M2.
Q So the CFF was simply not even applicable --
A That's right.
Q -- rather than an applicable CFF on murder one without specials, which would be subject to nullification?
A That's right.
Q Tell us why it's lying in wait.
A Here we have a situation where the defendant and the victim were quarreling. They were a husband and wife pair.

Defendant left the group, went into the house, and it was during a barbecue, and it continued without the defendant.

He spent a good amount of time alone, and he was thinking, and he obtained a weapon -- a rifle, I think it was. Yes, a rifle.

And the wife went in the house to drop off leftovers, apparently, and he confronted her with the weapon, and she ran out of the house and he gunned her down outside the house -- classic lying in wait for a vulnerable victim to appear, which is what happened in this case.
Q Was it the defendant running out?
A No. No. It was the victim running out. Did I say the defendant? Pardon me.
Q I might have misheard. I just want to know, what is the -- what fact in the particular establishes the lying in

wait? You kind of gave a narrative of what transpired, but I want to know what makes it lying in wait.

A Okay. It's the fact that the defendant left the interaction that they were having at the barbecue, that's when the watching and waiting began, and he went inside and obtained a weapon and waited for his wife to enter the house.

When she entered he assaulted her with a weapon and she turned and fled, and then he pursued her and gunned her down.

Q 5013. This is a torture, torture with a gang, which under '08 law, which we are not interested in, and this does involve jury nullification because the jury came back with murder two; correct?

A Yes, that's right.

Q And your coder determined that that was a case of jury nullification, and the test for jury nullification again was whether the jury ignored overwhelming evidence?

Is that the way it's phrased?

A Yes.

Q I don't want to put words in your mouth.

A Yes. That's right.

Q Ignored overwhelming evidence establishing a special circumstance and death eligibility and with an inexplicable display of mercy convicted him only of M2.

And why is this torture?

A Because the defendant and his co-perpetrators attacked and killed the victim in a brutal manner.

One of the co-perpetrators hit the victim with a baseball bat three to five times. Another one hit him in the back of the head with a shovel, and by this time the victim was motionless on the ground and the defendant and another co-perpetrator were punching and kicking the victim on the ground, and the victim died of massive head trauma.

I believe that that would be sufficient to establish torture for purposes of establishing first-degree murder.

In addition, he was liable for first-degree murder as an aider or abettor, and also that this killing was a natural and probable consequence of the conspiracy to confront this other gang.

Q That arguably goes to M1 and the gang.

A That's right.

Q My question was focused on the other matter.

A Oh, the torture?

Q The torture.

A Yes. It was the use of multiple weapons inflicted on a motionless victim on the ground and injuring him in a multitude of parts of his body that killed him.

That's my opinion of the predicate of the torture.

Q I understand your understanding of the torture.

If you would look -- we are done with all of those by the way. That takes care of the 10?

A Yes.

Q If you would just turn back to your declaration, and I'm going to ask you to look at Part Three of the last table that we were examining together.

A Was that Table Three?

Q I think it was Table Three.

A Yeah. Okay.

Q I'm sorry. I'm sorry.

I'm actually asking you about -- yes. I was asking about Table Three. I'm sorry.

That number, line one in death-eligibility rate, 37.8, everything on this chart actually, not just California, every statistical entry on this chart is derived from unpublished data documented by somebody other than yourself; is that correct?

A Correct.

Q Including necessarily the information dealing with California on line one?

A No. Wait a minute. Wait a minute. Just one minute. I would like to amend that.

If you look at footnote one, these data came from a published article published in the Texas Law Review.

Q Well, I know some of it does, but in footnote one, the very last sentence says:

"Professor Fagan and his colleagues generously shared their unpublished state-by-state finings for use in this declaration."

A That's true.

Q That's what I was getting at. I'm not trying to trip you up. I just want to establish that it is unpublished data.

Needless to say you have not validated it?

A No.

Q Can you tell me that that 37.8 -- I know from reading all of your other tables that that is the product of a numerator over a denominator.

Can you tell me what the numerator and the denominator were that produced 37.8?

A No.

Q Only Professor Fagan et al. would know that?

A Yeah.

Q You can confirm for me, though, because you do know something about their methodology, that some portion of that 37.8 percent includes cases in which the chance of a death verdict is zero.

A Their population is murder and non-negligent homicide. Sorry -- non-negligent manslaughter. It's murder, non-negligent manslaughter. That's their denominator.

Q And we will actually get to the -- these are all

supplemental homicide report cases data?

A That's right. And that's the population of cases that were embraced in the supplemental homicide report.

Q Right. Well, actually, we are going to spend a few moments on that in a minute.

If you would, please turn to Table Four.

A (Complies.)

Q Actually, we can look at Parts One and Two simultaneously and speed things up here.

This is actually all the same information; correct? It's just arranged a little differently.

A Correct.

Q In part one you've batched the states by region?

A Yes.

Q What is the relevance of that?

The implication, I take it, from this is that a certain death-eligibility rate would be very problematic if it were in one corner of the country but somehow it's not anything we should worry about if it were some other part of the country.

And I don't know why you chose to sort it in two different ways, so why don't you explain the sorting by geography?

A The sorting by geography has no special significance. It's just to give the reader a flavor for the data. Most people

when they look at information of that type nationwide think about it in terms of regions.

Q Okay. So --

A That's the only reason. It has no particular bearing on the issue of death-eligibility rates in any of these states.

Q Okay. So part two is exactly the same data arranged from high to low -- or low to high death-eligibility rates.

A Yeah.

Q Now, again, is the point here that California, which is down at the bottom because it's 37.8, should really try to be a lot more like Alabama, which is a 13.1?

Is that the point of arranging it in ascending order?

A It's not what it should or shouldn't do. It's just explaining factually where it fits in on this distribution, which is better demonstrated actually on Figure One. That gives you the picture much more clearly.

Q Yeah. We will turn to that in a moment, actually.

Actually, why don't we turn to it right now?

A (Complies.)

Q This is exactly the same data in yet a third form; is that right?

A That's right.

Q And the point here is the recurring frequency of similar death-eligibility rates, and the real eye-catching

feature of this graph is the 22-percent rate, where we see the frequency sores up to five, because five states are in or about the neighborhood of a -- of a death-eligibility rate down around 22 percent?

A Yes.

Q Those five happen to correspond to Texas, Maryland, Ohio, Missouri, South Carolina.

A I have to verify that. I take your word for it.

Q I don't think I'm wrong, so -- but that's the point?

A I'll stipulate to that.

Q There's a cluster of -- that's what this is illustrating, that there's a high concentration of recurring frequency to the tune of five.

Whereas much, much higher and much, much lower from that 22 most recurrent frequency to the far left we see Alabama, and to the far right we see -- well, New Hampshire and even further to the right California.

And the point here is to establish that Alabama and California are what can be referred to as "statistical outliers," which is a term of art, although there's a careful description of this in your declaration which explains that they are not actually outliers because they don't quite meet the definition of it but they are awfully close.

A Yes.

Q But they are short of being a statistical outlier.

A Professor Woodworth can give you more in his cross-examination.

Q And I would ask him about that, except for the fact that I want know to know whether you think being at or near outlier status is in and of itself of any constitutional significance in the sense that that was something *Furman* was concerned with?

A There was no comparative analysis in *Furman*.

Q Okay. And now I want to shift your attention finally to that portion of your declaration that begins on page 27 and then back to our Venn diagram.

The first half of the declaration as I understand it you compared the middle circle to the outer circle. Now you are comparing the middle circle to the smallest, interior circle that represents the universe -- that's probably the wrong word -- the population --

A Yes.

Q -- of -- of people who actually were sentenced to death.

So we have the small circle, a bigger circle, and now even a bigger circle, and we are now doing the second phase that you described of comparing that middle circle to the small circle; is that right?

A I characterize it as -- I don't use the Venn diagram terminology in this paper.

What I talk about are, what are the charging and sentencing rates among death-eligible cases? That's the issue presented by Figure Two.

Q I think I understand.

Now, do you have any understanding at all of what California prosecutors take into consideration when making a capital charging decision?

A I've never interviewed any of them or read any empirical studies about them.

I assume they behave as prosectors do around the country. They look at the evidence, look at the evidence in the specials, and the evidence in murder one liability.

Q And when they look at the evidence are they looking for legally-sufficient evidence or some other point along the spectrum of strength of evidence?

A They are looking for evidence that they think is sufficient to support a conviction and a death sentence, if they think death is appropriate in that case regardless of what the facts are.

Q Well, the reason I ask you about your knowledge of California prosecutors and what they consider in the capital charging decision, the reason I ask that is because I know from your article that you did undertake to inform yourself what Nebraska prosecutors took into consideration in making their charging decisions, and among the things you identified were

that the prosecutors would consider how likely it is that the penalty trial will result in a death verdict.

You also learned that Nebraska prosecutors consider whether the interests of justice would be served by a position of a death sentence, and you learned that prosecutors even consider things such as the opinions of the victim's family to be part of the constellation of considerations that will affect the charging decision.

And do you have any reason to suppose that prosecutors in California consider, or fail to consider those very same things?

A No. Those are based upon, if I remember correctly, on interviews that we had with prosecutors. But I assume -- they sound like the kinds of considerations that prosectors use nationwide.

Q I'm sure you are right. I'm sure you are right.

But declining to pursue a capital-eligible case, as you define it, in the interest of justice impairs under your analysis the state's death-sentencing rate. It makes it constitutionally suspect to the extent that you read *Furman*, saying that "infrequent death penalty verdicts are constitutionally suspect."

A I just prefer to talk about the facts rather than the legal implications if you don't mind. What it does is it reduces the death-sentencing rate.

Now, what the legal implications are for that, that's not my department.

Q We will come back to that, too.

What techniques, if any, did you use for controlling for the influence of other variables which affect the feasibility and propriety of pursuing the case capitally?

A None. That was not the purpose of the enterprise.

Q None, including strength of evidence --

A No.

Q But again, you do have -- at your disposal you have techniques for taking those into consideration?

A To replicate this controlling for those factors?

I'd like you to cite me the article that does that. I'd like to see it.

Q No. What I asked was that you have -- there are devices available to characterize cases as relatively strong or weak, and you did it in *McCleskey* and you've done it elsewhere.

A That's true, but it wouldn't give you a picture of the flow of cases throughout the entire system.

Q It would give you a different picture with a slightly different question asked, but you could do it.

You could, for example, if you wanted to know the extent to which the outcomes that you've documented here in your 36-page declaration, you wanted to know the extent to which they were influenced by perfectly legitimate

prosecutorial discretion, you could have brought to bear certain techniques on that question.

A What you would have to do is create a scale that takes into account the various factors that you mentioned that were present in the cases, and then you would create a scale of the cases that had, say, for example, one and then two or three or four of five of those, or create an index based on a multivariate analysis of some sort. You could do that.

Q You've done that?

A No, I haven't done that with respect to death-sentencing rates on a flowchart like this.

What we've done is looked at the death-sentencing rates overall. What we've done is looked at Table -- box 5A and -- 5A among cases characterized by their culpability.

But those are culpability. They aren't those factors that you are describing. These are enormously complicated projects that you are envisioning.

Q Well, a challenge to a state's death penalty statute is an awfully serious matter, so I wouldn't be surprised that the study of it might entail some complexity.

The point is, though, that at one point you did have a plan to assess how specific characteristics influenced charging and sentencing decisions and you abandoned that; is that correct?

A I don't -- I don't recall that.

Q Well, if you would take a look at the protocol.

And again, when I say "protocol," I mean that document that's called a protocol in the lower right-hand corner with the pagination system.

And turn to page -- I'm sorry?

A Let me say this, Counselor. If we had contemplated that at one time we abandoned that effort. We just didn't simply have the resources to do it if we did contemplate it.

And any time I do a study I'd like to do that if I could, but if we didn't do it here that's why we didn't do it. Simple as that.

I mean, if you want me to look at your exhibit, I'll be glad to do it. That's the explanation for it.

Q Sure. It's Protocol 0015.

A Let me see here. Perhaps you could just read to me what it says because I can't put my hands on it. I apologize for that.

Q Let's try reading it. It's actually just -- the paragraph that I have in mind is two sentences, so I think that will work:

"The second goal of the study is to document the flow of cases through the California capital charging and sentencing system." Period. "In this regard it will assess how specific characteristics

influence charging and sentencing decisions."

And at the end of day you did no such thing.

A That's right.

Q Do you think that had you done this it would shed light on the validity of the constitutional challenge that is before this Court?

A I don't know, Counselor, because I don't know what the results would have been. Had we had the data to do it I would like to have done it.

But this was way back in this early stages of the planning of this, and that was before the data collection instrument was created, and we just abandoned that plan over time.

Q If you would, please, turn to Figure Two. This is on page 28.

A Yeah.

Q Now, I'm looking at box 3B and -- 5A and 5B, actually, which are the subject of the changes you made in the latest version of your declaration --

A Yes.

Q -- provided yesterday. And I noticed some numbers got changed there. Basically 5A got changed in light of what is reflected in 3B.

Is that fair?

A Yes.

Q Okay. Now, let's just look at 5A, where you come up with the 4.6, and this is a death-sentencing rate as contrasted with a death-eligibility rate, which we talked about at greater length earlier.

A Yes.

Q That is calculated by 705 over 15,394 in its revised form. It used to be 16,007. Today it's 15,394, producing 4.6; correct?

A Yes.

Q Now, of the 15,394, can you tell me how many of those cases -- in how many of those cases was the chance of a death verdict zero?

A No.

Q But you can estimate. You can come close.

A Well, what I can tell you is the following. I can estimate a death-sentencing rate among cases where the court found a special circumstance present, where it was admitted an M1 liability was established. I can estimate that.

Q Okay.

A And that sentencing rate would be 21.

Q And that's -- what fraction -- pardon me. What numerator or what --

A 705 over 3404.

Q And 3404 is the number of --

A That's an adjusted figure. Go ahead. I'm sorry.
Q No. You tell me. Adjusted figure -- go ahead.
A What I'm saying is that you'll notice in the footnote here it says:

"We estimated that approximately nine percent of the cases of the special circumstance resulted in a term of years, and those cases were deleted from stage three."

When I computed -- made adjustments for that nine percent and added them back in, I get a denominator of 3404 divided by 705.
Q You are saying that nine percent of the special circumstances cases where a special circumstance was found?
A Yes.
Q Or admitted?
A Resulted in a term of years.
Q Instead of LWOP.
A Or death, yes. Instead of LWOP or death.
Q Nine percent of the people found in special circumstances avoided an LWOP or death.
A Yes. That's my estimate. I have to tell you, this was not the principal focus of our work. That's why I omitted that, but I thought you might be interested in that since that's what you were focusing on.

Q I'm very interested. I'm imagining how it's possible because of the proscribed sentence under California law for special circumstance murder is LWOP or death in the judgment of the jury.

A No. I don't believe it is, sir.

The proscribed sentence when there's a special found in M1 and the government waives the death penalty, then it can be sentenced by the court to a term of years. It's my understanding of the law. Maybe I have it wrong.

Q With the LWOP in tact.

A No. Without an LWOP.

Q Pardon me. With the special circumstances intact?

A Maybe I'm wrong in the law, but that's how I was advised by counsel, but that happens.

Q I would never say you are wrong on that.

Now, back to -- and that's not really the point I was asking about.

I'm looking at the denominator of 15,394. This includes a known number of voluntary manslaughters?

A Oh, yes.

Q And if you don't know it off the top of your head that's fine, but we could begin by subtracting them.

This goes back to my earlier question. I said -- I asked you whether of that number, some of that number the chance of a death verdict was zero, and you said, "Yes," but

you couldn't estimate it, but we could get close, and one way to start getting close is to subtract the voluntary manslaughters, the second-degree murders, the first degrees without specials -- we could do all of that. You have all of that data.

And then the fourth element to subtract would be the first degrees with specials in which the prosecution did not seek death, and I know from your declaration that you can't figure that number precisely because your data do not squarely focus on the rate that death-eligible cases advance to a penalty trial.

A Yes.

Q But you have a rough proxy or approximation of that. But we know that it at least has got to be reduced by the first three elements that I just listed for you to get down -- to eliminate cases where the chance of death was zero; right?

A If one wanted to do that. That was not my assignment.

Q I appreciate that. I'm just asking you.

A Yes.

Q I'm asking you about things that were not your assignment.

A Okay.

Q Have you ever heard the expression, "the worst of the worst"?

A Yes.

Q In the context of the death penalty?
A Oh, certainly.
Q What does that mean to you?
A That means the worst of the worst are the crimes that -- the homicides that take your breath away in terms of the level of culpability and aggravation.
Q Now, you said earlier that you weren't really here to offer commentary on the legal significance of this statistic or that statistic, but in paragraph 69 of your declaration you do characterize California's death penalty statute as overbroad, which I understood to mean too broad, or broader than it should be or could be or must be or something.
I just want you to explain what you mean by overbroad.
A Well, I guess overbroad is in comparison to other jurisdictions, is the easiest way to put it.
Q Okay.
A And it's a legal question of whether it's too broad from a constitutional standpoint. I'm not in a position to make that judgment.
Q Well, you know, to my ear "overbroad" smacks of constitutional deficiency, but I think you've explained it.
You said that during the Carlos Garcia -- in that same paragraph you say that in the *Carlos* Window period the lying in wait was present 29 percent of the time and it was

the sole special 21 percent of the time, and then you give the numerator, denominator there in each of the instants that yielded that fraction.

Do you have enough data in paragraph 69 or otherwise at your disposal to tell me what California's death-sentencing rate would be -- I'm sorry -- death-eligibility rate would be if there were no lying in wait?

You say that the laying in wait is a major -- makes a major contribution to the over-breadth state of affairs.

And my question is, if that's the major contribution, let's take it away, run the numbers again and now tell us what the rate would be.

A I didn't do that, but that could be done.

Q It could be done?

A Certainly. That means you would reduce -- if you struck the lying in wait special what would happen to the death-eligibility rate?

Q Exactly.

A No, that could be done. Sure.

Q But with the data that's in the footnote -- pardon me -- in the paragraph right there, is the data sufficient to allow you to do it, or -- I'm not asking you to do it without a calculator, but is this the data that you would use to make that calculation?

A No. You would have to go back and look at the whole database and suppress -- rerun the analysis.

Q You can't prorate it, knowing that it's -- knowing that the information in parentheses following each of these percentages you can't prorate out a new death-eligibility rate from the data?

A I cannot do it off the top of my head sitting here.

Q No. Could you do it with a calculator and all the time in the world?

A I don't know. I'd have to consult with Professor Woodworth. That's a question for him.

Q Okay. All right. Thanks.

Let me ask you this. Why don't you look at Table One again?

Thought we left it, huh? Sorry.

A (Complies.)

Q That combines the number -- we have the number of death-eligible cases, and we know from what you say in paragraph 69 that 21 percent of those were lying-in-wait death eligible, that is to say they were death eligible solely because of the lying in wait.

So would it be fair to say that that number would be 29 percent smaller?

A Look, this is not the way you do this analysis off the top of your head sitting on a witness stand.

If we're going to recompute the numbers we need to do it thoroughly, thinking through what's going on, examining the database and consulting with Professor Woodworth. We don't do these things off the top of our heads. Maybe Professor Woodworth can do it off the top of his head but I can't.

Q Of course we are here for Mr. Ashmus. That's the only matter before this Court, and lying in wait has nothing to do with his conviction because that is not the basis on which he was sentenced to death.

His specials were murder in the course of rape, murder in the course of sodomy, and murder in the course of a lewd and lascivious act on a child.

Can you quantify for us how much those special circumstances contribute to the breadth of California's death penalty statute as you use that term in paragraph 69?

Would that data -- could you extract that data because that's the data that pertains to Mr. Ashmus?

A I can tell you -- I think I can tell you what the distribution of those specials is, how many cases have them. We do have that information I think available.

Q Okay.

A But let me see if can I find it here. I have a recollection that we have that. Yeah -- well, I'm sorry, Counsel, I don't have it right here.

Q That's fine, but that data is available to you?

A Oh, certainly.

Q It is available to you?

A Certainly.

Q Now, let's just come full circle here on -- we started with *Furman*, which was the -- I guess the theoretical underpinning or inspiration for this study, and the teaching of *Furman* is to avoid the imposition of the death penalty in a wanton and freakish manner.

Does your study identify a single California inmate whose death sentence was imposed wantonly and freakishly?

A I don't have a measure for that. I don't think there is a legal measure for that.

The measures focus on what's the rate of death eligibility and what's the rate of death sentencing? Those are the relevant data that the Court looked to in *Furman*.

Q I guess the more precise question I should have asked you is, your study does not purport to find that Mr. Ashmus's death sentence was imposed freakishly or wantonly?

A No. That was not part of our assignment.

MR. MATTHIAS: Thank you, your Honor. I appreciate it.

THE COURT: Okay. Thank you. Give me, both Counsel -- I've got to send a note to my secretary to contact my driver and see how late he will wait.

What's your best estimate? It has to be fairly accurate, and I know that's difficult.

MR. LAURENCE: I think I will be 35 minutes and 30 seconds.

THE COURT: That's --

MR. MATTHIAS: Seventeen minutes and 12 seconds and not a second more.

THE COURT: So that's a quarter to six?

MR. LAURENCE: The other thing we have to discuss, your Honor, is we have George Woodworth here who can actually make it on Monday afternoon. But I assume --

THE COURT: Why don't we release him and then --

MR. LAURENCE: Yes.

THE COURT: Does that shorten this?

MR. LAURENCE: No.

MR. MATTHIAS: No.

MR. LAURENCE: He could make it Monday afternoon or Tuesday afternoon. He's in town until then.

THE COURT: All right. Let's proceed.

(Pause in proceedings.)

REDIRECT EXAMINATION

BY MR. LAURENCE:

Q Good afternoon, Professor Baldus. I want to touch first upon some questions that were asked of you about bias.

Several times you were asked questions about

whether or not there was any injection of bias into this study, and I want to ask first, were the attorneys for Mr. Ashmus or any other death row inmates in a position to inject bias into your study?

A No.

Q Why was that?

A Because they would evaluate cases, make recommendations, but we made the decisions.

Q And at any moment in the last five years that you have conducted this study did you feel that your ethical responsibilities or your ethics were being compromised by this study?

A No.

Q And what would you have done had you felt so?

A We would have withdrawn from the study. We make that clear to everybody with whom we conduct studies. We control it. We are doing it in a professional, intellectually honest way. Those are the only circumstances under which we will do it. We will control what's published.

Q The selection of the members of your team were made by whom?

A The -- our research team?

Q Yes.

A Well, George Woodworth and I have gone back 30 years, so it was the two of us that made choices, and we made decisions

about who else to employ, and they were Robin Glenn and Richard Newell who had worked for us for 15 years.

Q And did I have or any other lawyer representing Mr. Ashmus or any other death row inmate have any influence on who you selected to work on this case?

A No.

Q Now, I wanted to ask a question -- before I ask that question.

By the way, how much have you been paid for your services over the past five years?

A Nothing.

Q Now, you've conducted many studies for death row inmates and for criminal defendants over the years.

In those studies have they produced results that were contrary to the legal interests of death row inmates?

A Yes, often.

Q How often?

A Well, in Georgia there was no evidence of race of defendant effect, which was what counsel had hoped we would find. The same holds true in Philadelphia County. The same held true in Colorado. In Nebraska we found neither race of defendant effects nor race of victim effects.

Those are all the effects that the attorneys in those states wanted us to find and we did not find them. In fact, it was interesting, in Nebraska when we look at the

data statewide we did see race of defendant effects, but when we controlled for the county of prosecution those race effects disappeared altogether, and that's what we reported. This is explained in our Nebraska Law Review article.

Q Did you have any hesitation about reporting those results to the lawyers representing those individuals?

A No. That's always our understanding. We tell them when we are engaged to do this kind of work we can't guarantee what the results are going to be, and we will present the data as we find them, and that's what we've always done.

Q And did you do so in this case?

A Oh, certainly. We applied the very same standard in this case.

Q Did you make any changes to the database or any other action in this study to bias the results one way or the other?

A No.

Q Now, the methodology questions that I was about to ask on direct examination, I know I jumped the gun but I think I must have been omniscient to realize that we were going to get into this issue.

And let me go right directly into that.

Did you seek any assessments of the validity of your methodology?

A Yes, I did.

Q What steps did you take to assess the validity of your

methodology?

A Well, we identified a group of scholars who had done this kind of work before, empirical studies of death penalty systems, and are well respected around the country. And I converted the declaration into an article that would be more familiar to them and sent it to them, and asked them to do a review of the paper focusing solely on the validity of the empirical methodology.

MR. MATTHIAS: Excuse me, your Honor. This is the problem we encountered at the outset. I've not seen the article that supposedly parallels the research that resulted in the declaration, and I did not see the 120 pages of supportive -- I assume they are supportive or I wouldn't be presented with them, letters from other academics until this morning. Most of them have been in existence --

THE COURT: Well, let me just --

MR. MATTHIAS: -- for over a month.

THE COURT: -- if that's true we won't go into it.

MR. MATTHIAS: Well, it is true. These are letters -- three of them are dated in October and I got them today.

I don't understand. I don't understand why -- we were ready to have this hearing six months ago, and this window of opportunity to go and write articles and send them to people would not have existed, and it gets dropped on me today? I don't understand.

THE COURT: Well, it would be inappropriate to go into them. I wouldn't -- if you want to come back and have a chance to look at them and prepare.

MR. LAURENCE: I don't think it's necessary, your Honor.

BY MR. LAURENCE:

Q After all the questions that you received today about methodology from the Attorney General's Office, did you have any question about the validity of your methodology?

A No, I don't.

This is the most extensive and complicated study that we've ever done, and it's consumed an enormous amount of our energies and talent, and I have enormous confidence in the validity of our finings.

Q And let me ask one question about the action you've taken since you've completed the study.

Have you published the data or published the study, and is it available for other individuals to read and comment on?

A In June we put on the SSR, the Social Science Research Network a copy of the paper that we circulated to other scholars to review, and it's been in the public domain since this past summer.

And in addition I presented these findings two days ago at a meeting of the American Criminology Society, which

is meeting here right now this week in San Francisco.

Q Okay. There was a question that I asked you about probation reports and whether or not they were valid sources of information.

Have you used probation reports in other studies?

A Yes. In New Jersey and -- New Jersey and Nebraska.

Q Were there any questions raised about the quality of information contained in those probation reports?

A No. Probation reports are considered very high-level data.

Q Okay. I'd like to turn your attention now to the coding materials and protocol.

You called the documents that you provided to your coders "the protocol"; is that correct?

A Yes.

Q They were provided with a notebook of material, and I want to clarify exactly what they got.

The first portion of that book was the documents that were -- you looked at for the Attorney General's Exhibits WWW?

A Yes.

Q Who prepared those documents?

A You are going to have to help me here a little bit.

Can you show me the documents?

Q Certainly.

(Whereupon, counsel hands the document to the witness.)

THE WITNESS: Oh, this is WWW. This is information I prepared. A large part of it is just excerpts from California law and then provides my overview of what the study is all about and what I expect the coders would be doing.

BY MR. LAURENCE:

Q Did I review the document at any time prior to going to the coders or any other lawyer representing Mr. Ashmus or any other death row inmates?

A Honestly, I don't recall, but there would be no reason for me to show it to you. I don't think so. But honestly I'm not certain.

Q You testified that the bulk of the notebook was -- consisted of legal material?

A Uh-huh.

Q I'm going to show you documents that were Bates labeled Baldus 0001 through 00373.

MR. LAURENCE: Your Honor, I've not marked this document. It's the discovery that we provided to the Attorney General. I have no problems marking it as an exhibit.

MR. MATTHIAS: No objection.

THE COURT: Okay.

MR. LAURENCE: But unfortunately it's my only copy.

BY MR. LAURENCE:

Q Is that the material that my office provided to you?

A Yes.

Q And that was placed in the coding book?

A Yes.

Q And that you considered part of the protocol because it was being used to code the cases?

A It was the core of the coding protocol.

Q Okay.

MR. LAURENCE: Now, your Honor, let me -- actually, I should mark that correctly. That should be marked as Petitioner's Exhibit 224.

(Petitioner's Exhibit 224 was marked for identification.)

THE COURT: It will be so marked for identification.

MR. LAURENCE: All right. And I'd like to move it into evidence, your Honor.

THE COURT: It will be admitted.

(Petitioner's Exhibit 224 was received into evidence.)

BY MR. LAURENCE:

Q I want to now turn your attention to decision-making in this study because it seems to be unclear as to who is making the final decision as to whether or not a case is death eligible.

A I made it.

Q So if a coder, an initial coder, the ones who took the

cases initially and created the thumbnail and filled out the DCI incorrectly coded that case, who would be responsible for correcting it?

A Well, ultimately I would. I had students who would review them, and then we would get together and go over them, the ones we thought were problematic, and work out a consensus. But I would sign off on them.

Q And you testified that in three-quarters of the death-eligible cases you personally reviewed the probation report; is that correct?

A Yes. Yes.

Q Let's talk about the cases in which you did not review the probation reports.

What types of case were those kinds of cases?

A Those were cases where the statutory special circumstance was based on clear, factual matters. And my cleaning team presented narratives that convinced me that they were probably correct, that there was a robbery, you know, many, many or hundreds and hundreds of robberies -- over 250 robbery cases in our database, and I didn't read the coding protocol for all of those.

I specialized on the ones that were hard torture and lying in wait and pecuniary gain. That was another hard one.

Q Is it fair to say that you believe you had reviewed

the probation reports for all hard decisions --

A Yes.

Q -- regarding death eligibility?

A Yes.

Q And if a student had made an error prior to your reviewing the document would you have corrected that error?

A If it came to my attention, certainly.

Q Okay. I want to talk a little bit about the discovery that has been talked about in this case.

Do you recall sometime last year me asking for information about your coding of cases for the Attorney General?

A Yes. You mean, in terms of the spreadsheet that we've been discussing?

Q Yes.

A Yes.

Q Let's break those requests down.

First, at some point do you recall me asking for the thumbnails that had been produced during the coding process?

A Yes.

Q How many pages of thumbnails were there roughly?

A Oh, several. Two or three -- 2000 I would guess or something. They average -- probably more than that, actually. They average a couple of pages, and there were 1900 cases, but we were missing them in maybe 50 or 60 cases, so you are talking

about several -- many hundreds of pages.

Q And you provided them to me?

A Yes. It was big task getting it all together.

Q At the time that you provided them all to me did you make any statements about whether or not we should rely on those as conclusive for either coding purposes or factual purposes?

A No. I told you that we were in the process of cleaning all those cases, and that they definitely were not what we would consider the definitive interpretation.

Q What was the definitive interpretation of the facts that you used to code cases?

A The definitive interpretation is what appeared in our narrative summaries that we created starting in May of 2009 continuing up to December of 2009.

Q I'd like to show you what we have provided in discovery as data 001 to 1386. These are double-sided, and I'm going to ask you some questions on the first one.

MR. LAURENCE: Your Honor, again, this is my only copy, but if I could have it marked as Exhibit 228.

THE COURT: It will be so marked.

(Petitioner's Exhibit 228 was marked for identification.)

MR. MATTHIAS: What are these?

MR. LAURENCE: The discovery turned over to the Attorney General's Office? They were labeled data 001 to 1386.

MR. MATTHIAS: They are labeled or paginated?

MR. LAURENCE: They are paginated.

MR. MATTHIAS: Could I just take a peak?

MR. LAURENCE: Certainly. I'm sorry.

MR. MATTHIAS: I will recognize it on site, but I don't know it by that label.

BY MR. LAURENCE:

Q I'd like to -- I'd like you to take a look at data 001 through 57. That's just the first 57 pages. Again, it's double-sided.

A Very well. (Complies.)

Q Can you tell me what those pages represent?

A Yes. They represent our final judgment of the special circumstance and the death eligibility of each of the 1900 cases identified by project number and defendant's name.

Q And that's the coding for each of the cases?

A That's right. That's the coding of the special circumstances.

Q And from that document you can tell which cases are coded for death eligibility and which special circumstances you have concluded is present, or found to be true in each of the cases in the study?

A Yes.

Q I'd like you to take a look at data 58 to 60.

A (Complies.)

Q Right after that document. What is that?

A This is what we call an array, which presents more detail on the underlying information that's coded in the data collection instrument. It includes information on questions 40 through 53 of the DCI.

Q Okay. And did you produce that array?

A Well, we did -- Richard Newell is the man who actually produced the document under my direction.

Q And it contains coding for many of the questions that are asked in the DCI?

A Yes. It includes coding for questions 40 through 53.

Q Okay. Do you offhand recall what 40 through 53 were?

A Yes. They had to do with basically what was charged, and what was charged in terms of liability and found in terms of liability, who the decision-maker was and what special circumstances were found or were present.

Q Now, I want to turn your attention to the narratives.

Do you have any objection to me providing the Attorney General's Office with the narratives that you shipped to my office earlier this month?

A No.

Q Now, how different are the narratives that you produced just a few weeks ago from the thumbnails?

A They are different in this regard; they represent a more considered judgment of the death eligibility of the cases, and they have a refined statement of the facts.

And also they have authority, the authority that we relied on for the death-eligible cases, that is, that didn't result in a CFF finding of death eligibility.

That is, when we were having to rely a finding of death eligibility in a case that did not result in a capital conviction and a finding of a special we turned to the case law, and here it includes the citations that we thought were appropriate to support our judgment that this case was factually liable -- factually death eligible.

Q Now, the narrative that is in that -- the description of the case in that narrative --

A Yeah.

Q -- how different are those narratives from the thumbnails that you provided to me last year?

A They were different only in the sense that they reflect a more accurate judgment of what we think was in the case and what happened procedurally in this case -- what was found and what was present in the case.

Q In what percentage of the time is that different from the thumbnail?

A I've not actually quantified that. I've not made that an individual research project, but I would guess probably a quarter to 30 percent of the death-eligible cases are coded different now than they were before.

Q Now, if you were asked to review coding decisions of

another researcher who conducted an identical study, and I provided you with the probation report and data one through -- one through 57, the coding information, could you review the coding of that particular -- that particular study?

A Here's my assumption of what you are asking me.

I have the probation report and I have the bottom-line codes on death eligibility and the specials.

Q Correct.

A Yes. I could look at those probation reports and determine whether or not they were supported, whether they supported the findings of death eligibility, and in addition, the particular specials that were alleged to be found or present.

Q And even with the narratives that were produced in these cases you still reviewed three quarters of the death eligible probation reports?

A Yes.

Q Why?

A Did you say why?

Q Why?

A Why? Because I wanted to make sure this was as correct as we could get it.

Q Now, there were some questions about jury nullification. I want to clarify the controlling fact-finding rule and jury nullification.

Of the 1900 cases that you reviewed, how many did you conclude warranted a jury nullification finding?

A Twenty-five.

Q Twenty-five out of 1900 cases?

A Yes.

Q And of those, how many of the 25 were classified as a death-eligible case?

A Seventy-two percent were death eligible; 28 percent were not death eligible.

Q And that's 18?

A That's right. Eighteen death eligible and seven not death eligible.

Q Okay. You were then asked in a series of questions hypotheticals involving facts from the defendant's statements, or one was involving the Dalai Lama.

Do you recall that testimony or those questions?

A About the Dalai Lama?

Q Yes. There was a question asked if you had a drunk witness --

THE COURT: Eagle Scouts and Dalai Lamas.

THE WITNESS: Oh, okay. I guess I missed the Dalai Lama part of it. That was the drunk person?

BY MR. LAURENCE:

Q Yeah. Not the Dalai Lama.

A No.

Q But yes --
A A drunk and then credible people. Was it the Dalai Lama and Boy Scouts?
Q Yes.
A Oh, okay. I missed the Dalai Lama. I'm sorry.
Q Did it change your mind at all to answer your questions if the Dalai had been -- if you recall the Dalai Lama?
A No. No.
Q First, I was to clarify your understanding of what *Furman* required, and let me ask this question.
Does *Furman* in your mind require the legislature to define crimes --
A Yes.
Q -- that are death eligible?
A Yes.
Q Okay. And does the legislature in defining crimes take into account whether or not the police officers violate the Fourth Amendment?
A No.
Q So tell me, what should the legislature do in compliance with *Furman* that confirm that -- what should the legislature do?
A It should pass a statute that restricts death eligibility to narrowly-defined categories of cases that can be objectively ascertained by prosecutors.

Q And that's irrespective of any criminal procedure violations that a future law enforcement officer might entail?

A Yes.

Q Now, the hypotheticals that he gave you this afternoon, did any of them -- were any of them familiar as cases -- case hypotheticals in this study?

A In terms of the weight that we put on different kinds of evidence? Is that what you mean?

Q Actually, he asked you a series of hypotheticals about, "The defendant said I did it, but I did it for a good reason."

A Oh, yes. Some of those sounded familiar to me; yes.

Q Do you recall whether or not any of those were coded as death eligible?

A I don't.

Q Now, I wanted to ask you a question about how you went about making decisions about death eligibility.

You said that the narratives that you have put together have legal authority for a death-eligibility decision.

But do you have a hierarchy -- did you have a hierarchy in making decisions about whether or not a case was death eligible?

A Yes. Now, this was a case that was not subject to the controlling fact-finding rule, that is, if a fact controlling fact finder found that there was M1 liability and a special that

was the end of it. That was what determined it.

The subsequent issue had to do with the cases where that did not occur, and when it hadn't occurred we looked at appellate authority as I've explained here earlier.

We also looked at other similar cases in our -- this study that looked like that case that resulted in a CFF, that is, a finding by a jury of M1 liability in the presence of a special.

And in the absence of those sources of authority we looked at our coding protocol -- the coding protocol that your office prepared for us.

Q And that was basically general principles of the law?

A That's right.

Q And jury instructions -- that sort of thing?

A That's right.

Q So that's the hierarchy. You made decisions first on controlling fact-finding; appellate decisions and other cases in which a fact finder had made a conclusion of liability; and only after that did you resort to the HCRC protocol as the authority for finding death-eligibility; is that correct?

A Yes. That's right.

Q Okay. I want to talk now a little bit about Table Three, which is the table that has three parts, and we talked about it this morning as well.

And I only want to ask you two questions.

The comparison between New Jersey and California, the difference between you employing a CFF rule, controlling fact-finding rule versus persuasive evidence rule, what effect did that have on overall eligibility in your mind?

A I'd just like to amend the difference.

We applied the controlling fact-finding rule in both studies.

Q Oh, okay.

A It was only in the circumstances where the controlling fact-finding rule did not determine outcome that we applied a different standard.

In this California study we applied the legal sufficiency rule, that is, if a death sentence had been imposed in this case would an appellate court have affirmed it?

In New Jersey we applied a question of whether or not there was sufficient evidence for a jury to make a factual determination. In my opinion there's no difference whatever in the two of them.

Q And the other question I have on this table is that New Jersey -- the figure you use for Table Three was 21 percent.

Was that your figure or was that Judge Baime's figure?

A That's Judge Baime's figure. The figure estimated in my analysis was slightly lower than that. I think it was

16 percent. I think I mentioned that in the affidavit.

That I used his because he had twice the sample size. You see, he had run this process for nearly a decade or -- more than a decade after I left as special master he carried on and applied our methodology into estimating the death sentencing eligibility rates -- sorry -- the death-eligibility rates and that's the one I'm using here.

Q Okay. Now, there was a question about death-eligibility, and whether or not you can predict death-sentencing rates of real death eligible versus hypothetical death-eligibility.

The discussion was on Figure Two and Table Five of whether or not we can eliminate from the denominator, or from the denominator those individuals who could not be sentenced to death because they were not convicted of first-degree murder with special circumstances.

Do you recall that discussion this afternoon?

A Yes.

Q At one point you were -- I think it was a difficult calculation to make, but can you tell us if you just took murder one convictions and special circumstances found to be true what the percentage of the death-sentencing rate is?

A It's in the declaration.

Q Yes. Why don't we go to --

A I can't remember that off the top of my head.

Q I'm sorry. Let me withdraw that question.

Let's go to figure two.

A Okay.

Q And I believe it's box 3A.

3A says that 83 percent of the cases qualify as a special circumstance -- a special circumstance has been found to be true or admitted by the defendant.

A Yes.

Q And the numerator is 3067.

And did you testify on cross-examination that that needed to be modified to 3354 to account for the nine percent of the cases that you believe had a special circumstance found to be true but resulted in a term of years?

A That's right. It was 3405. 3404 is what I suggested that be adjusted to.

Q That works out to be 21 percent death-sentencing rate --

A Yes.

Q -- under anyone's theory of murder one liability plus special circumstance found to be true?

A Yes.

Q Twenty-one percent?

A Uh-huh.

Q Thank you. Now, I'd like to talk a little bit about the 10 cases, and I mean really a little bit, because I'm

heading quickly to my time limit.

I first want to ask a question about -- you know what? I don't even want to ask any specific questions about any case except for one, and that is 1682.

A Yes.

Q That's the one that had multiple special circumstances that were found by the coder and is still in the database as being death eligible for many different special circumstances.

Do you have a reason to believe that that case had been -- do you have a -- let me back up.

Why do you believe that that case was miscoded?

A Well, it's a very obscure probation report, and it doesn't sharply distinguish between victims and non-decedent victims, and moreover when you read about the second non-decedent victim and you turn to the next time where it asks about the victim's statement, it says "victim deceased."

And somebody who wasn't carefully reading this probation report might think that the -- I won't mention his name, but the second non-decedent victim was killed. That's what I think informed -- that was a mistake of reading I think on the part of the coder.

Q Did you -- did you come across any other mistakes like that in the several years that you have been reviewing these kinds of coding decisions?

A Yes. Yes, we have.

Q And what did you do when you came across them?
A Well, we fix them. We fixed them.
Q All right. Now, I'd like to try to understand how important these 10 cases are to your analysis.
And he questioned you about 10 cases; only 10 out of 1900 cases were you questioned about.
Did you conduct any analysis of the data to determine what effect errors in coding in these 10 cases would have on your overcall conclusions?
A Professor Woodworth did. Professor Woodworth recoded those 10 cases as not death eligible and then recomputed the death-eligibility rates shown in Table One in Part One, row four, column B and D. That's *Carlos* Window and 2008.
And it would have -- this change in coding of these cases would have reduced the death-sentencing rate by .47 percent -- .47 of one percent under *Carlos* Window law and .46 of one percent under 2008 law.
Q And that's if you were wrong on these cases --
A That's right.
Q -- entirely?
A That's right. If they were all wrong.
Q I'd like to show you Petitioner's Exhibit 227.
(Whereupon, counsel hands the exhibit to the witness.)
BY MR. LAURENCE:
Q And ask you, is this the analysis that Dr. Woodworth

provided to you?

A I honestly -- he didn't provide it to me. I got the results from him, but I haven't seen this document. So I'm afraid you are going to have to ask Professor Woodworth.

Q All right. Certainly.

But your testimony is that the change according to Dr. Woodworth would be .46 for 2008 law, death-eligibility, row four of Table One?

A Yes.

Q And .47 reduction in death-eligibility for *Carlos* Window law under row four --

A Yes.

Q -- of table one? Okay.

Now, did you also conduct an analysis of lying-in-wait cases?

A Yes.

Q Tell us -- please tell us.

A We certainly did. We conducted what are known as "sensitivity analyses" along the lines of an analysis that you just mentioned with respect to these 10 cases. We identified for this purpose the lying-in-wait cases and the torture cases, because those are the ones where the risk of error we believe was highest, because those involved the most subjective judgments.

And what Professor Woodworth did was to take a

random sample of the 25 -- a random sample of 25 of the 293 cases in the sample in which lying in wait was the only special circumstance found, and he recoded for those cases the case from death eligible to not death eligible, and then estimated in the same way that we've described the change with respect to the 10 cases. He then recomputed what the overall death-sentencing rates would have been in Table One, Part One, row four, and then he repeated this 10 more times.

And what he found was that the recoding of these across 10 experiments reduced the overall death-eligibility rate from 1.3 percentage points to .7 percentage point. And the average decline in death eligibility across both was .9.

Q So let me back up and make sure I understand this.

You took 25 cases --

A Yes.

Q -- where lying in wait was coded as the sole special circumstance?

A Yes.

Q You assumed those were all death-eligible cases?

A Yes.

Q So you assumed that you had made a mistake, or you changed death eligibility to non-death eligible in 25 randomly selected lying-in-wait cases --

A Yes.

Q -- where it was the sole special circumstance?

A Yes.
Q And you ran that 10 different times?
A Uh-huh.
Q Because -- and the reason why we had to run those is because they were weighted cases. You didn't know how much weight the individual cases would have for the overall numbers I assume?
A Yes. I'm sorry.
Q And the range of reduction in death eligibility was between .7 and 1.3 percentage points?
A Yes.
Q And the average of the 10 runs was .9 percentage points?
A That's right. Let me give you the --
Q Actually, let me show you an exhibit, because I'd like to mark this as an exhibit.
A That's the one.
(Whereupon, counsel hands the exhibit to the witness.)
BY MR. LAURENCE:
Q Yeah. I'm showing you Petitioner's Exhibit 226, which is entitled, "Sensitivity Analysis for Cases Uniquely Coding with Lying in Wait Special Circumstance."
These two tables tell us the results of the 10 runs on page one?
A Yes. And this is better evidence because it

distinguishes between the *Carlos* Window findings and the 2008 findings.

Q So page one -- and actually the pages that follow, tell me what those are.

A Well, the first one here has to do with -- the pages that follow are the raw output that Professor Woodworth produced that he used to synthesize into the summary statistics on the first page of the exhibit.

Q Okay. So the first page summarizes the computer runs that were -- that were made by Professor -- by Dr. Woodworth?

A Yeah. The first one -- yes, it does. The first part, on the first page, the top table shows the differences for the *Carlos* Window period and the average decline of 1.47 percentage points, and the second table on page one shows the decline under 2008 law, and it was .92 percent.

Q Did you perform the same kind of analysis for torture special circumstances that were uniquely coded for cases making them death eligible?

A Yes. Professor Woodworth did that for torture.

Q I'm going to show you Petitioner's Exhibit 225.

(Whereupon, counsel hands the exhibit to the witness.)

BY MR. LAURENCE:

Q Was the same analysis used to produce this exhibit as you've just described for the torture special circumstances?

A Yes. Exactly the same.

Q You randomly selected 25 cases, and you ran the runs 10 times?

A That's right. That's what Professor Woodworth did.

Q And what was the result of this analysis?

A Under *Carlos* Window law the average decline of death-eligibility as reported in Table One, Part One, row four, column B was 1.6 percent, and under column D, row four it was .95 percent.

Q And that's if you made 25 mistakes for a torture special circumstances that uniquely coded case that has a essential circumstances of torture --

A Yes.

Q -- if you made 25 mistakes that's the expected reduction in death-eligibility?

A Yes.

Q Okay. What does that tell you about your study?

A Well, it shows you that the findings are very robust.

I don't think we have anywhere near that kind of coding error in this study at all. I have a lot of confidence in the validity of our codes.

So this makes an assumption that goes well beyond what I think the actual rate of error is. There's no question that there are some mistakes in the coding, one of which was revealed here this afternoon, although it didn't affect death-eligibility.

I think it shows that the validity of the coding and special circumstance is very robust and very strong. It gives me great confidence in the validity of what we found.

Q Now, this analysis also assumes that all errors operate in one direction, that is, in bias assignment of death-eligibility; is that correct?

A Yes.

Q Do you have any reason to believe that would be the only direction that bias might appear?

A No. I think that -- that the bias could appear in findings of not death-eligibility as well. In fact, we saw some in our review of the 10 cases that the coders found no death-eligibility and we found death-eligibility. That runs both ways.

MR. LAURENCE: I move to admit Petitioner's Exhibits 225 and 226.

MR. MATTHIAS: I would object to that. These were generated -- 225 was generated on November 2nd. 226 was generated on November 2nd. If counsel wanted to use these I don't know why I had to get them after lunch.

MR. LAURENCE: Your Honor, the first time we heard that he was going to question Professor Baldus on any individual coding decisions was Tuesday night.

MR. MATTHIAS: That's false. I told Mr. Laurence probably a year ago that I would be questioning Professor Baldus

on individual cases. Last week at his request I identified them, which is relevant to 227, if there's going to be a motion to admit that.

Mr. Laurence asked me to identify --

THE COURT: Let me interrupt here. Let me take that off for under submission and we can argue it Monday. I just can't emphasize how much we're running out of time. Staff is gone. My driver is going to be gone. I don't know how I'm going do get down to my driver because time crucial.

MR. LAURENCE: Yes, your Honor.

BY MR. LAURENCE:

Q Finally, I want to talk just about a corroboration of your findings.

Do you have information that corroborates your findings with respect to the death-eligibility rates in California?

A Yes.

Q And what is that?

A What gives us confidence in our findings of death-eligibility is their consistency with other studies done with different methodologies, specifically the supplemental homicide report, which showed a death-eligibility rate adjusted by Professor Woodworth of 50.3 compared to the findings that we have in Table One of 55 and 59.

Also the death-eligibility rate among M1

convictions in our analysis is 91 for *Carlos* Window and 95 for 2008, and that is very close to the findings that were produced by Professor Shatz using the same methodology on a smaller sample of cases.

Q And if I understand correctly, the supplemental homicide report data is a different methodology and different data source from which you used?

A Completely different.

Q Professor Shatz's study is different data sources but the same methodology?

A That's right.

Q Do you understand Professor Shatz's included juvenile cases in his study?

A Yes.

Q If he had excluded juvenile cases from his study what would be the expected effect on the 84 percent figure?

A Well, that would increase the death-eligibility rate in an amount I don't know.

Q Okay. Do you have any information that corroborates your finings with respect to comparisons of California's death-eligibility rate to other states?

A Yes. What impresses me about our findings is their consistency with the rates of death-eligibility estimated under the supplemental homicide reports.

We compared Maryland, New Jersey, and Nebraska with

California, and if you do the same thing with the estimates based on the supplemental homicide reports the results are very comparable.

Q Okay. And finally, do you have any information that corroborates your findings with respect to California's death-sentencing rates?

A Yes, I do.

Q What is it?

A Specifically in Note 49 of my declaration our studies there using slightly different methods to show that California's death-sentencing rate is among the lowest in the nation. And also among murder one convictions our data show a death-sentencing rate of 9.4 percent, while Professor Shatz's data show death-sentencing rates of 11.4 and 12.6, which are very comparable to our findings.

MR. LAURENCE: Thank you.

MR. MATTHIAS: This will be very quick.

RECROSS-EXAMINATION

BY MR. MATTHIAS:

Q You understood that I was going to ask you about 10 cases.

A Certainly.

Q Right. And did you understand why I was asked to name those cases?

A Because counsel requested you to.

Q Right. If those 10 cases are merely emblematic of problems throughout the sample, would your answer be any different to Mr. Laurence's question when he said, "Why don't we just take those 10 of 1900 cases out and readjust the numbers?"

Would that be an adjustment adequate to deal with a problem where those were emblematic?

Because I can assure you I didn't read 1900 cases.

A I'm not sure what you mean by "emblematic."

Q That there are many, many more like them that suffered from the same problem.

A Could be. That's why we did the analysis that Professor Woodworth conducted to look at large numbers of cases.

You see, that's what that addresses, what he did. He looked at large numbers of cases and took 25 different samples 10 times. That's what gives you a sense of what the error would do to the findings.

Q You were asked a series of questions about the supplemental homicide reports -- a different body of material from probation reports; right?

A Yes.

Q And it includes, for example, all cases in which there's been a report of a crime, which would include cases in which there's been an acquittal, unsolved cases, and cases which for whatever reason aren't prosecuted. It's a very large and very different body of material.

A That's why the consistency of the findings estimated with those data with our findings is truly impressive.

Q And is that not a species of apples-to-oranges problem?

A No, it's --

Q Just a happy coincidence that the numbers coincide?

A It surprised me greatly, because I thought they would be different for the very reasons that you stated. But they aren't. They aren't different.

Q But you do know from your reading, you do know that the supplemental homicide reports are notoriously unreliable, inaccurate?

A For some purposes. But apparently they are not unreliable for these purposes because our findings and the findings that are very reliable replicate them almost to the T.

Q One of the reasons that they are notoriously unreliable is that the reporting element of it is purely voluntary. There's no requirement in law for these reports so as a result the reports are inconsistent and spotty compliance; isn't that correct? And that's in the literature, is it not?

A It is. But another thing that's in the literature is that those errors could be random, and that's what our findings suggest about the errors in the supplemental homicide report.

We had complete data here and in New Jersey and in Maryland, and our findings are almost identical to what's in

the supplemental homicide report, which suggests very strongly to me that the errors in the SHR are random.

MR. MATTHIAS: Thank you. Thank you, your Honor.

THE COURT: Thank you.

MR. LAURENCE: No further questions, your Honor.

THE COURT: Thank you very much for testifying, Professor. You are excused.

We will recess now. Let's plan to meet in this building but I'm not sure here at 10 o'clock, Monday.

THE CLERK: We have this courtroom Monday morning.

THE COURT: Oh, we have it Monday morning.

THE CLERK: We have it for one motion hearing that we have, so we can have it all morning. Just depends on how soon they start.

THE COURT: Okay. We will report here.

MR. LAURENCE: Your Honor, Professor Woodworth is not available in the morning on Monday. I can see if I can't get him here late morning.

THE COURT: Well, I've got --

THE CLERK: You have to leave by three.

THE COURT: I have to leave by three.

MR. LAURENCE: He was planning to be here at one. I've got a handful of questions.

THE COURT: We can hear -- just tell him to come at one. Wait, we have the court in the morning.

THE CLERK: I'll check. He doesn't have anything till three.

THE COURT: Okay. Then we are okay.

THE CLERK: So I will just get a reporter.

THE COURT: So do we want to meet at one here?

MR. LAURENCE: Yes.

THE COURT: Or do we want to meet at 10? Nothing to do? We don't have anyone for 10?

MR. LAURENCE: We have no one for 10.

THE COURT: Let's plan to meet here at one o'clock.

MR. MATTHIAS: Is your Honor confident that we can have the discussion about exhibits and Professor Woodworth in that amount of time?

THE COURT: How long will the professor take?

MR. LAURENCE: I will qualify him with one question, and I have a couple of questions on matters that came up today.

MR. MATTHIAS: I don't contemplate more than 15 minutes, 20 minutes max.

THE COURT: So we've got two hours before I have to leave if we start at one.

MR. MATTHIAS: I didn't know what Mr. Laurence had in mind. That's why I broached it.

THE COURT: Okay. We can make it. Okay. We will see you Monday at one.

(The proceedings adjourned at 5:35 p.m.)

I N D E X

E X H I B I T S

PETITIONER'S EXHIBITS MOVED INTO EVIDENCE

CERTIFICATE OF REPORTER

I, CHRISTINE TRISKA, Pro-Tem Reporter for the United States Court, Northern District of California, hereby certify that the foregoing proceedings in Case No. C93-0594, Troy Ashmus versus Robert K. Wong, Acting Warden of San Quentin State Prison, were reported by me, a certified shorthand reporter, and were thereafter transcribed under my direction into typewriting; that the foregoing is a full, complete and true record of said proceedings as bound by me at the time of filing.

The validity of the reporter's certification of said transcript may be void upon disassembly and/or removal from the court file.

_____/S/ Christine Triska_____

Christine Triska, CSR 12826, RPR

Monday, November 29, 2011

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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORINIA, SOUTHERN DIVISION

ERNEST DEWAYNE JONES, Petitioner, v. VINCENT CULLEN, Warden of California State Prison at San Quentin, Respondent.	Case No. CV-09-2158-CJC DEATH PENALTY CASE

EXHIBITS IN SUPPORT OF MOTION FOR AN EVIDENTARY HEARING VOLUME 1

EXHIBIT L
TRANSCRIPT OF PROCEEDINGS FROM *TROY ADAM ASHMUS V. ROBERT K. WONG,* U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, CASE NO. C93-0594 (NOV. 22, 2010)

VOLUME 12

PAGES 1836 - 1895

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE THELTON E. HENDERSON, JUDGE

TROY ADAM ASHMUS, PETITIONER, VS. ROBERT K. WONG, ACTING WARDEN OF SAN QUENTIN STATE PRISON, RESPONDENT.	NO. C 93-0594 TEH SAN FRANCISCO, CALIFORNIA MONDAY NOVEMBER 22, 2010 1:00 O'CLOCK P.M.

TRANSCRIPT OF PROCEEDINGS

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OFFICIAL REPORTER - US DISTRICT COURT
COMPUTERIZED TRANSCRIPTION BY ECLIPSE

NOVEMBER 22, 2010 **1:00 O'CLOCK P.M.**

P R O C E E D I N G S

THE COURT: OKAY. GOOD AFTERNOON.

MR. MATTHIAS: GOOD AFTERNOON, YOUR HONOR.

THE COURT: LET ME ANNOUNCE, AGAIN -- I THINK THERE'S NO PROBLEM -- BUT SO THERE'S NO MISUNDERSTANDING, I'M OUT OF HERE AT 2:30 BECAUSE OF OTHER COMMITMENTS.

LET'S TALK FIRST ABOUT EXHIBITS 225 AND 226. RATHER THAN HAVE A GENERAL DISCUSSION, LET ME HEAR FROM MR. MATTHIAS ON HIS CONCERNS. WE WILL LET MR. LAURENCE RESPOND, AND THEN YOU MAY HAVE A BRIEF REPLY.

MR. MATTHIAS: SURE. 225 AND 226, THESE ARE THE SENSITIVITY STUDIES, SO CALLED. YOU KNOW, TO BE COMPLETELY HONEST WITH YOU, FROM A STATISTICAL STANDPOINT, I CAN'T MAKE HEADS OR TAILS OUT OF THEM.

BUT WHAT I CAN TELL IS THEY WERE GENERATED ON NOVEMBER 2ND, WHICH IS THREE WEEKS AGO. AND I GOT THEM FRIDAY AFTER LUNCH, WHICH IS A LITTLE PERPLEXING.

I JUST WANT TO REMIND THE COURT THAT THIS HEARING WAS TO HAVE BEEN COMPLETED ABOUT NINE MONTHS AGO, AND I DON'T THINK THE UNFORTUNATE CIRCUMSTANCES THAT REQUIRED THAT THE PROCEEDING BE CONTINUED CREATED SORT OF A WINDOW OF OPPORTUNITY FOR THE PETITIONER TO GO GENERATE NEW DATA.

I MEAN, WE HAD A DISCOVERY CUTOFF. WE HAD A POINT AT

WHICH DECLARATIONS FROM THE WITNESSES WHO WOULD TESTIFY ON DIRECT WERE DUE, AND THAT WAS TO CONSTITUTE THEIR DIRECT TESTIMONY.

SO SEEING A PIECE OF FAIRLY CAREFULLY TARGETED BUT HIGHLY BELATED DATA IS -- IT'S REALLY HARD TO TALK, ACTUALLY, ABOUT 225, 226 WITHOUT ALSO TALKING ABOUT 227, BECAUSE THEY -- WHICH COUNSEL HAS NOT ATTEMPTED TO INTRODUCE, AND MAY NOT.

BUT MUCH OF THIS STEMS FROM THE FACT THAT MR. LAURENCE HAS KNOWN FOR MANY, MANY MONTHS THAT I INTENDED TO CROSS-EXAMINE PROFESSOR BALDUS ABOUT SPECIFIC CASES.

AND MORE RECENTLY, HE ASKED ME TO IDENTIFY THOSE. AND THE WAY HE PITCHED THIS TO ME WAS IT WILL MAKE THINGS GO MORE SMOOTHLY.

AND, INDEED, IT WOULD, BECAUSE IF PROFESSOR BALDUS HAD THE BENEFIT OF KNOWING THE NAMES OF THE CASES HE COULD PULL THOSE PROBATION REPORTS, READ THEM AND NOT FUMBLE AROUND ON THE STAND WITH LONG PERIODS OF STONEY SILENCE WHERE EVERYBODY ELSE LOOKS AT EACH OTHER WHILE HE'S GIVEN A CHANCE TO LOOK THROUGH A PROBATION REPORT.

SO IT WAS ON THE STRENGTH OF THAT REPRESENTATION THAT I AGREED TO PROVIDE THAT INFORMATION IN ADVANCE. I MEAN, THIS IS IN THE NATURE OF A COURTESY TO COUNSEL. IT'S NOT AN OPPORTUNITY TO HAVE IT THEN USED AGAINST YOU SORT OF AS A PREEMPTIVE FORM OF REBUTTAL.

THAT'S NOT HOW I PRACTICE LAW, AND I DON'T LIKE IT

WHEN I SEE IT IN OTHERS. I THINK I NEED TO LEAVE IT AT THAT. THAT WAS NOT AN INVITATION TO GO GENERATE NEW DATA. AND THAT'S PARTICULARLY TRUE FOR 227, WHICH, I MEAN, IT'S NO COINCIDENCE THAT IT ADDRESSES THE TEN CASES THAT I IDENTIFIED.

THAT WAS A COURTESY TO PROFESSOR BALDUS. IT WAS A COURTESY TO COUNSEL AND TO THE COURT. IT WASN'T AN INVITATION TO BE EXPLOITED.

AND 225 AND 226 IS FRANKLY MUCH, MUCH THE SAME. IT'S OBVIOUS IT WAS IN LIGHT OF THE CASES IDENTIFIED, COUNSEL FELT HE NEEDS TO SHORE UP HIS CASE.

NOW, THAT'S NOT WHAT YOU'RE ALLOWED TO DO JUST BECAUSE I EFFECTIVELY DISCLOSED TO HIM IN ADVANCE SOME OF THE AREAS ON WHICH I INTENDED TO CROSS-EXAMINE HIM.

I MEAN, I COULD HAVE SAID:

"NO. COME TO COURT AND FIND OUT."

BUT THAT'S NOT HOW I PRACTICE LAW. AND, YOU KNOW, I KNOW YOUR HONOR HAS BEEN ON THE BENCH MANY, MANY YEARS, AND YOU KNOW BETTER THAN I THAT IN ORDER FOR THIS WHOLE PROCESS TO WORK, COUNSEL HAVE TO BE CIVIL TO EACH OTHER AND RESPECTFUL. AND THEY HAVE TO BE -- THEY HAVE TO BE ABLE TO RELY ON THEIR EXPECTATIONS.

AND I DON'T WANT MY EXPERIENCE FROM THIS EPISODE TO BE THAT I WON'T EXTEND COURTESIES ANYMORE BECAUSE IT ONLY HURTS ME. AND THAT'S REALLY WHAT THIS IS ABOUT WHEN I DISCLOSED IN ADVANCE THE TEN CASES I WANTED TO TALK ABOUT.

IT'S NOT AN INVITATION TO BE ABUSED OR EXPLOITED. AND I HOPE I DON'T SOUND TOO INDIGNANT ABOUT IT, BUT I'M QUITE OFFENDED BY IT. AND IT'S THE KIND OF TACTIC THAT YOU DON'T SEE FROM THIS SIDE OF THE ROOM. AND I WOULD -- MY ONLY REQUEST IS THAT IT NOT BE REWARDED.

THANK YOU.

THE COURT: I'M SORRY. THAT IT NOT BE?

MR. MATTHIAS: REWARDED.

THE COURT: OH, REWARDED.

OKAY. THANK YOU, COUNSEL.

MR. LAURENCE?

MR. LAURENCE: YOUR HONOR, THE EXHIBITS WERE PRODUCED IN ANTICIPATION OF CROSS-EXAMINATION AND FOR USE POSSIBLY IN REDIRECT EXAMINATION.

THE ORDER OF THIS COURT WAS TO PROVIDE ALL EXHIBITS, AND THE DIRECT TESTIMONY OF OUR EXPERTS AND OTHER WITNESSES, PRIOR TO THE BEGINNING OF THE EVIDENTIARY HEARING. THERE WAS NO ORDER THAT SUGGESTED THAT ALL EXHIBITS THAT WOULD BE USED IN REBUTTAL OR REDIRECT EXAMINATION BE DISCLOSED.

AND IF YOU LOOK VERY CAREFULLY AT BOTH 224 AND 225, WHICH THIS COURT FIRST ASKED US TO ADDRESS, THAT ANALYSIS WAS PRODUCED ON NOVEMBER 22ND PRIOR TO MR. MATTHIAS IDENTIFYING THE TEN CASES LAST TUESDAY NIGHT AS THE CASES THAT HE WAS CROSS-EXAMINING -- HE WOULD BE INTENDING TO CROSS-EXAMINE MR. BALDUS ABOUT.

THE IDEA THAT WE HAVE TO DISCLOSE ALTERNATIVE THEORIES OR ALTERNATIVE DATA WHEN PROFESSOR BALDUS QUITE CLEARLY EXPLAINED IN COURT THAT THE CASES THAT HE CODED HE BELIEVED HE CODED CORRECTLY, THE IDEA THAT WE WOULD NOW HAVE TO SUGGEST HE CODED THEM INCORRECTLY AND DISCLOSE WHAT EFFECT THAT INCORRECT CODING WOULD HAVE SOMETIME IN THE PAST SEEMS TO ME TO BE COMPLETELY BEYOND ANY EXPLANATION THAT THIS COURT'S ORDER WOULD POSSIBLY HAVE REQUIRED.

ALL PROFESSOR BALDUS DID WAS TO LOOK AT TWO SPECIAL CIRCUMSTANCES THAT HE THOUGHT, AS HE TESTIFIED, WERE THE MOST SUBJECTIVE IN THEIR APPLICATION AND MAKE AN ASSUMPTION: IF I HAVE MADE A MISTAKE IN TEN CASES, WHAT EFFECT WOULD THAT HAVE?

NOW, HE WASN'T ADVOCATING THAT HE MADE THOSE MISTAKES IN TEN CASES IN HIS DIRECT TESTIMONY. IT WASN'T EVEN RAISED IN HIS DIRECT TESTIMONY. IT WAS ENTIRELY IN ANTICIPATION TO A QUESTION ON CROSS-EXAMINATION ABOUT HIS CODING DECISIONS.

AND THERE IS ABSOLUTELY NO LAW THAT SAYS WE HAVE TO DISCLOSE REBUTTAL EVIDENCE OF WHEN THE QUESTION HASN'T EVEN BEEN ASKED ON CROSS-EXAMINATION.

TO ACTUALLY MAKE THAT KIND OF CONCLUSION WOULD HAVE US RUN ALL OF THIS ANALYSIS ABOUT THE STUDY BEING INCORRECT BACK IN DECEMBER AND DISCLOSE IT TO THE RESPONDENT, WHICH IS SOMETHING THAT I THINK CLEARLY THIS COURT DID NOT REQUIRE.

NOW, WITH RESPECT TO 227, FRIDAY WE HAD NO OBJECTION TO 227. I DO HEAR AN OBJECTION TO 227 TODAY. AND I CAN HONESTLY

SAY TO YOUR HONOR IF THE TEN CASES HAD COME UP ONLY ON CROSS-EXAMINATION, I WOULD HAVE ASKED FOR A BRIEF RECESS. WE WOULD HAVE RECODED THOSE CASES AS NONDEATH ELIGIBLE, AND YOU WOULD HAVE HAD EXACTLY THE SAME TESTIMONY.

THERE IS CERTAINLY NO REASON TO SUGGEST THAT INFORMATION WOULD NOT HAVE COME OUT IN REDIRECT. IT CERTAINLY WOULD HAVE COME OUT IN REDIRECT. SO I DON'T UNDERSTAND THE INDIGNATION.

I CERTAINLY DON'T UNDERSTAND THE OBLIGATION FOR US TO DISCLOSE EVERY PIECE OF PAPER THAT PROFESSOR BALDUS USED IN THE FIVE YEARS OF CONDUCTING THIS STUDY WHEN ALL THAT WAS REQUIRED WAS THE DATA THAT HE RELIED UPON, WHICH WE DID DISCLOSE.

AND WE VOLUNTARILY DISCLOSED THOUSANDS MORE PAGES, AS YOU WILL SEE IN EXHIBIT 239, WHICH WE PROVIDED TO THE COURT THIS MORNING.

THANK YOU.

THE COURT: OKAY. DO YOU WANT TO RESPOND BRIEFLY?

MR. MATTHIAS: WELL, I'LL CERTAINLY RESPOND IF THE COURT HAS ANY QUESTIONS ABOUT ANY OF THIS. I MEAN, TO ME, 227 IS BY FAR THE MORE INAPPROPRIATE. I CAN CLOSE MY EYES AND IMAGINE HOW THEY MIGHT HAVE DECIDED IT WAS GOOD IDEA TO SHORE UP THEIR CASE WITH 225 AND 226 WITHOUT ANY ADVANCE NOTICE.

I'LL ACCEPT THAT. 227 IS EXACTLY THE TEN CASES I IDENTIFIED, WHICH I IDENTIFIED AS A COURTESY. I MEAN, I'M JUST GOING TO REPEAT MYSELF, AND I AM NOT GOING TO. I CHOOSE NOT TO

DO THAT, YOUR HONOR.

THIS IS NOT -- THIS IS PROFOUNDLY UNFAIR, AND IT IS DYSFUNCTIONAL TO THE MISSION OF THIS COURT, WHICH IS TO RESOLVE THIS CASE AS FAIRLY AS POSSIBLE ON THE MERITS. AND THAT KIND OF TACTIC UNDERMINES THAT OBJECTIVE CONSIDERABLY.

THE COURT: OKAY. I'M GOING TO TAKE THIS MATTER UNDER SUBMISSION, COUNSEL.

OKAY. WHY DON'T WE PROCEED WITH OUR WITNESS?

MR. LAURENCE: PETITION FIRST CALLS GEORGE WOODWORTH TO THE STAND.

WOULD YOU LIKE US TO STATE OUR APPEARANCES FOR THE RECORD?

THE COURT: YES.

MR. LAURENCE: MICHAEL LAURENCE, HABEAS CORPUS RESOURCE CENTER FOR PETITIONER.

MS. CHANDLER: LORENA CHANDLER, GOOD AFTERNOON, ON BEHALF OF PETITIONER.

MR. MATTHIAS: OH, PARDON ME. RON MATTHIAS FOR RESPONDENT.

MR. PRUDEN: GLENN PRUDEN ON BEHALF OF RESPONDENT.

THE COURT: OKAY. THANKS FOR REMEMBERING TO PUT THAT ON THE RECORD, COUNSEL.

WOULD YOU SWEAR IN THE WITNESS?

THE CLERK: RAISE YOUR RIGHT HAND.

(THEREUPON, THE WITNESS WAS SWORN.)

THE WITNESS: I DO.

THE CLERK: PLEASE HAVE A SEAT. STATE YOUR NAME AND SPELL YOUR LAST NAME FOR THE RECORD.

THE WITNESS: MY NAME IS GEORGE WOODWORTH, W-O-O-D-W-O-R-T-H.

THE COURT: YOU MAY PROCEED WHEN YOU ARE READY.

MR. LAURENCE: THANK YOU, YOUR HONOR.

THEREUPON --

GEORGE WOODWORTH,

WAS CALLED AS A WITNESS ON BEHALF OF THE PETITIONER, AND AFTER HAVING BEEN FIRST DULY SWORN, WAS EXAMINED AND TESTIFIED AS FOLLOWS:

DIRECT EXAMINATION

BY MR. LAURENCE

Q. GOOD AFTERNOON, DR. WOODWORTH.

A. GOOD AFTERNOON.

Q. DID YOU PROVIDE A DECLARATION REGARDING TROY ASHMUS EARLIER THIS MONTH?

A. I DID.

Q. I ASK YOU TO LOOK AT PETITIONER'S EXHIBIT 218, WHICH IS IN THE BINDER ON YOUR RIGHT, AND ASK YOU IF THAT IS THE DECLARATION YOU PROVIDED?

A. YES.

MR. LAURENCE: YOUR HONOR, I'D MOVE TO ADMIT 218.

THE COURT: 218 WILL BE ADMITTED.

(THEREUPON, PETITIONER'S EXHIBIT 218 WAS ADMITTED INTO EVIDENCE.)

BY MR. LAURENCE

Q. DR, WOODWORTH, DOES THIS DECLARATION CONTAIN A DESCRIPTION OF YOUR EDUCATION AND QUALIFICATIONS?

A. IT DOES.

Q. DOES IT ALSO CONTAIN A RELATIVELY RECENT COPY OF YOUR CURRICULUM VITAE?

A. YES.

Q. HAVE YOU TESTIFIED IN COURT PROCEEDINGS BEFORE AS AN EXPERT?

A. YES, I HAVE.

Q. AND WHAT TYPES OF CASES HAVE YOU TESTIFIED IN?

A. THE FIRST ONE WAS MCCLESKEY, AND IT'S -- THAT WAS THE BEGINNING OF MY RESEARCH PARTNERSHIP WITH PROFESSOR BALDUS.

SUBSEQUENTLY, I HAVE TESTIFIED IN AGE AND RACE DISCRIMINATION IN EMPLOYMENT AND IN CAPITAL SENTENCING.

MR. LAURENCE: OKAY. YOUR HONOR, I MOVE TO HAVE DR. WOODWORTH QUALIFIED AS AN EXPERT IN STATISTICS AND STATISTICAL METHODOLOGY.

THE COURT: I'LL FIND HIM SO QUALIFIED.

BY MR. LAURENCE

Q. DR. WOODWORTH, WHAT WAS YOUR ROLE IN THIS STUDY?

A. I WAS THE SENIOR STATISTICIAN.

Q. AND DID YOU EMPLOY PRACTICES IN THAT CAPACITY -- STATISTICAL METHODS IN THAT CAPACITY?

A. YES.

Q. ARE ANY OF THE PRACTICES THAT YOU EMPLOYED IN THIS STUDY NOT CONSIDERED GENERALLY ACCEPTABLE?

A. NO. THEY ARE ALL CONSIDERED GENERALLY ACCEPTABLE.

Q. DID YOU EMPLOY ANY INVOLVE PRACTICES?

A. NO, I DID NOT.

Q. HOW WOULD YOU DESCRIBE THOSE PRACTICES?

A. THIS IS A TABULATION. THERE IS NO ATTEMPT TO MODEL A SYSTEM. IT'S SIMPLY A TABULATION OF THE -- THIS POPULATION AS IT IS.

Q. OKAY. THE WERE YOU PRESENT DURING THE TESTIMONY OF PROFESSOR BALDUS ON NOVEMBER 19TH?

A. YES, I WAS.

Q. DID YOU HEAR THE QUESTIONS CONCERNING THE SAMPLING METHODOLOGY USED IN THE STUDY?

A. I HEARD MANY OF THEM, YES.

Q. AND IN LIGHT OF THOSE QUESTIONS DO YOU HAVE ANY CONCERNS ABOUT THE SAMPLING DESIGN THAT YOU USED IN THIS STUDY?

A. NONE AT ALL.

Q. OKAY. THANK YOU.

YOUR DECLARATION TALKS ABOUT THE SUPPLEMENTAL HOMICIDE REPORT DATA THAT WAS USED IN TABLE ONE IN YOUR DECLARATION AND FIGURE ONE IN EXHIBIT 219.

DID YOU ANALYZE THE SUPPLEMENTAL HOMICIDE REPORT DATA WITH DATA FROM YOUR OWN STUDY?

A. I COMBINED THE TWO, YES.

Q. AND HOW DID YOU CONDUCT THAT ANALYSIS?

A. THE SUPPLEMENTAL HOMICIDE FIGURES ON DEATH ELIGIBILITY WERE BASED ON GENERIC SPECIAL CIRCUMSTANCES OR AGGRAVATING CIRCUMSTANCES, IF YOU PREFER. IN PARTICULAR, THOSE SHR FIGURES UNDERCOUNTED THE LYING-IN-WAIT CIRCUMSTANCE AND OVERCOUNTED THE GANG-RELATED CIRCUMSTANCE.

Q. AND SO?

A. AND SO I CORRECTED -- I CORRECTED THE SHR FOR THOSE OVER AND UNDER COUNTS.

Q. AND THAT'S HOW YOU ARRIVED AT THE 50.3 PERCENT DEATH ELIGIBILITY RATE THAT'S CONTAINED IN YOUR DECLARATION?

A. THAT'S CORRECT.

Q. BASED ON THE METHODOLOGY THAT YOU USED IN YOUR STUDY IN COMPARING THE AVAILABLE DATA FROM OTHER STATES, HAVE YOU REACHED ANY CONCLUSIONS REGARDING WHERE CALIFORNIA'S DEATH-ELIGIBILITY RATES RANK?

A. IT RANKS HIGHEST, AND IT IS ABOUT 3.7 SIGMA, 3.7 STANDARD DEVIATIONS ABOVE THE AVERAGE.

Q. WHEN YOU SAY "STANDARD DEVIATIONS," CAN YOU EXPLAIN WHAT A STANDARD DEVIATION IS?

A. A STANDARD DEVIATION IS A MEASURE OF VARIABILITY OR INDIVIDUAL DIFFERENCES, IF YOU LIKE, AMONG THE OBJECTS BEING TABULATED. IN A NORMAL DISTRIBUTION, 95 PERCENT OF THE CASES ARE WITHIN TWO STANDARD DEVIATIONS. 99-AND-A-HALF WITHIN -- AND 99.7 WITHIN THREE STANDARD DEVIATIONS.

IN THIS CASE, WE OBSERVED 3.7 STANDARD DEVIATIONS. AND A DEVIATION THAT LARGE OCCURS ONLY ONCE IN 10,000 CASES.

Q. CAN YOU HELP ME UNDERSTAND THE STANDARD DEVIATION ANALYSIS THAT YOU'VE DESCRIBED IN TERMS THAT I MIGHT UNDER BY TRYING TO GIVE US A COMPARISON WITH IQ SCORES?

A. WELL, IQ IS STANDARDIZED TO HAVE AN AVERAGE OF -- A MEAN OF 100, AND A STANDARD DEVIATION OF 15. 3.7 STANDARD DEVIATIONS WOULD CORRESPONDENCE TO AN IQ OF ABOUT 45.

Q. SO 45 AS IN -- IT WOULD BE THE EQUIVALENT OF 45 IQ WHERE THE MEAN IS 100?

A. IT WOULD BE THAT DEVIANT.

Q. OKAY. NOW, WE TALKED A LITTLE BIT THIS MORNING -- I MEAN, THIS AFTERNOON -- ABOUT THE SENSITIVITY ANALYSIS. AND LET ME FIRST ASK YOU: DID YOU HAVE YOUR LAPTOP WITH YOU ON FRIDAY?

A. I DID.

Q. AND IF I'D ASKED YOU TO COMPUTE ANY STATISTICS REGARDING DEATH ELIGIBILITY, WOULD YOU HAVE BEEN ABLE TO DO SO?

A. YES.

Q. AND IF I'D ASKED YOU TO CHANGE, FOR EXAMPLE, TEN CASES FROM DEATH-ELIGIBLE TO NONDEATH-ELIGIBLE, WOULD YOU HAVE BEEN ABLE TO DO SO?

A. NO PROBLEM.

Q. HOW LONG WOULD IT HAVE TAKEN YOU?

A. FIFTEEN OR 20 MINUTES.

Q. THANK YOU.

NOW, YOU DID CONDUCT THAT ANALYSIS PRIOR TO FRIDAY.

A. I DID.

Q. HOW DID YOU PERFORM THAT ANALYSIS?

A. IN DETAIL, I LOGGED INTO A COMPUTER AT THE UNIVERSITY OF IOWA, AND CHANGED THE CODING USING LOGIC, AND RERAN AN ANALYSIS I'D PREVIOUSLY RUN.

Q. OKAY. SO LET ME ACTUALLY DIRECT YOUR ATTENTION TO PETITIONER'S 227, WHICH IS ON YOUR LEFT SIDE.

A. I'M SORRY. WHAT NUMBER?

Q. I'M SORRY, 227.

A. 227, I SEE IT.

I HAVE IT.

Q. DOES THAT CONTAIN -- DOES THAT EXHIBIT CONTAIN THE RESULTS OF YOUR ANALYSIS?

A. YES.

Q. AND DOES THAT FIRST PAGE REFLECT THE RESULTS OF YOUR ANALYSIS?

A. YES, IT DOES.

MR. LAURENCE: YOUR HONOR, I WOULD MOVE TO ADMIT 227 AT THIS POINT.

THE COURT: I'LL TAKE THAT UNDER SUBMISSION, COUNSEL.

MR. LAURENCE: OKAY. AND, YOUR HONOR, I'D JUST LIKE TO LAY THE FOUNDATION FOR 225 AND 226, UNDERSTANDING YOU'VE TAKEN THAT UNDER ADVISEMENT, AS WELL.

BY MR. LAURENCE

Q. DID YOU CONDUCT ANY ANALYSTS OF THE DATA TO DETERMINE THE EFFECT OF THE ERRONEOUS CODING OF SPECIAL CIRCUMSTANCES?

A. THAT IS WHAT THE SENSITIVITY ANALYSIS IS.

Q. RIGHT.

AND I'D LIKE YOU TO TAKE A LOOK AT -- OH, I'M SORRY. LET ME GO BACK. 227, SINCE COUNSEL WAS NOT -- UNABLE TO INTERPRET 227, LET ME MAKE SURE THE RECORD IS CLEAR ABOUT HOW TO INTERPRET 227.

ON THE FIRST PAGE OF 227, IT BEGINS:

"TABLE TWO, UNMODIFIED DATA, OCTOBER, 2010 DATABASE," CORRECT?

A. OH, I'M SORRY. I THINK YOU HAVE THE WRONG NUMBER.

OH, I'M SORRY. I HAVE IT. I WITHDRAW THAT STATEMENT.

Q. WHAT DOES THIS FIRST PAGE TELL US? THIS IS UNMODIFIED DATA FROM THE DATABASE.

A. THAT IS DATA THAT WAS COMPILED IN TABLE TWO, PART ONE OF PROFESSOR BALDUS' DECLARATION. THIS IS WHAT THE UNDERLYING COMPUTER OUTPUT LOOKS LIKE. SO THIS WOULD BE THE RUN THAT PRODUCED PROFESSOR BALDUS' TABLE TWO.

Q. AND WHEN IT SAYS UNDER "01 CONVICT EQUALS 1CWDE RATE," IS THAT CARLOS WINDOW OF DEATH ELIGIBILITY RATES?

A. YES.

Q. AND THAT'S .9116?

MR. MATTHIAS: EXCUSE ME, YOUR HONOR. THIS IS NOT A

FOUNDATION FOR THE TESTIMONY. THIS IS THE EVIDENCE ITSELF. IT'S JUST RECITING THE VERY EVIDENCE THAT YOUR HONOR HAS INDICATED IT'S TAKING UNDER SUBMISSION. SO THIS IS SORT OF AN END RUN ON AWAITING YOUR RULING.

MR. LAURENCE: YOUR HONOR, I'M JUST ACTUALLY EDUCATING COUNSEL FOR RESPONDENT. I HAVE ACTUALLY READ THIS, AND CERTAINLY IF IT'S ADMITTED WILL BE ABLE TO USE IT WITHOUT ANY FURTHER EXPLANATION.

MR. MATTHIAS: NATURALLY, I WON'T NEED TO BE EDUCATED IF IT'S PROPERLY EXCLUDED SO --

THE COURT: OKAY.

BY MR. LAURENCE:

Q. BUT THE FIRST PAGE IS UNWEIGHTED -- I MEAN IS UNMODIFIED DATA, CORRECT?

A. YES.

Q. AND THEN, THE REST OF THE EXHIBIT IS YOU RUNNING THE CHANGES BY CHANGING TEN CASES FROM DEATH ELIGIBLE TO NONDEATH ELIGIBLE, CORRECT?

A. THE FIRST FOUR PAGES ARE UNMODIFIED.

Q. OH, I'M SORRY.

A. AND THEN, THE NEXT FOUR PAGES, WHICH I LABELED "HYPOTHETICAL," THEY ARE LABELED IN PARALLEL WITH THE FIRST FOUR, BUT WITH THE WORD "HYPOTHETICAL" APPENDED. AND THESE ARE THE ONES WITH THE TEN CASES --

Q. SO --

A. -- NOTED AS NOT DEATH ELIGIBLE.

Q. SO THE FIRST FOUR PAGES ARE UNMODIFIED. THE NEXT -- THE REST OF THE EXHIBIT ARE THE MODIFIED BY HAVING THE TEN CASES BE DESIGNATED AS NONDEATH ELIGIBLE.

A. THAT'S RIGHT.

Q. THANK YOU. AND I'D LIKE YOU TO TURN TO EXHIBIT 226.

A. OKAY.

Q. NOW, IS THIS THE SENSITIVITY ANALYSIS THAT YOU CONDUCTED REGARDING SOLELY CLASSIFIED LYING-IN-WAIT SPECIAL CIRCUMSTANCE CASES?

A. YES.

Q. CAN YOU EXPLAIN WHAT YOU DID TO CREATE THIS EXHIBIT?

A. THE DETAILS OF WHAT I DID CAN BE DETERMINED BY LOOKING AT THE NEXT PAGE OF THIS EXHIBIT. THIS IS A TYPICAL ONE OF THE TEN RUNS THAT I DID THE TEN REPLICATIONS OF THIS DELETION PROCESS, RECODING PROCESS THAT I RAN.

UNDER THE HEADING "PROJ," WHICH IS THE IDENTIFICATION NUMBER OF THE CASES, THESE ARE 25 RANDOMLY SELECTED CASES THAT HAD A LYING-IN-WAIT SPECIAL CIRCUMSTANCE PRESENT, CODED AS PRESENT.

THOSE 25 CASES WERE SELECTED AT RANDOM, AND THE CODING WAS CHANGED TO ZERO. AND THEN, WE RECALCULATED THE NARROWING MEASURE. AND THIS IS THE SAME NARROWING MEASURE THAT APPEARS IN PROFESSOR BALDUS' TABLE TWO.

THE NARROWING MEASURES ARE SHOWN AS THE -- FOR

EXAMPLE, IN RUN NUMBER ONE, WHICH IS THE ONE I JUST ALLUDED TO, THE NARROWING MEASURE AFTER RECODING THOSE NUMBERS WAS 54.2, WHICH IS EIGHT-TENTHS OF A PERCENTAGE POINT BELOW THE NUMBER IN PROFESSOR BALDUS' TABLE TWO, WHICH WAS 55 PERCENT.

Q. OKAY. SO JUST TO BE CLEAR FOR RECORD, THE PROJECT, THE 25 PROJECT CASES YOU DESCRIBED IS ON PAGE TWO OF THAT EXHIBIT.

A. THIS IS RUN NUMBER ONE.

Q. RIGHT. RUN NUMBER ONE IS ON PAGE TWO OF THE EXHIBIT, CORRECT?

A. RIGHT.

Q. AND ON PAGE THREE YOU HAVE THE RESULTS OF CHANGING DEATH ELIGIBILITY FOR THOSE 25 CASES.

A. THAT'S RIGHT.

Q. AND THE 54 PERCENT YOU REFERRED TO IS AT THE VERY BOTTOM SET OF THOSE TABLES. IT SAYS:

"CWDE RATE CARLOS WINDOW DEATH ELIGIBILITY RATE," WHICH IS .417?

A. .5417.

Q. .5417.

A. YES.

Q. EXCUSE ME. NOW, DOES THE -- AND YOU SAID THAT THESE ARE CARLOS -- I MEAN, THESE WERE SPECIAL CIRCUMSTANCES OF LYING IN WAIT WERE CODED FOR THESE CASES. WHAT DOES A UNIQUE WORD MEAN ON PAGE TWO OF THIS EXHIBIT?

A. IT MEANS THAT WAS THE ONLY SPECIAL PRESENT.

Q. OKAY. SO 25 CASES WHERE LYING IN WAIT WAS THE ONLY SPECIAL, THOSE CASES WERE THEN CHANGED FROM DEATH ELIGIBLE TO NONDEATH ELIGIBLE?

A. CORRECT.

Q. DOES PAGE ONE OF THIS EXHIBIT CONTAIN THE RESULTS OF THESE TEN DIFFERENT RUNS?

A. YES.

Q. THANK YOU.

I'D LIKE YOU TO TURN NOW TO EXHIBIT 225, WHICH IS A SENSITIVITY ANALYSIS FOR CASES UNIQUELY CODED FOR TORTURE.

A. YES.

Q. IS YOUR TESTIMONY CONCERNING 226 THE SAME AS -- IF I ASKED YOU THE SAME QUESTIONS FOR 225, WOULD THE SAME QUESTIONS BE ANSWERED --

A. YES.

Q. -- THE SAME?

A. THE ONLY CHANGE IS THE SPECIAL.

Q. SO THE ONLY CHANGE ARE SPECIALS. AND THEN, THE RESULTS OF THE ANALYSIS?

A. YES.

Q. NOW, AGAIN, THESE -- THESE ANALYSES WERE CONDUCTED IN BOTH -- IN 226, 227 AND 225, ASSUME THAT ALL CODING MISTAKES ARE MADE IN FAVOR OF DEATH ELIGIBILITY, CORRECT?

A. YES.

Q. WORSE CASE SCENARIO.

A. UM-HUM.

Q. OKAY.

MR. LAURENCE: THANK YOU, YOUR HONOR.

THE COURT: THANK YOU, COUNSEL.

CROSS?

MR. MATTHIAS: THANK YOU, YOUR HONOR.

CROSS-EXAMINATION

BY MR. MATTHIAS

Q. GOOD AFTERNOON, PROFESSOR WOODWORTH.

A. GOOD AFTERNOON.

Q. AND CONGRATULATIONS, AGAIN, ON YOUR RECENT RETIREMENT.

A. THANK YOU.

Q. THESE LATE-GENERATED REPORTS, WAS SOME EXPLANATION PROVIDED TO YOU FOR WHY YOU SHOULD DO THEM?

A. UM --

Q. I MEAN, HOW WAS IT YOU SETTLED ON THE TEN CASES THAT I IDENTIFIED AS THE ONES I WOULD CROSS-EXAMINE PROFESSOR BALDUS ABOUT? AND HOW IS IT THAT YOU CAME TO FOCUS SPECIFICALLY SO TORTURE AND LYING-IN-WAIT, AS OPPOSED TO ANY OTHER NUMBER OF SPECIAL CIRCUMSTANCES?

HOW WAS THAT EXPLAINED TO YOU, IS MY QUESTION.

A. OKAY. YOU HAVE TWO QUESTIONS THERE. THE FIRST ONE IS: HOW DID I SETTLE ON THE TEN CASES. AND THAT IS SPECIFICALLY I WAS GIVEN THE LIST THAT YOU HAD PROVIDED.

Q. WAS SOME EXPLANATION PROVIDED TO YOU OF WHAT THAT LIST WAS

OR WHERE IT HAD BEEN DERIVED FROM?

A. YES, IT WAS.

Q. AND WHAT WAS SAID TO YOU ABOUT THAT?

A. THAT THOSE WERE THE CASES YOU WERE INTERESTED IN CROSS-EXAMINING PROFESSOR BALDUS ABOUT.

Q. AND NOW, WITH RESPECT TO THE TORTURE AND THE LYING-IN-WAIT, DID COUNSEL EXPLAIN TO YOU WHY HE WAS PARTICULARLY INTERESTED IN HAVING YOU DO A SENSITIVITY ANALYSIS THAT WAS SPECIFIC TO THOSE TWO SPECIAL CIRCUMSTANCES AS OPPOSED TO THE OTHER SPECIAL CIRCUMSTANCES?

A. ACTUALLY, IT WAS PROFESSOR BALDUS WHO EXPLAINED IT TO ME, AND THEN HE SAID IT WAS BECAUSE THOSE WERE THE -- AND I QUOTE:

"ROUGHLY THE MOST SUBJECTIVE FROM THE POINT OF VIEW OF CODING."

AND HE WANTED SOME CONFIDENCE THAT EVEN AN UNREASONABLY LARGE NUMBER OF CODING ERRORS, EVEN AN INCREDIBLE -- I USE THAT IN THE LITERAL SENSE -- EVEN AN INCREDIBLE NUMBER OF CODING ERRORS THAT THE RESULTS WOULD HAVE BEEN RELATIVELY ROBUST.

Q. YOU AND PROFESSOR BALDUS HAVE COLLABORATED IN DEATH PENALTY RELATED STUDIES HOW MANY TIMES?

A. I'VE LOST COUNT. WE'VE WRITTEN MANY PAPERS. HE ENUMERATED THE CASES THAT WE HAVE BEEN INVOLVED IN: NEBRASKA, GEORGIA, NEW JERSEY, PHILADELPHIA COUNTY, THIS CASE, AND WE ALSO COLLABORATED ON A STUDY OF THE MILITARY CAPITAL SENTENCING SYSTEM.

Q. SO HOW MANY WOULD YOU ESTIMATE IT WOULD BE?

A. FIVE OR SIX.

Q. OKAY. AND HAVE YOU, LIKE PROFESSOR BALDUS, TAKEN SIDES IN THE DEATH PENALTY DEBATE?

A. I DON'T UNDERSTAND THE QUESTION. TAKE SIDES IN A FORUM?

Q. WELL, NO. IT'S THE DEATH PENALTY, LIKE A LOT OF OTHER ISSUES ON THE FOREFRONT OF AMERICAN PUBLIC LIFE, IS SOMETHING PEOPLE DEBATE PRETTY OPENLY.

IS THAT ONE OF THOSE ISSUES ON WHICH YOU'VE DEVELOPED FEELINGS?

A. IT WOULD BE HARD TO AVOID IT, YES. I HAVE FEELINGS ABOUT IT.

Q. AND WHAT ARE THEY?

A. I THINK IT'S AN INEFFICIENT WAY TO ACHIEVE A PUBLIC GOOD, WHICH IS TO INCAPACITATE DANGEROUS PEOPLE.

Q. YOU HAVE WRITTEN ON THIS SUBJECT, AND YOU'VE COMMENTED ON THE SUPREME COURT'S TREATMENT OF STATISTICAL EVIDENCE. AND YOU HAVE SUGGESTED THAT THAT DECISION UNDERMINES BASIC NOTIONS OF EQUAL JUSTICE IN THE ADMINISTRATION OF DEATH SENTENCING SYSTEMS IN THIS COUNTRY.

DO YOU STILL HOLD THAT VIEW?

A. I AGREE WITH THOSE WORDS WHICH WERE WRITTEN BY PROFESSOR BALDUS.

Q. ACTUALLY, THEY WERE WRITTEN BY YOU.

A. IN WHAT?

Q. IN AN ARTICLE YOU WROTE: "EXPERIENCES OF AN EXPERT WITNESS."

A. OH, THEN I WAS PERHAPS PLAGIARIZING PROFESSOR BALDUS. BUT, YES, I DON'T RETRACT THOSE WORDS, NO.

Q. OKAY. THANKS.

NOW, DEATH ELIGIBILITY FOR PURPOSES OF THIS STUDY HAS BEEN DEFINED IN A CERTAIN WAY. AND I TAKE IT YOU HAD NO PERSONAL ROLE IN SETTLING ON THAT DEFINITION; IS THAT CORRECT?

A. NOT MY PAID RATE, AS THEY SAY.

Q. SO THAT WAS SOMETHING THAT WAS DECIDED ENTIRELY BETWEEN PROFESSOR BALDUS AND HCRC, CORRECT?

A. REPEAT WHAT IT WAS THAT YOU WERE ASKING ME ABOUT THAT WAS DECIDED.

Q. THE DEFINITION OF DEATH ELIGIBILITY.

A. I COULDN'T SAY THAT PROFESSOR BALDUS CONSULTED HCRC. I HAVE NO DIRECT KNOWLEDGE OF THAT.

Q. OKAY. IS IT YOUR BELIEF, THEN, THAT PROFESSOR BALDUS CAME UP WITH IT ON HIS OWN?

A. ALL I'M EXPRESSING IS THAT I HAVE NO DIRECT KNOWLEDGE OF WHERE THAT DEFINITION CAME FROM.

Q. OKAY. BUT AT SOME POINT YOU DID COME TO REALIZE THAT THE PROJECT WAS DEFINING "DEATH ELIGIBLE" IN A WAY THAT INCLUDED A VERY LARGE NUMBER OF PEOPLE AS TO WHOM THE CHANCE OF BEING SENTENCED TO DEATH WAS ACTUALLY ZERO, CORRECT?

A. NO, I DON'T. I HAVE NO SUCH UNDERSTANDING.

Q. YOU DON'T? YOU DON'T UNDERSTAND THAT TO BE THE CASE?
A. I HAVE NO SUCH UNDERSTANDING, NO.
Q. WELL, DO YOU HAVE A DIFFERENT UNDERSTANDING ON THAT POINT?
A. NO.
Q. OKAY.
A. I'M NOT QUALIFIED TO OPINE ON THAT POINT.
Q. WELL, YOU'VE SAID, FOR EXAMPLE, THAT YOU KNOW -- IN YOUR DECLARATION YOU SAID YOU KNOW THAT CALIFORNIA'S DEATH PENALTY, CALIFORNIA'S LYING-IN-WAIT SPECIAL CIRCUMSTANCE IS BROAD.
A. UM-HUM.
Q. SO YOU DO HAVE -- I ASSUME THROUGH YOUR WORK ON THIS PROJECT, YOU'VE ACQUIRED A FEEL FOR THIS MATERIAL?
A. IT IS RELATIVELY BROADER THAN THE SPECIAL CIRCUMSTANCE USED IN THE SHR, THE ANALOGOUS SPECIAL CIRCUMSTANCE, WHICH IS SNIPING.
Q. SO WHEN YOU ASSIST PROFESSOR BALDUS IN TABULATING THESE NUMBERS AND CREATING THESE CHARTS, WHICH I ASSUME IS SOMETHING YOU DID DO; IS THAT CORRECT?
A. YES, I PROVIDED HIM WITH THE UNDERLYING DATA.
Q. AND YOU SAW THE RAW NUMBERS?
A. I PROVIDED THE RAW NUMBERS.
Q. YOU KNEW WHAT SOME OF THOSE PEOPLE HAD BEEN CONVICTED OF AND WHAT THEY HAD NOT BEEN CONVICTED OF WHEN YOU WERE CREATING THE DEATH ELIGIBILITY RATIO BY PUTTING A NUMERATOR OVER A DENOMINATOR. YOU KNEW THE DENOMINATOR INCLUDED PEOPLE WHO HAD

NOT BEEN CONVICTED OF CAPITAL MURDER.

A. YES.

Q. OKAY. SO YOU UNDERSTOOD THAT THAT DENOMINATOR INCLUDED PEOPLE AS TO WHOM THE DEATH PENALTY IN THE REAL WORLD POSED A CHANCE OF ZERO.

A. NO, I DON'T AGREE WITH "THE CHANCE OF ZERO." THAT'S A WORD OF ART FOR ME. I DON'T KNOW HOW YOU'RE COMING UP WITH THAT.

Q. WELL, WHEN I SPOKE WITH PROFESSOR BALDUS AND ASKED HIM, HE ACKNOWLEDGED THAT THE DENOMINATOR INCLUDED PEOPLE AS TO WHOM THE CHANCE OF DEATH WAS ZERO BY VIRTUE OF WHAT THEY HAD BEEN CONVICTED OF. I WENT THROUGH A SERIES OF QUESTIONS, AND I ASKED HIM:

"WHAT IS THE CHANCE OF SUFFERING THE DEATH PENALTY IF YOU'RE CONVICTED, FOR EXAMPLE, OF VOLUNTARY MANSLAUGHTER?"

I ASKED FOUR QUESTIONS IN SUCCESSION, AND HE ACKNOWLEDGED EACH TIME THAT THE CHANCE OF DEATH, OF A DEATH SENTENCE UNDER CALIFORNIA LAW IN THOSE INSTANCES WAS ZERO.

NOW, I ASSUMED YOU HAD THAT SAME UNDERSTANDING. BUT IF YOU DON'T, I'LL MOVE ON. I THOUGHT YOU KNEW THAT. AM I WRONG?

A. PROFESSOR BALDUS AND I HAVE NEVER DISCUSSED THIS POINT. THIS, AS I UNDERSTOOD IT, WAS AN APPLICATION OF A BODY OF LAW TO THE FACTS OF A BODY OF CASES.

Q. OKAY.

A. AND IT HAD NOTHING TO DO WITH THE ACTUAL OUTCOMES IN THESE

CASES.

Q. OKAY. I SEE FROM YOUR RESUME YOU'VE DONE SOME STATISTICAL -- YOU PROVIDED STATISTICAL SUPPORT OF SOME SORT IN CONNECTION WITH MEDICAL CLINICAL TRIALS; IS THAT CORRECT?

A. CORRECT.

Q. AND WHAT IS IT THAT YOU HAVE DONE? HAVE YOU DESIGNED THE STUDIES OR SIMPLY ASSISTED IN THE TABULATION? WHY DON'T YOU DESCRIBE THAT ROLE?

A. I HAVE DESIGNED SEVERAL STUDIES OF ANTIHISTAMINES.

Q. AND YOU DID THIS ON BEHALF OF A PHARMACEUTICAL COMPANY?

A. I WAS UNDER CONTRACT WITH A LOCAL CLINICAL TRIAL MANAGEMENT FIRM IN IOWA CITY --

Q. WERE YOU --

A. -- WITH --

Q. SORRY.

A. -- WITH A FORMER MEDICAL SCHOOL FACULTY MEMBER WITH WHOM I HAD HAD A RESEARCH RELATIONSHIP.

Q. DID YOU HAVE ANY HAND OR WERE YOU CONSULTED SPECIFICALLY ON THE ISSUE OF THE COMPOSITION OF THE SUBJECT POPULATION, OF THE TEST POPULATION?

A. THE COMPOSITION OF A SUBJECT POPULATION IN A MEDICAL STUDY IS DETERMINED BY WHAT ARE CALLED "ENTRY AND EXCLUSION CRITERIA," WHICH ARE TYPICALLY DEFINED IN MEDICAL TERMS.

AND, NO, I HAD NO INPUT ON THAT.

Q. INCLUDING EVEN ITS SIZE OR --

A. CERTAINLY I WILL DO WHAT IS CALLED "A POWER ANALYSIS," WHICH IS TO CALCULATE A SAMPLE SIZE NEEDED TO ACHIEVE A LEVEL OF PRECISION. IT WOULD BE PERSUASIVE TO THE FACT-FINDERS, IN THIS CASE, THE FDA.

Q. BUT, OTHERWISE, YOU HAD NO ROLE IN DEFINING WHO SHOULD BE IN THE POPULATION FOR TEST PURPOSES?

A. NO.

Q. I'D LIKE TO TAKE IT -- I UNDERSTAND THAT ONE OF THE THINGS THAT YOU DID IN CONNECTION WITH THIS STUDY WAS YOU TOOK THE INFORMATION THAT'S REFLECTED IN PROFESSOR BALDUS' TABLE FOUR, PART TWO, WHICH IS THE LIST OF STATES, IF THAT'S FAMILIAR TO YOU, AND YOU MADE SOME VERY SUBSTANTIAL ADJUSTMENTS TO IT IN LIGHT OF THE DATA THAT WAS DERIVED FROM THE SUPPLEMENTAL HOMICIDE REPORTS; IS THAT CORRECT?

A. I MADE SOME ADJUSTMENTS. "SUBSTANTIAL" IS YOUR TERM.

Q. WELL, WHAT WAS THE DIFFERENCE BETWEEN THE RESULTS, THE DEATH ELIGIBILITY RATE CALCULATED BY YOU AND PROFESSOR BALDUS, OR JUST BY YOU, FOR CALIFORNIA, AND THE DEATH ELIGIBILITY RATE THAT WAS DERIVED FROM THE UNPUBLISHED DATA GENEROUSLY PROVIDED TO YOU BY PROFESSORS FAGAN, ET AL?

A. TWELVE PERCENTAGE POINTS, ROUGHLY.

Q. TWELVE?

A. UM-HUM.

Q. WHY DON'T YOU LOOK AT TABLE ONE IN PROFESSOR BALDUS' CHART?

A. YOU'LL HAVE TO FIND IT FOR ME.

Q. WELL, LET ME JUST DO IT THIS WAY, IN THE INTEREST OF TIME.

IF TABLE ONE REFLECTS A DEATH ELIGIBILITY RATE OF SOMEWHERE IN THE NEIGHBORHOOD OF 55 PERCENT, AND THE TABLE ONE OF YOURS, WHICH REFLECTS THE SHR RESULTS --

A. I THOUGHT YOU WERE ASKING ME THE DIFFERENCE BETWEEN 37.8 AND 50.3.

Q. NO. I'M ASKING YOU THE DIFFERENCE BETWEEN YOUR PREADJUSTED --

A. OH.

Q. -- CALIFORNIA STUDY, AND THE DATA, THE CALCULATION TETHERED TO CALIFORNIA IN THE FAGAN MATERIAL.

A. WELL, PROCEED. I DON'T UNDERSTAND YOUR QUESTION YET. CONTINUE.

Q. WHAT'S THE DIFFERENCE, IS MY QUESTION.

A. BETWEEN?

Q. BETWEEN THE DEATH ELIGIBILITY RATE THAT YOU CALCULATED AS A RESULT OF THIS STUDY, AND THE DEATH ELIGIBILITY RATE --

A. YOU MEAN, THE OVERALL DEATH ELIGIBILITY RATE.

Q. I MEAN --

A. FOR ALL CRIMES OF CONVICTION.

Q. NO. THE FAGAN MATERIAL.

A. OH, WE DIDN'T CALCULATE THE FAGAN MATERIAL.

Q. WELL, YOU ENDED UP ADJUSTING IT. AND MY QUESTION IS --

A. RIGHT.

Q. OKAY. YOU ENDED UP -- HOW MUCH DID YOU HAVE TO ADJUST IT IN

ORDER TO MAKE IT CLOSE TO YOUR RESULTS? THAT'S MY QUESTION.

A. I DID NOT ADJUST IT TO MAKE IT CLOSE.

Q. WELL, AGAIN --

A. I ADJUSTED IT USING STATISTICAL PRINCIPLES.

Q. AND IT BECAME CLOSER.

A. AND IT BECAME CLOSER.

Q. AND MY QUESTION IS: WHAT IS THAT MEASURE?

A. WHAT?

Q. THE MEASURE BY WHICH IT WAS ADJUSTED UPWARDLY TO BE CLOSER?

A. IT WAS, AS PROFESSOR BALDUS HAS EXPLAINED, AND AS I EXPLAINED IN DIRECT, IT WAS ADJUSTED UPWARD BY ADDING IN AN ESTIMATE OF WHAT PROPORTION OF THE SHR SAMPLE WOULD HAVE THE LYING-IN-WAIT CIRCUMSTANCE. THAT WAS THE PRINCIPAL ADJUSTMENT.

Q. I WAS REALLY ASKING YOU FOR A NUMBER, BUT WE CAN ACTUALLY ALL DO THE MATH.

A. WELL, YOU CAN SEE IT.

Q. ALL WE HAVE TO DO IS COMPARE THE RESULTS THAT APPEAR IN TABLE ONE AND THE RESULTS THAT APPEAR IN TABLE FOUR, FART TWO. AND WE CAN DO THE MATH.

LET ME MOVE ON, PLEASE.

IF YOU COULD JUST KEEP IN MIND ALL OF YOUR TABLES. YOU HAVE TABLE ONE, TABLE TWO, TABLE THREE AND TABLE FOUR. I THINK THIS IS NOT GOING TO BE CONTROVERSIAL, BUT I JUST WANT TO MAKE SURE I UNDERSTAND.

THE PREADJUSTED CALCULATIONS ARE THOSE THAT ARE SHOWN

IN TABLE ONE.

THE UNDERLYING DATA FOR WHICH THOSE CALCULATIONS ARE DERIVED IS SHOWN IN TABLES TWO AND THREE. AND YOUR REANALYSIS AND ADJUSTMENTS ARE SHOWN AND EXPLAINED IN TABLE FOUR.

IS THAT ALL CORRECT?

MR. LAURENCE: OBJECTION. I'M NOT SURE WHICH.

THE WITNESS: YOU HAVE ME AT A LOSS. I DON'T KNOW WHAT YOU'RE TALKING ABOUT.

BY MR. MATTHIAS

Q. I'M REFERRING TO YOUR DECLARATION.

A. MY DECLARATION HAS AN APPENDIX B, PART ONE AND TWO. AND IT HAS THE SOME APPENDIX TABLES, WHICH ARE THE SOURCES OF MY DATA.

Q. RIGHT YOU ARE. SO LET ME TRY AGAIN.

TABLE ONE IS THE PREADJUSTED DATA. TABLES TWO AND TABLES THREE ARE THE RAW DATA THAT UNDERLIE THOSE CALCULATIONS.

A. CAN SOMEBODY PROVIDE ME WITH THOSE TABLES, PLEASE?

Q. YOU DON'T HAVE YOUR DECLARATION IN FRONT OF YOU?

A. I HAVE IT IN FRONT OF ME. IT DOESN'T HAVE THE TABLES ATTACHED.

Q. OH, THAT'S THE EARLIER VERSION THAT YOU PRODUCED THAT LEFT OUT THE TABLES.

MR. LAURENCE: PAGE FIVE OF 218.

THE WITNESS: THANK YOU. ALL RIGHT.

I'M ORIENTED AS TO TIME AND SPACE NOW.

BY MR. MATTHIAS

Q. OKAY. WHY DON'T YOU TAKE TEN SECONDS, OR WHATEVER YOU NEED. LOOK AT TABLE ONE, TABLE TWO, TABLE THREE AND YOUR APPENDIX E, WHICH I ERRONEOUSLY REFERRED TO AS TABLE FOUR.

A. YOU'RE NOT INTERESTED IN TABLE THREE?

Q. NO, I AM INTERESTED IN TABLE THREE. LOOK AT ONE, TWO, THREE.

A. AND THE APPENDIX.

Q. AND THE APPENDIX, WHICH IS THE VERY LAST PAGE BEHIND THE CD.

A. YES. OKAY. I'M FINE. PROCEED.

Q. SO THE PREADJUSTED CALCULATIONS ARE REFLECTED IN TABLE ONE. THE DATA UNDERLYING THOSE CALCULATIONS CAN BE FOUND IN TWO AND THREE. AND YOUR REANALYSIS AND ADJUSTMENTS ARE SHOWN AND EXPLAINED IN THE APPENDIX.

A. THE SHR DATA THAT WENT INTO THE STUDY IS IN TABLES ONE, TWO AND THREE.

Q. IN THEIR PREADJUSTED FORM?

A. YES.

Q. OKAY. AND THEN, E.

A. BUT THAT'S NOT ALL OF THE DATA THAT WENT INTO THE ADJUSTMENT. THE REST OF THE DATA IS IN PART TWO. AND THAT CAME FROM THE CALIFORNIA STUDY THAT PROFESSOR BALDUS AND I ARE TESTIFYING ON.

Q. UNDERSTOOD. YOU CANNOT PERSONALLY ATTEST TO THE ACCURACY OF THE INFORMATION IN TABLE ONE, CAN YOU?

A. FAGAN IS A RESPECTED INVESTIGATOR.

Q. I APPRECIATE YOUR VIEWS ON THAT. THE QUESTION WAS WHETHER YOU CAN PERSONALLY ATTEST TO THE VALIDITY AND ACCURACY OF THOSE FIGURES.

A. NO.

Q. AND WHY NOT?

A. I DIDN'T DO THE TABULATIONS. I RELIED ON THE WORK OF ANOTHER SCHOLAR, WHICH IS NOT UNUSUAL.

Q. LET ME ASK YOU: LOOKING AT TABLE ONE, WHO DECIDED NOT TO INCLUDE IN THIS DISPLAY OF JURISDICTIONS INFORMATION PERTINENT TO THE FEDERAL DEATH PENALTY STATUTE?

A. I HAVEN'T ANY IDEA.

Q. BUT IT WASN'T YOU?

A. NO.

Q. YOU ARE AWARE OF AVAILABLE DATA OF SIMILAR KIND TO THE DATA THAT'S REFLECTED HERE FOR EACH OF THESE STATES THAT PERTAINS TO THE FEDERAL STATUTE, CORRECT?

YOU'RE AWARE OF THAT FROM THE LITERATURE, IS WHAT I MEAN.

A. YES, I'M AWARE THAT SOMETHING OF THAT SORT IS AVAILABLE. I HAVEN'T WORKED WITH IT.

Q. SO YOU HAVE NO FEEL FOR WHERE IT WOULD PLUG IN ON THIS SPECTRUM OF THE HIGH OF ALABAMA TO THE LOW OF CALIFORNIA?

A. STATE YOUR QUESTION AGAIN.

Q. DO YOU HAVE ANY IDEA WHERE IT WOULD PLUG IN --

A. WELL --

Q. -- IF YOU HAD THE SAME DATA.

A. -- CLARIFY IT FOR ME AGAIN.

Q. I'M SORRY. IS THERE A PARTICULAR WORD I'M USING THAT YOU'RE NOT UNDERSTANDING?

A. YES, "WHERE IT WOULD PLUG IN."

Q. THE FEDERAL DATA, THE DATA PERTINENT TO THE FEDERAL STATUTE. COMPARABLE DATA TO THAT DISPLAYED IN TABLE ONE.

A. WHAT FEDERAL STATUTE?

Q. THE FEDERAL DEATH PENALTY STATUTE.

A. THIS IS ABOUT A STATE JURISDICTION. IT'S NOT RELEVANT. THE FEDERAL DATA IS NOT RELEVANT.

Q. YOU MADE THAT JUDGMENT?

A. NO, OF COURSE NOT. I DO WHAT I'M ASKED TO DO. I'M A TEAM MEMBER. MY JUDGMENT AND EXPERTISE ARE CALLED UPON IN MANY CASES, BUT THIS IS NOT ONE OF THEM.

Q. WELL, DID YOU MAKE THE JUDGMENT TO INCLUDE OTHER JURISDICTIONS OTHER THAN CALIFORNIA?

A. NO.

Q. OKAY. NOW, IN ITS PREADJUSTED FORM AS IT'S APPEARS IN TABLE ONE, I HOPE YOU'LL ACKNOWLEDGE THAT IF THERE ARE DEFICIENCIES IN THIS DATA, THEY WOULD CARRY FORWARD TO ANY ADJUSTMENTS YOU MADE.

A. THAT'S UNARGUABLE.

Q. OKAY.

A. ALSO VERY GENERAL.

Q. NOW, PROFESSOR BALDUS TESTIFIED, OR HE SAID ACTUALLY IN HIS DECLARATION, THAT THE VALIDITY OF THE STUDIES THAT HE CONDUCTED WITH RESPECT TO MARYLAND, NEBRASKA AND NEW JERSEY BECAME ENHANCED WHEN HE SAW THAT THE RESULTS OF THE SHR STUDY BY FAGAN, WHEN HE SAW THOSE BECAUSE THOSE RESULTS WERE WHAT YOU CALLED "COMPARABLE" TO THOSE OBTAINED UNDER HIS STUDY.

MY QUESTION WAS YOUR CONFIDENCE IN THE VALIDITY OF EITHER FAGAN'S STUDY OR THE CALIFORNIA STUDY UNDERMINED WHEN YOU SAW THAT THE DEATH-ELIGIBILITY RATES CALCULATED BY FAGAN WERE 17 TO 30 POINTS LOWER?

A. WE WERE PUZZLED BY IT AT FIRST, AND THEN WE RECOGNIZED THE REASON THAT IT WAS LOWER.

Q. SO AS SOON AS YOU SAW THAT DIFFERENCE YOU SET ABOUT LOOKING FOR AN ADJUSTMENT OR AN EXPLANATION THAT COULD BE DEALT WITH BY ADJUSTMENT?

A. I'M A SCIENTIST. THAT'S THE WAY WE THINK. WE LOOK FOR EXPLANATIONS OF ANOMALIES.

Q. YOU'RE AWARE OF THE LIMITATIONS OF USING THIS SUPPLEMENTAL HOMICIDE REPORTS, CORRECT? THAT YOU'RE FAMILIAR WITH THE LITERATURE ON THAT. I ASKED -- I ASKED THE SAME QUESTION OF PROFESSOR BALDUS, AND YOU WERE, NO DOUBT, PRESENT.

HE ACKNOWLEDGED IT. I'M ASKING YOU IF YOU WOULD DO THE SAME.

A. NO, I HAVE NO DIRECT KNOWLEDGE OF THE LIMITATIONS OF THOSE DATA.

Q. YOU ARE UNAWARE OF LITERATURE IN YOUR FIELD WHICH HAS IDENTIFIED THE DEFICIENCIES OF RELYING --

A. MY FIELD IS STATISTICAL METHODOLOGY. WE ARE ABOUT MAKING VALID INFERENCES FROM DATA.

Q. SO YOU WOULD DISAGREE THAT THE SHR DATA ARE MARKED BY ERRORS IN CLASSIFYING THE CIRCUMSTANCES SURROUNDING HOMICIDES?

A. NO, YOU MISUNDERSTAND ME. I'M SAYING I HAVE NO DIRECT KNOWLEDGE OF IT.

Q. WELL, ARE YOU AWARE OF PEOPLE IN YOUR FIELD WHO HAVE MADE THAT OBSERVATION?

A. NO.

Q. ARE YOU AWARE OF PEOPLE IN YOUR FIELD HAVING MADE THAT OBSERVATION?

A. NO.

Q. OKAY. ALL RIGHT. EVEN SO, LET'S LOOK AT THE CALIFORNIA SHR'S FOR THE PERIOD 1978 TO 2003.

NOW, YOUR STUDY, YOUR CALIFORNIA STUDY EXAMINED ALMOST AN IDENTICAL PERIOD. IT WAS 1978 TO 2002; IS THAT CORRECT?

A. YES.

Q. OKAY. AND FAGAN'S UNIVERSE WAS 76,000 CASES AND CHANGE. AND YOUR UNIVERSE WAS 27,000 CASES AND CHANGE. AND YET, THEY COVERED ESSENTIALLY THE SAME PERIOD LESS ONE YEAR, 25 VERSUS 26 YEARS.

AND, OF COURSE, THE EXPLANATION FOR THAT DIFFERENCE

IS THAT THE SHR INCLUDED UNSOLVED CRIMES, UNCHARGED CRIMES AND ACQUITTALS.

A. YES, I KNOW WHAT IT'S BASED ON.

Q. AND DOES THAT EXPLAIN THE DIFFERENCE IN THE SIZE OF THE UNIVERSE?

A. THAT IS THE EXPLANATION THAT I HAVE HEARD, YES.

Q. NOW, ACQUITTAL, AN ACQUITTAL WOULD BE INCLUDED IN THE SHR'S. AN ACQUITTAL WAS A CFF, UNDER YOUR STUDY, CORRECT?

A. WHAT'S "CFF" STAND FOR?

Q. DO YOU KNOW?

A. WHAT IS "CFF"?

Q. PARDON ME. CCF.

A. CCF.

Q. PARDON ME. CCF. CONTROLLING FINDING OF FACT, CFF. CONTROLLING FINDER OF FACT.

A. OH, OKAY.

Q. IS THAT CORRECT? IT WAS A CONTROLLING FINDER OF FACT UNDER YOUR STUDY, ACQUITTALS?

A. I HAVE NO DIRECT KNOWLEDGE OF THAT. I'VE NEVER DISCUSSED THOSE POINTS WITH PROFESSOR BALDUS OR ANYONE ELSE.

Q. NOW, THE ADJUSTMENT THAT YOU MADE TO FAGAN'S NUMBERS, IN ORDER TO MAKE THAT ADJUSTMENT YOU RELIED UPON CALCULATIONS DERIVED FROM YOUR CALIFORNIA STUDY, CORRECT?

A. CORRECT.

Q. AND THAT MADE THE RESULTS MORE SIMILAR?

A. SOMEWHAT TO MY SURPRISE, YES. BUT IT DID MAKE THEM MORE SIMILAR.

Q. NOW, LET ME ASK YOU THIS: IN ORDER TO ANSWER THIS YOU PROBABLY NEED TO LOOK AT PAGE TWO, FOOTNOTE ONE OF YOUR DECLARATION.

A. OKAY.

Q. AND YOU DESCRIBED EARLIER WHY IT WAS THAT YOU MADE AN ADJUSTMENT FOR THE GANG ENHANCEMENT. AND THAT RESTS ON THE FACT THAT FOR SOME PERIOD OF THE PERIOD OF TIME COVERED BY THE STUDY THE GANG ENHANCEMENT WAS NOT IN EFFECT. AND SO YOU NEEDED TO ADJUST FOR THAT; IS THAT CORRECT?

A. I NEEDED TO REMOVE THAT OVERCOUNT, YES.

Q. OKAY. AND WHILE YOU WERE AT IT, IS THERE ANY REASON THAT YOU DIDN'T MAKE AN ADJUSTMENT FOR THE FACT THAT -- WELL, LET'S LOOK AT THE LIST.

THE FAGAN MATERIAL, AS YOU DESCRIBE IT IN FOOTNOTE ONE, THE AUTHOR'S CLASSIFIED -- I'M READING ON ABOUT LINE 23, IF YOU WANT TO FOLLOW ALONG IN THE FOOTNOTE, MIDDLE OF THE FOOTNOTE:

> "TO GENERATE A DEATH ELIGIBILITY ESTIMATE FOR EACH STATE, THE AUTHOR HAS CLASSIFIED A MURDER OR NONNEGLIGENT HOMICIDE AS DEATH ELIGIBLE IF IT INCLUDED ANY OF THE FOLLOWING ELEMENTS THAT ARE PART OF THE RECURRENT LANGUAGE OF CAPITAL ELIGIBLE HOMICIDES ACROSS THE STATES."

AND THEN, THERE'S A LIST A THROUGH G.

AND YOU MADE AN ADJUSTMENT FOR A D AND FOR E.

D BEING GANGLAND KILLING INVOLVING STREET GANGS, AND E BEING INSTITUTION KILLINGS WHERE THE OFFENDER WAS CONFINED; IS THAT CORRECT?

OR YOU DIDN'T MAKE THAT ADJUSTMENT. PARDON ME. YOU DID IT FOR LYING IN WAIT?

A. YEAH, F.

Q. RIGHT. WHY DIDN'T YOU DO IT FOR B, KILLING OF CHILDREN BELOW AGE SIX? THAT'S NOT A SPECIAL IN CALIFORNIA.

I MEAN, THE ANSWER MAY BE IT WASN'T YOUR DECISION, AND THAT'S FINE. BUT MY QUESTION IS: WHY DIDN'T YOU?

A. GOOD QUESTION.

Q. ALL RIGHT.

A. IT NEVER CAME UP IN ANY CONVERSATION I CAN RECALL.

Q. OKAY. WELL, BY INCLUDING IT YOU ACKNOWLEDGE THAT THAT WOULD RESULT IN INFLATION OF THE SHR DATA.

A. LET'S SEE. PERHAPS. YES, IT WOULD.

Q. LIKEWISE WITH E?

A. E IS WHAT?

Q. INSTITUTION KILLINGS WHERE THE OFFENDER WAS CONFINED IN A CORRECTIONAL OR OTHER GOVERNMENTAL INSTITUTION.

A. LET'S LOOK AT FAGAN'S NUMBERS ON THAT.

Q. WELL, EVEN IF IT'S ONLY ONE CASE, IT RESULTS -- IT WOULD INFLATE THE NUMBERS, WOULDN'T IT?

A. HALF OF 1 PERCENT IN CALIFORNIA.

Q. OKAY.

A. ACCORDING TO FAGAN, SO THAT'S GOING TO BE NEGLIGIBLE.

Q. HOW ABOUT G: KILLINGS IN THE COURSE OF DRUG BUSINESS ALSO NOT A SPECIAL IN CALIFORNIA.

IT WOULD RESULT IN AN INFLATED FIGURE, WOULD IT NOT?

A. IF I MAY, I'M LOOKING AT TABLE TWO AND THREE --

Q. YOU KNOW, IF MR. LAURENCE WANTS TO GET THE PRECISE NUMBER, HE CAN DO IT ON HIS TIME. I'M JUST ASKING WHETHER IT WOULD RESULT IN AN INFLATED NUMBER. AND I THINK THE ANSWER HAS TO BE YES.

A. AND MY ANSWER IS THAT IT'S PROBABLY DE MINIMUS BECAUSE FAGAN DIDN'T EVEN CHOOSE TO TABULATE IT AS FAR AS I CAN SEE, UNLESS YOU CAN CORRECT ME ON THAT.

Q. IF YOU WOULD, LOOK AT YOUR TABLE ONE, AGAIN. I TAKE IT THAT YOU DID NOT MAKE ANY ADJUSTMENTS TO ANY OTHER STATE, TO ANY OTHER STATE'S NUMBERS IN LIGHT OF WHAT YOU MAY HAVE PERCEIVED TO BE A LESS THAN PERFECT FIT BETWEEN THE SHR REPORTING CRITERIA AND THAT PARTICULAR STATE'S DEATH PENALTY STATUTE; IS THAT CORRECT?

A. THAT IS CORRECT. AND THE REASON FOR THAT IS, AS I UNDERSTAND IT -- IT WASN'T MY DECISION NOT TO DO IT. THE REASON FOR THAT AS I UNDERSTAND IT IS THAT CALIFORNIA IS THE ONLY STATE THAT HAS SUCH A BROAD -- AND, AGAIN, THIS IS HEARSAY, IF YOU LIKE -- LYING-IN-WAIT STATUTE.

AND THAT WAS THE PRINCIPAL REASON THAT THE GENERIC SHR NUMBER WAS LOW.

Q. YOU DON'T KNOW WHETHER ANY OTHER STATES HAVE A SUBSTANTIAL DISCONNECT BETWEEN THE SCOPE OF THEIR DEATH PENALTY STATUTE AND THE SHR --

A. I WAS --

Q. -- REPORTING CRITERIA, CORRECT?

A. -- NEVER PRESENT AT A MEETING AT WHICH THAT WAS DISCUSSED.

Q. SO IF WE WANTED TO TAKE THE ADJUSTED NUMBER AND COMPARE IT MEANINGFULLY TO THE OTHER STATES, WE WOULD HAVE TO HAVE CONFIDENCE THAT THE SAME -- THAT THE OTHER STATES UNDERWENT THE SAME RIGOROUS REANALYSIS IN LIGHT OF ANY DISCONNECT BETWEEN THEIR STATUTORY TERMS AND THE SHR REPORTS, CORRECT?

A. WE WOULD HAVE -- WE'RE SPECIFICALLY LOOKING AT THE EFFECT OF -- PRINCIPALLY LOOKING AT THE EFFECT OF THE LYING-IN-WAIT STATUTE, WHICH, AS I UNDERSTAND IT, IS UNIQUE, OR NEARLY UNIQUE. AGAIN, THIS IS HEARSAY.

AND, THEREFORE, THE ONLY CONCERN I WOULD HAVE HAD IS WHETHER THERE'S ANY OTHER STATE WITH THAT SPECIAL CIRCUMSTANCE.

Q. IT'S YOUR UNDERSTANDING THAT THE ONLY PURPOSE OF THIS STUDY WAS TO ASSESS THE SCOPE OF CALIFORNIA'S LYING-IN-WAIT SPECIAL CIRCUMSTANCE AND NO OTHER PURPOSE?

A. NO, I DIDN'T SAY THAT.

Q. OKAY. YOU ARE FAMILIAR WITH THE TERM "OBSERVER EXPECTANCY BIAS"?

A. NOT IN THOSE EXACT -- NOT IN THAT EXACT FORM OF WORDS, NO.

Q. HOW ABOUT "OBSERVER BIAS"?

A. I UNDERSTAND THE CONCEPT. I HAVEN'T HEARD IT IN THOSE WORDS, NO.

Q. DO YOU KNOW IT BY ANOTHER LABEL?

A. WELL, YES, OF COURSE. PARTICULARLY SINCE I WORK WITH CLINICAL MEDICAL TRIALS. WE'RE VERY CONCERNED ABOUT CONSCIOUS AND UNCONSCIOUS BIASES IN THE OBSERVER CAUSED BY KNOWLEDGE OF WHAT EXPERIMENTAL GROUP THE SUBJECT WAS IN. SO I'M WELL-AWARE OF OBSERVER EXPECTATIONS THAT MIGHT BIAS RESULTS.

HOWEVER, IN MEDICAL STUDIES THE EXPECTATION IS CLEARCUT AND PLAUSIBLE. IN FACT, IT'S DOCUMENTABLE IN THAT THE PHYSICIAN WHO IS IN CHARGE OF ASSIGNING THE TREATMENT WOULD KNOW -- WOULD ACTUALLY PROBABLY BE ABLE TO STEER HEALTHIER SUBJECTS INTO THE TREATMENT THAT WAS EXPECTED TO BE BETTER FOR THEM.

IT MIGHT HAVE BEEN AN ACT OF HUMANITY. THERE'S SOME DOCUMENTATION OF THAT IN SOME STUDIES.

Q. MY QUESTION WAS WHETHER YOU KNOW OF THAT PHENOMENON BY ANOTHER LABEL.

A. WE CERTAINLY TALK ABOUT THAT KIND OF CONCEPT IN CLINICAL RESEARCH.

Q. WHAT'S THE LABEL YOU ALL USE?

A. I DON'T HAVE ANY SPECIFIC LABEL FOR IT.

Q. WELL, WHAT YOU'RE DESCRIBING FOR ME, WOULD YOU CALL THAT

SYSTEMIC OR SYSTEMATIC ERROR PRODUCED BY OBSERVATIONAL DATA BY AN OBSERVER'S EXPECTATIONS OR WISHES?

I'M SORRY. I GARBLED THAT. I AM GOING TO READ THAT AGAIN:

"SYSTEMATIC ERROR PRODUCED IN OBSERVATIONAL DATA BY AN OBSERVER'S EXPECTATIONS OR WISHES."

A. THAT SEEMS LIKE A FAIR CHARACTERIZATION OF THE CONCEPT THAT WE'RE TALKING ABOUT.

Q. AND WOULD YOU AGREE THAT THIS IS A SPECIES OF ERROR THAT IS STRONGLY ASSOCIATED WITH OBSERVATIONS MADE ON VARIABLES THAT REQUIRE SUBJECTIVE ASSESSMENT?

A. THAT'S ALMOST A TAUTOLOGY, BECAUSE IF IT'S NOT SUBJECTIVE, THEN IT'S A READING ON AN INSTRUMENT, YEAH. SO YEAH.

Q. YOU'D AGREE THAT THE DEATH ELIGIBILITY ASSESSMENT THAT WAS GOING ON IN THE STUDY YOU PARTICIPATED IN WAS A SUBJECTIVE ENTERPRISE, CORRECT?

A. PROFESSOR BALDUS HAS STATED IN MY HEARING THAT --

Q. MY QUESTION REALLY DIDN'T ASK YOU YOUR POWER OF RECALL ON WHAT PROFESSOR BALDUS SAID.

A. I HAVE NEVER CRACKED ONE OF THESE PROBATION REPORTS. I DON'T KNOW WHAT THEY LOOK LIKE. I HAVE NO FEELING FOR HOW MUCH JUDGMENT IS REQUIRED BY THE OBSERVER.

"SUBJECTIVE" SIMPLY MEANS THAT THE JUDGMENT DEPENDS UPON THE BACKGROUND AND EXPERIENCE OF THE OBSERVER. IT DOES NOT NECESSARILY MEAN WHIMSICAL OR BIAS.

Q. YOU EARLIER IDENTIFIED THE TORTURE AND LYING-IN-WAIT SPECIAL CIRCUMSTANCES AS AMONG THE MORE DIFFICULT. AND THAT'S WHY YOU WERE DIRECTED TO REEXAMINE THEM.

WAS THE DIFFICULTY ASSOCIATED WITH THE SUBJECTIVE NATURE IN WHICH THAT HAD TO BE APPLIED? I THOUGHT THAT WAS THE EXACT RATIONALE GAVE FOR WHY YOU LOOKED AT THOSE SPECIAL CIRCUMSTANCES.

A. NO, I THINK THAT IT'S REQUIRED -- THAT THE LYING-IN-WAIT IS COMPLICATED IN ITS APPLICATION, AS I UNDERSTAND IT. AND IT REQUIRES FAIRLY MATURE LEGAL JUDGMENT, AS REPRESENTED BY PROFESSOR BALDUS.

THAT DOES NOT MAKE IT SUBJECTIVE. IT SIMPLY MAKES IT REQUIRE A HIGHER LEVEL OF EXPERTISE THAN THE OTHERS.

HE WAS MORE CONCERNED ABOUT THOSE TWO, AS I UNDERSTAND IT, FOR THAT REASON. NOT BECAUSE THEY WERE MORE SUBJECT TO THE WHIMS AND PASSIONS OF THE OBSERVER, BUT BECAUSE THEY REQUIRED MORE KNOWLEDGE AND EXPERTISE ON THE PART OF THE OBSERVER, IF YOU WANT TO ALL A JUDGE AN EXPERT. A JUDGE IS NOT --

Q. ARE YOU AWARE OF THE CRITERIA BY WHICH "DEATH ELIGIBILITY" WAS DEFINED FOR PURPOSES OF THIS STUDY?

A. I'VE ALREADY SAID "NO" TO THAT.

Q. YOU ARE NOT AWARE OF THE DEFINITION, THE OPERATING DEFINITION FOR THE STUDY?

A. I BELIEVE THAT QUESTION HAS BEEN ASKED AND ANSWERED. I

BELIEVE I SAID --

Q. WELL, THAT MIGHT BE AN APPROPRIATE -- EXCUSE ME, PROFESSOR. THAT MIGHT BE AN APPROPRIATE OBJECTION FOR MR. LAURENCE TO RAISE. IT'S NOT A REASON FOR YOU NOT TO ANSWER MY QUESTION.

A. WELL, I'M NOT DENYING IT. I'M JUST GIVING SOME META COMMENTARY HERE. NOW, LET ME THINK ABOUT IT.

ASK ME THE QUESTION AGAIN P.

Q. ARE YOU AWARE OF THE DEFINITION OF "DEATH ELIGIBILITY" THAT WAS OPERATIVE FOR PURPOSES OF THIS STUDY?

A. DEATH ELIGIBILITY WAS DEFINED BY THE STATUTE, AND IT WAS DEFINED AS THE PRESENCE OF ONE OR MORE SPECIAL CIRCUMSTANCES UNDER THE BODY OF LAW OF A SPECIFIC PERIOD, I.E., PRE-FURMAN, OR CARLOS WINDOW OR 2008.

Q. NOW, IN ADDITION TO CALCULATING A DEATH ELIGIBILITY RATIO, YOU PURPORTED TO CALCULATE A DEATH SENTENCING RATIO, CORRECT?

A. WHAT ARE YOU REFERRING TO HERE?

Q. I'M REFERRING TO YOUR DECLARATION. ARE THESE TERMS NOT FAMILIAR TO YOU, "DEATH ELIGIBILITY RATE"?

A. OF COURSE I UNDERSTAND THAT.

Q. OKAY.

A. IT'S MY PHRASE.

Q. "DEATH SENTENCING RATE," THESE MEAN THINGS. THIS MEANS SOMETHING TO YOU?

A. WHERE DO YOU SEE THE WORD "DEATH SENTENCING RATE"?

Q. IN YOUR DECLARATION. WE DON'T NEED TO FIND IT IN THERE.

LET'S JUST TALK ABOUT THE TERMS.

MR. LAURENCE: I OBJECT. I DON'T FIND "DEATH SENTENCING RATE."

THE WITNESS: I DON'T FIND IT IN MY DECLARATION. YOU HAVE TO ENLIGHTEN ME WHERE I SAID IT.

MR. LAURENCE: CAN WE HAVE A PAGE AND LINE NUMBER?

BY MR. MATTHIAS

Q. LET'S TRY THIS. DO YOU KNOW THE TERM "DEATH SENTENCING RATE"?

A. YES. IT'S THE NUMBER OF DEATHS OVER NUMBER AT RISK OF DEATHS.

Q. OKAY. WHAT IS THE "DEATH ELIGIBILITY RATE"?

A. NUMBER OF DEATH ELIGIBLE OVER THE NUMBER OF CASES THAT WERE AT RISK OF BEING DEATH ELIGIBLE.

Q. NOW, IN ORDER TO CALCULATE THE DEATH SENTENCING RATE, DO YOU FIRST NEED TO KNOW THE DEATH ELIGIBILITY RATE?

A. NO.

Q. HOW WOULD YOU CALCULATE IT WITHOUT KNOWING IT?

A. THE DEATH SENTENCING RATE?

Q. LET'S MAKE THIS REALLY SIMPLE. WE HAVE A POPULATION OF TEN PEOPLE. FIVE ARE DEATH ELIGIBLE BY SOME DEFINITION.

A. UM-HUM.

Q. THREE ARE SENTENCED TO DEATH.

A. RIGHT.

Q. OKAY. NOW, YOU'D NEED TO KNOW BEFORE YOU CAN GET TO THREE

OVER FIVE, YOU HAVE GOT TO GET TO FIVE OVER TEN, RIGHT?

A. YEAH, YOU GOT TO --

Q. THAT'S WHAT I MEANT.

A. THREE OVER FIVE, YOU HAVE TO GET TO FIVE.

Q. THREE IS MEANINGLESS IN REFERENCE TO TEN. IT'S ONLY MEANINGFUL UNLESS THE DEATH SENTENCING RATE BY REFERENCE -- SORRY. THAT'S WHAT I MEANT BY "YOU NEED TO CALCULATE DEATH ELIGIBILITY RATE FIRST."

A. WELL, AS TO "YOU HAVE TO," I CAN DIVIDE ANY TWO NUMBERS I PLEASE. I WAS TOLD THAT WHAT THE -- WHAT MY PRINCIPAL INVESTIGATOR, PROFESSOR BALDUS, FELT WAS THE CORRECT THING TO CALCULATE WAS CAPITAL SENTENCES AMONG DEATH-ELIGIBLE.

NOW, THAT'S -- TO SAY THAT THAT'S THE RIGHT THING TO DO IS A LEGAL STATEMENT, AND I HAVE ABSOLUTELY NO QUALIFICATIONS --

Q. THAT'S NOT --

A. -- DENY THAT STATEMENT.

Q. THAT'S NOT WHAT I ASKED YOU TO SAY. I'M ASKING A QUESTION ABOUT MATH.

A. UM-HUM.

Q. OKAY? IN MY EXAMPLE, WE HAVE A POPULATION OF TEN. FIVE OF THEM ARE DEATH ELIGIBLE. THREE ARE SENTENCED TO DEATH. WE WANT TO KNOW THE DEATH SENTENCING RATE.

WE CAN'T DO THAT WITHOUT FIRST CALCULATING THE NUMBER OF DEATH ELIGIBLE.

A. IT'S ACTUALLY USUALLY DEFINED AS THE NUMBER OF DEATH SENTENCES AMONG PENALTY TRIALS, CASES TAKEN TO PENALTY TRIAL.

SO THIS IS A --

Q. I'M SORRY. YOU SAY IT USUALLY IS DEFINED THAT WAY?

A. IN OTHER STUDIES WE'VE DONE IT'S DEATH SENTENCES DIVIDED BY PENALTY TRIALS.

Q. REALLY? WHY DIDN'T YOU DO THAT HERE?

A. BECAUSE WE WERE LOOKING AT A DIFFERENT QUESTION. WE'RE NOT LOOKING AT HOW THE SYSTEM IS FUNCTIONING. WE ARE LOOKING AT THE BREADTH OF THE STATUTE.

Q. YOU'RE ALSO LOOKING AT THE DEATH SENTENCING RATE.

A. NO, I DON'T BELIEVE SO. WE'RE LOOKING AT THE DEATH ELIGIBILITY RATE AND THE EXTENT TO WHICH IT IS BROADER THAN IN OTHER JURISDICTIONS AND TO THE EXTENT THAT IT HAS NOT BEEN NARROWED OR HAS OR HAS NOT BEEN NARROWED.

Q. AND THAT'S WHERE THE ANALYSIS ENDS WITH DEATH ELIGIBILITY? YOU DON'T UNDERSTAND PROFESSOR BALDUS TO HAVE GONE ON AND OPINED ON THE DEATH SENTENCING RATE FOR CALIFORNIA?

A. WHAT DOES IT MATTER WHETHER I KNOW HE DID THAT OR NOT? YES, OF COURSE I KNOW WHAT HE DID IN HIS DECLARATION.

Q. WELL, DO YOU KNOW --

A. NONE OF THOSE DECISIONS WERE MADE BY ME.

Q. BUT YOU KNOW THAT HE DID THAT?

A. YES.

Q. AND YOU KNOW THAT IN ORDER -- AND ASSISTED HIM IN

CALCULATING THAT NUMBER, DID YOU NOT?

A. NOT THAT PARTICULAR ONE. THAT WAS SUCH A SIMPLE THING TO DO I BELIEVE THAT HIS DATA MANAGER DID THAT ONE.

Q. YOU DESCRIBED YOURSELF EARLIER WHEN MR. LAURENCE WAS QUESTIONING YOU AS THE SENIOR STATISTICIAN IN THIS PROJECT. WAS THERE A JUNIOR STATISTICIAN?

A. OH, DAVE'S DATA MANAGER HAD SOME, A FEW STATISTICS COURSES.

Q. YOU MEAN, MR. NEWELL?

A. MR. NEWELL, YES.

Q. WOULD YOU REGARD HIM AS THE JUNIOR STATISTICIAN ON THIS PROJECT?

A. BY NO MEANS. I WOULDN'T GIVE HIM THAT TITLE.

Q. WELL, I'M JUST ASKING THE QUESTION: WERE THERE ANY OTHER STATISTICIANS INVOLVED IN THIS PROJECT?

A. NO.

Q. SUBORDINATE TO YOU?

A. NO.

Q. OKAY. WERE YOU THE ONLY STATISTICIAN TO BE INVOLVED IN THIS PROJECT?

A. WELL, YES. I GUESS I DON'T UNDERSTAND WHAT YOU'RE GETTING AT HERE. BUT, YES, I'M WHERE THE BUCK STOPS, YES. I TOLD DICK HOW TO DO ANALYSES. I WROTE PROGRAMS THAT HE COULD RUN ON HIS OWN.

Q. AND YOU DID THAT --

THE COURT: EXCUSE ME, COUNSEL. I FEEL COMPELLED TO

TELL YOU THAT --

MR. MATTHIAS: I SEE.

THE COURT: -- TIME IS RUNNING OUT.

MR. MATTHIAS: YES.

THE COURT: AND THIS IS A VERY IMPORTANT CASE. YOU'LL GET ALL THE TIME YOU NEED, BUT I MAY NOT BE ABLE --

MR. MATTHIAS: NO.

THE COURT: DON'T CHANGE ANYTHING, BUT --

MR. MATTHIAS: I APPRECIATE IT, YOUR HONOR. TIME GOT A LITTLE BIT AWAY FROM ME, AS WELL. ACTUALLY, BASICALLY, I HAVE ONE QUESTION THAT IF THE PATTERN HOLDS WILL MORPH INTO THREE, BUT LET'S GIVE IT A SHOT.

BY MR. MATTHIAS

Q. YOU ARE AWARE FROM YOUR EXPERIENCE IN OTHER STUDIES THAT THERE IS A WAY -- THERE ARE STATISTICAL TECHNIQUES AVAILABLE FOR CONTROLLING FOR OR TAKING INTO ACCOUNT SUCH THINGS AS STRENGTH OF EVIDENCE, CORRECT?

A. YES.

Q. AND THAT COULD HAVE BEEN DONE HERE, CORRECT, IF THE DESIGNERS OF THE STUDY HAD WANTED TO?

A. COULD HAVE BEEN DONE HERE IF THE DESIGNERS HAD WANTED TO.

I WOULD HAVE TO SAY AS A PRACTICAL MATTER PROBABLY NOT, BECAUSE THE CODING EXERCISE WOULD HAVE VASTLY EXCEEDED THE TIME THAT WE HAVE AVAILABLE.

Q. DID YOU EMPLOY THOSE TECHNIQUES IN YOUR MCCLESKEY WORK?

A. YES. WE HAD A LOT MORE TIME IN MCCLESKEY.

Q. IS THAT A "YES"?

A. YES.

Q. YOU ALSO COULD HAVE ACCOUNTED FOR THE EFFECT OF MITIGATING EVIDENCE RELATING SPECIFICALLY TO THE DEFENDANT'S CHARACTER AS OPPOSED TO THE CIRCUMSTANCES SURROUNDING HIS CRIME, AND YOU DID NOT DO THAT, EITHER, CORRECT?

A. NOT MY DEPARTMENT.

Q. BUT YOU KNOW IT WAS NOT DONE?

A. YES.

Q. AND YOU KNOW THAT IT COULD HAVE BEEN DONE BECAUSE YOU'RE AWARE OF THE AVAILABILITY OF STATISTICAL TECHNIQUES FOR THAT PURPOSE?

A. IF YOU WANT A LAY OPINION, WHICH I'M NOT QUALIFIED TO GIVE, I DON'T THINK THAT ADJUSTMENT IS RELEVANT IN THIS STUDY.

MR. MATTHIAS: YOUR HONOR, I MOVE TO STRIKE THE LAST COMMENT.

THE COURT: SUSTAINED.

MR. MATTHIAS: THANK YOU.

THANK YOU, PROFESSOR.

THE WITNESS: MY PLEASURE.

MR. LAURENCE: NOTHING FURTHER, YOUR HONOR.

THE COURT: OKAY. THANK YOU FOR TESTIFYING, PROFESSOR WOODWORTH. YOU'RE EXCUSED.

THE WITNESS: YOU'RE WELCOME, YOUR HONOR.

THE COURT: OKAY. LET'S DISCUSS WHERE WE GO FROM HERE.

I ASSUME WE WANT POST HEARING BRIEFS. DO WE WANT POST HEARING ORAL ARGUMENT?

MR. MATTHIAS: WELL, ORAL ARGUMENT, I'VE ALWAYS THOUGHT THAT'S AS VALUABLE AS THE JUDGE THINKS AND NEVER MORE.

THE COURT: OKAY. WELL --

MR. MATTHIAS: OR LESS, I SUPPOSE, SO --

THE COURT: YES. I'M OF THE MIND THAT THE MORE -- I NEED ALL THE HELP I CAN GET. AND IT WOULD BE HELPFUL TO ME, IN PART, BECAUSE I TEND TO BENEFIT FROM ORAL MORE THAN WRITTEN, ACTUALLY, ALTHOUGH I HAVE MORE TIME WITH THE WRITTEN.

MR. MATTHIAS: I WAS GOING TO GUESS THAT YOU WERE ACTUALLY -- YOU'D SEEN ENOUGH OF US, RATHER. BUT ORAL ARGUMENT IT IS.

THE COURT: OKAY.

MR. LAURENCE: YES, YOUR HONOR.

THE COURT: LET'S -- HOW MUCH TIME DO YOU WANT FOR THAT, TO GET READY FOR IT?

MR. MATTHIAS: OH, YES. ONE POINT OF CLARIFICATION. SPECIFIC TO THIS ISSUE? OR TO ALL OF THE ISSUES ON WHICH HEARING HAS BEEN CONDUCTED?

THE COURT: I WAS THINKING OF THIS ISSUE.

MR. MATTHIAS: OH, ON THIS ISSUE ALONE?

THE COURT: YES.

MR. MATTHIAS: WELL, I'M READY TODAY.

THE COURT: NO. NO. WELL, THAT WOULD BE INEFFICIENT. LET'S TALK ABOUT ALL ISSUES.

MR. MATTHIAS: OKAY.

THE COURT: TALK ABOUT ALL ISSUES.

MR. MATTHIAS: THAT WILL CERTAINLY REQUIRE MORE TIME, THEN.

THE COURT: YES.

MR. LAURENCE: IT CERTAINLY WOULD. AND I WAS GOING TO SUGGEST THAT WE BIFURCATE. IT'S MUCH EASIER TO DO THE NARROWING ISSUE, I THINK, GIVEN MY TIME LINE OVER THE NEXT COUPLE OF MONTHS. AND THEN, DOING THE MORE COMPLEX FACTUAL ISSUES AFTER THAT.

WE'VE NOT DISCUSSED THIS, BUT I'M CERTAINLY -- EITHER WAY WOULD BE FINE WITH ME, I JUST DO HAVE --

THE COURT: WELL, EITHER WAY WOULD BE FINE WITH ME. I'M SORRY TO NOT BE MORE HELPFUL IN DIRECTING THIS, WHICH IS PROBABLY MY JOB.

MR. MATTHIAS: WELL, I'M NOT BEING ANY MORE HELPFUL. I SEE THE ADVANTAGES OF BIFURCATING. I SEE THE ADVANTAGES OF NOT.

THE COURT: LET'S -- WANT TO THINK ABOUT IT AND GET ON THE PHONE?

MR. LAURENCE: OKAY.

THE COURT: TALK, THINK ABOUT IT, AND THEN SET UP A

PHONE. YOU WON'T HAVE TO COME BACK IN. IF YOU CAN SET UP A SCHEDULE, THAT'S EVEN BETTER.

MR. MATTHIAS: AND WE JUST FILE IT.

THE COURT: YES, LET'S DO THAT.

MR. LAURENCE: YOUR HONOR, WE'VE ADDED SOME ADDITIONAL EXHIBITS THIS MORNING THAT I WANTED TO GO OVER VERY QUICKLY.

EXHIBIT 228 WAS REFERRED TO DURING THE DIRECT EXAM -- REDIRECT EXAMINATION OF PROFESSOR BALDUS. IT IS THE CODING INFORMATION AS WELL AS THE CODING OF SPECIFIC QUESTIONS THAT WAS DISCLOSED TO RESPONDENT IN DECEMBER OF 2009.

I'D LIKE TO MOVE ITS ADMISSION NOW. IT IS SUBJECT TO A STIPULATION BETWEEN THE PARTIES AS WELL AS THIS COURT'S ORDER. I WOULD LIKE TO MOVE THAT INTO EVIDENCE.

MR. MATTHIAS: I HAVE NO OBJECTION TO 228.

THE COURT: OKAY. 228 WILL BE ADMITTED.

(THEREUPON, PETITIONER'S EXHIBIT 228 WAS RECEIVED IN EVIDENCE.)

MR. LAURENCE: 224 WAS ADMITTED ON FRIDAY. THAT IS SUBJECT TO A STIPULATION BETWEEN THE PARTIES.

THE COURT: OKAY.

MR. LAURENCE: I WOULD LIKE TO THEN CERTAINLY -- I'D LIKE TO HAVE IT SEALED, ACTUALLY, UNTIL WE CAN RESOLVE HOW WE DEAL WITH IT UNTIL AT THE END OF THE HEARING.

THE COURT: OKAY. IT WILL BE SEALED UNTIL SUCH TIME

AS YOU RESOLVE THAT.

MR. LAURENCE: EXHIBITS 229 TO 238 ARE THE PROBATION REPORTS.

MR. MATTHIAS: NO OBJECTION.

MR. LAURENCE: THE TEN CASES.

MR. MATTHIAS: NO OBJECTION. I KNOW YOU NEED TO GET OUT OF HERE. NO OBJECTION. ALL TEN PROBATION REPORTS ARE FINE.

THE COURT: THOSE WILL BE ADMITTED.

(THEREUPON, PETITIONER'S EXHIBIT 229 WAS RECEIVED IN EVIDENCE.)

(THEREUPON, PETITIONER'S EXHIBIT 230 WAS RECEIVED IN EVIDENCE.)

(THEREUPON, PETITIONER'S EXHIBIT 231 WAS RECEIVED IN EVIDENCE.)

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(THEREUPON, PETITIONER'S EXHIBIT 236 WAS RECEIVED IN EVIDENCE.)

(THEREUPON, PETITIONER'S EXHIBIT 237 WAS RECEIVED IN

EVIDENCE.)

(THEREUPON, PETITIONER'S EXHIBIT 238 WAS RECEIVED IN EVIDENCE.)

MR. LAURENCE: 239 IS CORRESPONDENCE BETWEEN PETITIONER AND RESPONDENT CONCERNING THE BALDUS STUDY DISCLOSURES.

IT'S LETTERS AND E-MAILS BACK AND FORTH ABOUT INFORMATION THAT CAME UP DURING FRIDAY'S CROSS-EXAMINATION. I JUST WANTED TO CLARIFY THE RECORD WITH RESPECT TO THOSE ITEMS.

MR. MATTHIAS: WELL, I DON'T KNOW WHAT IT CLARIFIES. I CERTAINLY HAVE NO OBJECTION TO YOU READING A BUNCH OF E-MAILS BETWEEN COUNSEL, BUT IT'S UTTERLY IRRELEVANT.

MR. LAURENCE ACKNOWLEDGED THAT HE DID NOT PROVIDE ME WITH THE NARRATIVES THAT SUPERSEDED AND CORRECTED THE THUMBNAILS.

PROFESSOR BALDUS TESTIFIED THAT SOMEWHERE BETWEEN 25 AND 33 PERCENT OF THE CASES WERE CHANGED ON THAT GROUND, HE THOUGHT, BY VIRTUE OF THAT PROCESS. HE DESCRIBED THOSE AS SUPERSEDING AND MORE DETAILED, MORE REVEALING OF THE RATIONALE FOR THE CODING DECISIONS.

I DID NOT HAVE THAT, AND THAT WAS A SUBJECT OF MY OBJECTION TO THAT PORTION OF PROFESSOR BALDUS' TESTIMONY THAT VENTURED INTO THE CLEANING PROCESS, WHICH IS NOT DESCRIBED IN HIS DECLARATION. THE WORD "CLEANING" APPEARS TWICE, AND BOTH TIMES TO THE FACT OF IT HAVING HAPPENED.

NO REFERENCE TO THE NARRATIVES. IT ALSO CAME OUT DURING EXAMINATION OF MY EXAMINATION OF PROFESSOR BALDUS THAT HE REGARDS THE PROTOCOL TO INCLUDE SOME 20-PAGE DOCUMENT GENERATED BY RICHARD NEWELL THAT HAS SOMETHING TO DO WITH CODING LIABILITY OR LISTING SOME NUMBER OF CASES.

THAT HAS STILL NOT BEEN PROVIDED TO ME. SO, THIS WHOLE THING ABOUT WHAT IS THE PROTOCOL, WHICH APPEARS TO BE AN EVER EXPANDING AND CONTRACTING AND THEN EXPANDING DESIGNATION AGAIN, IT IS WHAT IT IS. BUT NONE OF THESE CORRESPONDENCE ADDRESSED THE CONCERNS I HAD, WHICH WAS NOT BEING PROVIDED THAT PORTION OF THE NEWELL DOCUMENT AND THE NARRATIVES.

AND IT'S THE LATTER THAT ACTUALLY DOVETAILS WITH MY CONCERN ABOUT THE FAILURE OF THAT WITNESS TO PROVIDE ANY DESCRIPTION OF THE CODING -- OF THE CLEANING PROCESS IN HIS DECLARATION, WHICH MR. LAURENCE SPENT, I'D SAY, SOMEWHERE BETWEEN THREE AND FIVE MINUTES ON IN HIS DIRECT EXAMINATION. AND I OBJECTED BECAUSE IT SHOULD HAVE BEEN IN THE DECLARATION IF IT'S IMPORTANT.

AND THERE'S A PAPER TRAIL OF THAT CLEANING PROCESS. IT'S CALLED THE NARRATIVES, AND THERE ARE 1900 OF THEM. AND I WASN'T GIVEN THEM.

SO YOU CAN READ THESE CORRESPONDENCE IF YOU WANT, BUT IT WON'T SPEAK TO ANY OF THE POINTS THAT I JUST RAISED.

THE COURT: OKAY. LET'S DO THIS. I'LL ADMIT THEM SUBJECT TO MY DETERMINATION AS TO THEIR RELEVANCE.

(THEREUPON, PETITIONER'S EXHIBIT 239 WAS ADMITTED INTO EVIDENCE AS OUTLINED ABOVE.)

MR. LAURENCE: AND AS I STRESSED ON FRIDAY, YOUR HONOR, WE'RE MORE THAN HAPPY TO TURN OVER THE NARRATIVES TO COUNSEL FOR RESPONDENT, IF THEY WOULD LIKE THEM.

THEY WERE PROVIDED TO ME EARLIER THIS MONTH, AS PROFESSOR BALDUS TESTIFIED. MORE THAN HAPPY TO TURN THEM OVER TO YOU.

MR. MATTHIAS: WELL, THE DATE ON WHICH THEY ARE TURNED OVER BY THE EXPERT TO COUNSEL IS NOT DETERMINATIVE OF COUNSEL'S DUTY TO FIND THEM AND GIVE THEM TO ME, PARTICULARLY IN LIGHT OF MY REQUEST FOR THE THUMBNAILS, WHICH WERE SUPERSEDED AND CORRECTED.

MR. LAURENCE: YOUR HONOR?

MR. MATTHIAS: AND I JUST WANT TO ALSO EMPHASIZE I'LL TAKE WHAT I CAN, BUT THAT DOESN'T BEGIN TO ADDRESS THE PREJUDICE THAT WE SUFFERED BY NOT HAVING THAT STUFF IN ADVANCE OF THE HEARING, OBVIOUSLY. I THINK THE COURT CAN SEE. I WENT TO SOME PAINS TO LOOK AT THIS MATERIAL IN SOME DETAIL. AND THEN, TO FIND OUT THAT THE MATERIAL I WAS LOOKING AT WAS CLEANED IN THIS ELABORATE PROCESS INVOLVING FIVE STUDENTS, WHO AREN'T MENTIONED IN THE DECLARATION, AND THE GENERATION OF AN ADDITIONAL PAPER TRAIL CALLED "NARRATIVES" WHICH AREN'T MENTIONED IN THE DECLARATION, AND WHICH WEREN'T PROVIDED TO ME, THAT MAKES IT A DIFFERENT CASE IN SOME RESPECTS.

AND COUNSEL'S OWN WITNESS DESCRIBED THAT AS AFFECTING SOMEWHERE BETWEEN 25 AND 33 PERCENT, WHICH IS SOMEWHERE LIKE SOMEWHERE BETWEEN FIVE AND 600 CASES. AND IT'S NOT INSIGNIFICANT.

I STRONGLY URGE THAT THAT PORTION OF PROFESSOR BALDUS' TESTIMONY BE STRICKEN. IT SHOULD HAVE BEEN PROVIDED ON DIRECT, AND I'VE NOT HEARD AN EXCUSE FOR WHY IT WASN'T PROVIDED.

BUT, I MEAN, COUNSEL THOUGHT IT WAS IMPORTANT ENOUGH TO COVER AT THE HEARING, BUT HE DIDN'T THINK IT WAS IMPORTANT ENOUGH TO PUT IN THE DECLARATION. AND THAT'S NOT HIS CHOICE TO MAKE.

MR. LAURENCE: IF I COULD RESPOND, YOUR HONOR. ON NOVEMBER 2ND, WE TURNED OVER ALL THE DATA THAT WE WERE REQUIRED TO TURN OVER.

PROFESSOR BALDUS TESTIFIED THREE TIMES THAT HE BASED HIS DECISIONS ON PROBATION REPORTS. THE E-MAILS IN 239 CLARIFY THAT AT LEAST FIVE SETS OF TIMES THAT THE THUMBNAILS WERE NOT BEING USED FOR FINAL CODING DECISIONS.

AND I REALLY DO TAKE SOME OFFENSE HERE THAT SOMEHOW WE WERE OBLIGATED TO TURN OVER EVERY PIECE OF PAPER IN IOWA WHEN THERE'S ABSOLUTELY NO OBLIGATION WHATSOEVER TO DO SO.

WE TURNED OVER THOUSANDS OF PAGES TO RESPONDENT. EVERY REQUEST THEY MADE I GRANTED WITHOUT ANY JUDICIAL INTERVENTION WHATSOEVER. AND TO SAY THAT WE SOMEHOW HID THE BALL FROM THEM IS TO ME -- IT STRIKES ME AS BEING ABSOLUTELY

RIDICULOUS.

THE COURT: OKAY. I UNDERSTAND THE POSITIONS.

SO TURN OVER --

MR. LAURENCE: 239, YES.

THE COURT: SO WE MAY REVISIT IT, TURN THOSE DOCUMENTS OVER TO MR. MATTHIAS.

MR. LAURENCE: I WILL, YOUR HONOR.

THE COURT: OKAY. ANY OTHER DOCUMENTS YOU'RE OFFERING?

MR. LAURENCE: NO, YOUR HONOR. THAT'S IT.

THE COURT: OKAY. OKAY, THEN. I'LL WAIT TO HEAR FROM YOU ON OUR FURTHER SCHEDULE HERE, COUNSEL.

MR. MATTHIAS: THANK YOU, YOUR HONOR.

MR. LAURENCE: THANK YOU, YOUR HONOR.

MR. MATTHIAS: HAVE A NICE HOLIDAY.

THE COURT: YOU, TOO.

(THEREUPON, THIS HEARING WAS CONCLUDED.)

I N D E X

PETITIONER WITNESS

GEORGE WOODWORTH

PETITIONER'S EXHIBITS INTO EVIDENCE

CERTIFICATE OF REPORTER

I, KATHERINE WYATT, THE UNDERSIGNED, HEREBY CERTIFY THAT THE FOREGOING PROCEEDINGS WERE REPORTED BY ME, A CERTIFIED SHORTHAND REPORTER, AND WERE THEREAFTER TRANSCRIBED BY ME INTO TYPEWRITING; THAT THE FOREGOING IS A FULL, COMPLETE AND TRUE RECORD OF SAID PROCEEDINGS.

I FURTHER CERTIFY THAT I AM NOT OF COUNSEL OR ATTORNEY FOR EITHER OR ANY OF THE PARTIES IN THE FOREGOING PROCEEDINGS AND CAPTION NAMED, OR IN ANY WAY INTERESTED IN THE OUTCOME OF THE CAUSE NAMED IN SAID CAPTION.

THE FEE CHARGED AND THE PAGE FORMAT FOR THE TRANSCRIPT CONFORM TO THE REGULATIONS OF THE JUDICIAL CONFERENCE.

IN WITNESS WHEREOF, I HAVE HEREUNTO SET MY HAND THIS 8TH DAY OF DECEMBER, 2010.

_____

/S/ KATHERINE WYATT

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Attorneys for Petitioner ERNEST DEWAYNE JONES

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORINIA, SOUTHERN DIVISION

ERNEST DEWAYNE JONES, Petitioner, v. VINCENT CULLEN, Warden of California State Prison at San Quentin, Respondent.	Case No. CV-09-2158-CJC DEATH PENALTY CASE

EXHIBITS IN SUPPORT OF MOTION FOR AN EVIDENTARY HEARING VOLUME 1

EXHIBIT M
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Special Statewide Election,
November 6, 1973

General Laws, Amendments to the Codes, Resolutions,
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and
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Compiled by
GEORGE H. MURPHY
Legislative Counsel

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745	—	905	Way (Coauthor: Assemblyman Badham)
746	—	910	Coombs
747	—	928	Zenovich
748	—	943	Marks
749	—	957	Gregorio
750	—	963	Stull
751	—	1011	Grunsky
752	—	1024	Lagomarsino
753	—	1047	Petris and Holmdahl (Coauthors: Assemblymen Meade, Fong, Crown, and Miller)
754	—	1056	Stull
755	—	1064	Marks and Moscone
756	—	1114	Gregorio (Coauthor: Assemblyman Arnett)
757	—	1135	Coombs
758	—	1136	Coombs
759	—	1148	Carpenter
760	—	1216	Collier
761	—	1217	Carpenter
762	—	1266	Alquist
763	—	1267	Way
764	—	1285	Mills
765	—	1312	Carpenter (Coauthor: Assemblyman Bill Greene)
766	—	1316	Petris
767	—	1437	Beilenson
768	—	1447	Collier
769	—	1464	Lagomarsino (Coauthor: Assemblyman MacGillivray)
770	15	—	Wood, Burton, Hayden, MacDonald, Arnett, and Sieroty (Coauthor: Senator Grunsky)
771	183	—	Z'berg
772	200	—	Deddeh
773	342	—	Bagley (Coauthor: Senator Marks)
774	392	—	Townsend and Foran
775	419	—	Cory
776	493	—	Thurman
777	444	—	Thurman
778	461	—	Boatwright
779	518	—	Cory
780	579	—	Badham
781	597	—	Fong
782	609	—	Kapiloff
783	631	—	Ralph, Townsend, Cullen, and Mobley (Coauthors: Senators Berryhill, Dills, Wedworth, and Zenovich)
784	662	—	Keene and Bagley
785	702	—	Wilson, Deddeh, Ingalls, Keene, Boatwright, Gonzales, Harvey Johnson, Montoya, and Thurman
786	709	—	Kapiloff
787	778	—	Wilson, Ingalls, Keene, Deddeh, Boatwright, Gonzales, Harvey Johnson, Montoya, and Thurman
788	811	—	Deddeh
789	863	—	Ingalls (Coauthor: Senator Biddle)
790	866	—	Chappie
791	868	—	Chappie
792	940	—	Sieroty
793	992	—	Murphy
794	954	—	MacGillivray
795	961	—	Dunlap
796	972	—	Briggs
797	978	—	Chappie
798	979	—	Deddeh
799	989	—	Russell
800	1033	—	Hayden
801	1035	—	Beverly
802	1074	—	Deddeh, Papan, and Wood
803	1094	—	Z'berg
804	1138	—	Berman, MacDonald, and Waxman (Coauthor: Senator Lagomarsino)
805	1164	—	Arnett
806	1179	—	Fong, MacGillivray, Wood, Meade, and Cullen
807	1205	—	Murphy and Wood
808	1212	—	Nimmo

Ch. No.	A.B. No.	S.B. No.	Author
809	1256	—	Quimby
810	1277	—	Cullen
811	1333	—	Deddeh (Coauthor: Senator Sch
812	1336	—	Deddeh
813	1363	—	Foran (Coauthor: Senator Marl
814	1405	—	Cory
815	1473	—	Dunlap
816	1512	—	Deddeh
817	1571	—	Warren
818	1592	—	Cullen
819	1593	—	Cullen
820	1597	—	Murphy
821	1617	—	Sieroty (Coauthor: Senator Car
822	1626	—	Berman
823	1634	—	Kapiloff
824	1641	—	Lewis and Quimby
825	1656	—	Chappie
826	1677	—	McAlister
827	1679	—	McAlister
828	1683	—	McAlister
829	1701	—	Thurman
830	1703	—	Thurman
831	1706	—	Seeley and Ingalls
832	1733	—	Knox and Boatwright
833	1760	—	Lanterman
834	1793	—	Keysor
835	1804	—	Knox
836	1849	—	Foran
837	1865	—	Kapiloff
838	1941	—	Russell
839	1994	—	Briggs, Murphy, Thurman, C vey Johnson, Ray E. Jo Powers, and Wood (Coat Berryhill, Way, and Zeno
840	2012	—	Thurman
841	2082	—	Kapiloff
842	2084	—	Kapiloff
843	2096	—	Maddy
844	2207	—	Z'berg
845	2276	—	Russell
846	2345	—	Mobley
847	2357	—	Waxman
848	2478	—	Murphy
849	2522	—	Foran
850	2525	—	Lewis (Coauthor: Senator C
851	2467	—	Thomas
852	2577	—	MacDonald (Coauthor: Sc sino)
853	2632	—	Carter
854	799	—	Badham and Knox
855	—	219	Wedworth
856	—	496	Cusanovich
857	—	537	Short
858	—	798	Bradley
859	—	819	Mills
860	—	1159	Rodda
861	1342	—	Knox
862	1374	—	Burton
863	—	501	Deukmejian, Dills, Dymall Song, and Whetmore blyman Powers)
864	—	868	Deukmejian
865	—	914	Coombs
866	—	999	Wedworth
867	55	—	Lanterman
868	123	—	Deddeh
869	152	—	Briggs
870	320	—	Knox and Russell
871	371	—	Chappie
872	372	—	Brown, Bill Greene, and
873	1422	—	Chappie
874	1427	—	Chappie
875	1506	—	MacGillivray (Coauthor sino)
876	1912	—	Cullen
877	—	753	Alquist
878	—	281	Grunsky
879	10	—	Leroy F. Greene
880	227	—	Z'berg, Moretti, Miller Dunlap, Bill Green

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Witness my hand and the seal of said court this _____ day of _____, 19__.

(Signed).

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Judge of said court

If it appears that the offense complained of has been committed by a corporation, no warrant of arrest shall issue, but the judge must issue a summons substantially in the form prescribed in Section 1391. Such summons must be served at the time and in the manner designated in Section 1392 except that if the offense complained of is a violation of the Vehicle Code or a local ordinance adopted pursuant to the Vehicle Code, such summons may be served by deposit by the clerk of the court in the United States mail of an envelope enclosing the summons, which envelope shall be addressed to a person authorized to accept service of legal process on behalf of the defendant, and which envelope shall be mailed by registered mail or certified mail with a return receipt requested. Promptly upon such mailing, the clerk of the court shall execute a certificate of such mailing and place it in the file of the court for that case. At the time stated in the summons the corporation may appear by counsel and answer the complaint, except that in the case of misdemeanors arising from operation of motor vehicles, or of infractions arising from operation of motor vehicles, a corporation may appear by its president, vice president, secretary or managing agent for the purpose of entering a plea of guilty. If it does not appear, a plea of not guilty shall be entered, and the same proceedings had therein as in other cases.

CHAPTER 719

An act to amend Section 1018 of, to add Sections 190, 190.1, 190.2, 190.3, 209, 219, and 4500 to, and to repeal Sections 190, 190.1, 209, 219, and 4500 of, the Penal Code, relating to punishment for crimes.

[Approved by Governor September 24, 1973. Filed with Secretary of State September 24, 1973.]

The people of the State of California do enact as follows:

SECTION 1. Section 190 of the Penal Code is repealed.

SEC. 2. Section 190 is added to the Penal Code, to read:

190. Every person guilty of murder in the first degree shall suffer death if any one or more of the special circumstances enumerated in Section 190.2 have been charged and found to be true in the manner provided in Section 190.1. Every person otherwise guilty of murder in the first degree shall suffer confinement in the state prison

for life. Every person guilty of murder in the second degree is punishable by imprisonment in the state prison from five years to life.

SEC. 3. Section 190.1 of the Penal Code is repealed.

SEC. 4. Section 190.1 is added to the Penal Code, to read:

190.1. In any case in which the death penalty is to be imposed as the penalty for an offense only upon the finding of the truth of the special circumstances enumerated in Section 190.2, the guilt or innocence of the person charged shall first be determined without a finding as to penalty. In any such case the person charged shall be represented by counsel. If such a person has been found guilty of such an offense, and has been found sane on any plea of not guilty by reason of insanity, and any one or more of the special circumstances enumerated in Section 190.2 have been charged, there shall be further proceedings on the issue of the special circumstances charged. In any such proceedings the person shall be represented by counsel. The determination of the truth of any or all of the special circumstances charged shall be made by the trier of fact on the evidence presented. In case of a reasonable doubt whether a special circumstance is true, the defendant is entitled to a finding that it is not true. The trier of fact shall make a special finding that each special circumstance charged is either true or not true. Wherever a special circumstance requires proof of the commission or attempted commission of a crime, such crime shall be charged and proved pursuant to the general law applying to the trial and conviction of a crime.

If the defendant was convicted by the court sitting without a jury, the trier of fact shall be a jury unless a jury is waived by the defendant with the consent of the defendant's counsel, in which case the trier of fact shall be the court. If the defendant was convicted by a plea of guilty the trier of fact shall be a jury unless a jury is waived by the defendant with the consent of his counsel. If the defendant was convicted by a jury, the trier of fact shall be the same jury unless, for good cause shown, the court discharges that jury, in which case a new jury shall be drawn to determine the issue of whether or not any of the special circumstances charged are true or not true.

If the trier of fact finds, as to any person convicted of any offense under Section 190 requiring further proceedings that any one or more of the special circumstances enumerated in Section 190.2 as charged is true, the defendant shall suffer the penalty of death, and neither the finding that any of the remaining special circumstances charged is not true, nor if the trier of fact is a jury, the inability of the jury to agree on the issue of the truth or untruth of any of the remaining special circumstances charged, shall prohibit the imposition of such penalty.

In any case in which the defendant has been found guilty by a jury, and the same or another jury is unable to reach a unanimous verdict that one or more of the special circumstances charged are true, and does not reach a unanimous verdict that all of such special

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circumstances charged are not true, the court shall dismiss the jury and shall order a new jury impaneled to try the issues, but the issue of guilt shall not be retried by such jury, nor shall such jury retry the issue of the truth of any of the special circumstances which were found by a unanimous verdict of the previous jury to be untrue. If such new jury is unable to reach a unanimous verdict that one or more of the special circumstances it is trying are true, the court shall dismiss the jury and impose the punishment of confinement in the state prison for life.

SEC. 5. Section 190.2 is added to the Penal Code, to read:

190.2. The penalty for a person found guilty of first-degree murder shall be death in any case in which the trier of fact pursuant to the further proceedings provided for in Section 190.1 makes a special finding that:

(a) The murder was intentional and was carried out pursuant to an agreement with the defendant. "An agreement," as used in this subdivision, means an agreement by the person who committed the murder to accept valuable consideration for the act of murder from any person other than the victim.

(b) The defendant personally committed the act which caused the death of the victim and any of the following additional circumstances exist:

(1) The victim is a peace officer, as defined in Section 830.1, subdivision (a) of Section 830.2, or subdivision (b) of Section 830.5, who, while engaged in the performance of his duty, was intentionally killed, and the defendant knew or reasonably should have known that such victim was a peace officer engaged in the performance of his duties.

(2) The murder was willful, deliberate and premeditated and the victim was a witness to a crime who was intentionally killed for the purpose of preventing his testimony in any criminal proceeding.

(3) The murder was willful, deliberate and premeditated and was committed during the commission or attempted commission of any of the following crimes:

(i) Robbery, in violation of Section 211.

(ii) Kidnapping, in violation of Section 207 or Section 209. Brief movements of a victim which are merely incidental to the commission of another offense and which do not substantially increase the victim's risk of harm over that necessarily inherent in the other offense do not constitute kidnapping within the meaning of this paragraph.

(iii) Rape by force or violence, in violation of subdivision (2) of Section 261; or by threat of great and immediate bodily harm, in violation of subdivision (3) of Section 261.

(iv) The performance of lewd or lascivious acts upon the person of a child under the age of 14, in violation of Section 288.

(v) Burglary, in violation of subdivision (1) of Section 460, of an inhabited dwelling housing entered by the defendant with an intent to commit grand or petit larceny or rape.

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(4) The defendant has in this or in any prior proceeding been convicted of more than one offense of murder of the first or second degree. For the purpose of this paragraph an offense committed in another jurisdiction which if committed in California would be punishable as first or second degree murder shall be deemed to be murder of the first or second degree.

SEC. 6. Section 190.3 is added to the Penal Code, to read:

190.3. (a) Notwithstanding any other provision of law, the death penalty shall not be imposed upon any person who was under the age of 18 years at the time of the commission of the crime. The burden of proof as to the age of such person shall be upon the defendant.

(b) Except when the trier of facts finds that a murder was committed pursuant to an agreement as defined in subdivision (a) of Section 190.2, or when a person is convicted of a violation of Section 37 or 128, the death penalty shall not be imposed upon any person who is a principal in the commission of a capital offense unless he was personally present during the commission of the act or acts causing death, and directly committed or physically aided in the commission of such act or acts.

SEC. 7. Section 209 of the Penal Code is repealed.

SEC. 8. Section 209 is added to the Penal Code, to read:

209. Any person who seizes, confines, inveigles, entices, decoys, abducts, conceals, kidnaps or carries away any individual by any means whatsoever with intent to hold or detain, or who holds or detains, such individual for ransom, reward or to commit extortion or to exact from relatives or friends of such person any money or valuable thing, or any person who kidnaps or carries away any individual to commit robbery, or any person who aids or abets any such act, is guilty of a felony and upon conviction thereof shall suffer death in cases in which any person subjected to any such act suffers death, or shall be punished by imprisonment in the state prison for life without possibility of parole in cases in which any person subjected to any such act suffers bodily harm, or shall be punished by imprisonment in the state prison for life with possibility of parole in cases where no such person suffers death or bodily harm.

Any person serving a sentence of imprisonment for life without possibility of parole following a conviction under Section 209 as it read prior to September 22, 1951, shall be eligible for a release on parole as if he had been sentenced to imprisonment for life with possibility of parole.

SEC. 9. Section 219 of the Penal Code is repealed.

SEC. 10. Section 219 is added to the Penal Code, to read:

219. Every person who unlawfully throws out a switch, removes a rail, or places any obstruction on any railroad with the intention of derailing any passenger, freight or other train, car or engine and thus derails the same, or who unlawfully places any dynamite or other explosive material or any other obstruction upon or near the track of any railroad with the intention of blowing up or derailing any such train, car or engine and thus blows up or derails the same, or who

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SEC. 11. Section 1018 of the Penal Code is amended to read:

1018. Unless otherwise provided by law every plea must be put in by the defendant himself in open court. No plea of guilty of a felony for which the maximum punishment is death, or life imprisonment without the possibility of parole, shall be received from a defendant who does not appear with counsel, nor shall any such plea be received without the consent of the defendant's counsel. No plea of guilty to a capital offense which does not require the further proceedings provided for in Section 190.1 shall be received from a defendant. No plea of guilty of a felony for which the maximum punishment is not death or life imprisonment without the possibility of parole shall be accepted from any defendant who does not appear with counsel unless the court shall first fully inform him of his right to counsel and unless the court shall find that the defendant understands his right to counsel and freely waives it and then, only if the defendant has expressly stated in open court, to the court, that he does not wish to be represented by counsel. On application of the defendant at any time before judgment the court may, and in case of a defendant who appeared without counsel at the time of the plea the court must, for a good cause shown, permit the plea of guilty to be withdrawn and a plea of not guilty substituted. Upon indictment or information against a corporation a plea of guilty may be put in by counsel. This section shall be liberally construed to effect these objects and to promote justice.

SEC. 12. Section 4500 of the Penal Code is repealed.

SEC. 13. Section 4500 is added to the Penal Code, to read:

4500. Every person undergoing a life sentence in a state prison of this state, who, with malice aforethought, commits an assault upon the person of another, other than another inmate, with a deadly weapon or instrument, or by any means of force likely to produce great bodily injury is punishable with death; however, in cases in which the person subjected to such assault does not die within a year and a day after such assault as a proximate result thereof, or the person so assaulted is another inmate, the punishment shall be imprisonment in the state prison for life without the possibility of parole for nine years.

For the purpose of computing the days elapsed between the commission of the assault and the death of the person assaulted, the whole of the day on which the assault was committed shall be

counted as the first day.

Nothing in this section shall be construed to prohibit the application of this section when the assault was committed outside the walls of any prison if the person committing the assault was undergoing a life sentence in a state prison at the time of the commission of the assault.

SEC. 14. Notwithstanding Section 2164.3 of the Revenue and Taxation Code, there shall be no reimbursement pursuant to this section nor shall there be any appropriation made by this act because the duties, obligations or responsibilities imposed on local government by this act are minor in nature and will not cause any financial burden to local government.

SEC. 15. If any word, phrase, clause, or sentence in any section amended or added by this act, or any section or provision of this act, or application thereof to any person or circumstance, is held invalid, such invalidity shall not affect any other word, phrase, clause, or sentence in any section amended or added by this act, or any other section, provision or application of this act, which can be given effect without the invalid word, phrase, clause, sentence, section, provision or application and to this end the provisions of this act are declared to be severable.

CHAPTER 720

An act to add Section 25956 to the Health and Safety Code, relating to fetuses, and declaring the urgency thereof, to take effect immediately.

[Approved by Governor September 24, 1973. Filed with Secretary of State September 24, 1973.]

The people of the State of California do enact as follows:

SECTION 1. Section 25956 is added to the Health and Safety Code, to read:

25956. (a) It is unlawful for any person to use any aborted product of conception, other than fetal remains, for any type of scientific or laboratory research or for any other kind of experimentation or study, except to protect or preserve the life and health of the fetus. "Fetal remains," as used in this section, means a lifeless product of conception regardless of the duration of pregnancy.

(b) In addition to any other criminal or civil liability which may be imposed by law, any violation of this section constitutes unprofessional conduct within the meaning of the State Medical Practice Act, Chapter 5 (commencing with Section 2000) of Division 2 of the Business and Professions Code.

SEC. 2. This act is an urgency statute necessary for the

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CALIFORNIA LEGISLATURE

AT SACRAMENTO

1973–74 REGULAR SESSION

SENATE FINAL HISTORY

SHOWING ACTION TAKEN IN THIS SESSION ON ALL SENATE BILLS, CONSTITUTIONAL AMENDMENTS, CONCURRENT, JOINT RESOLUTIONS AND SENATE RESOLUTIONS

CONVENED JANUARY 8, 1973

ADJOURNED SINE DIE NOVEMBER 30, 1974

DAYS IN SESSION	254
CALENDAR DAYS	635

LT. GOVERNOR JOHN L. HARMER
President of the Senate

SENATOR JAMES R. MILLS
President pro Tempore

Compiled Under the Direction of
DARRYL R. WHITE
Secretary of the Senate

By
DAVID H. KNEALE
History Clerk

S.B. No. 450—Deukmejian, Richardson, Berryhill, Biddle, Carpenter, Coombs, Grunsky, Harmer, Lagomarsino, Marler, Nejedly, Schrade, Stevens, Stull, Way, and Whetmore (Coauthors: Assemblymen Antonovich, Bannai, Beverly, Bond, Burke, Carter, Chappie, Cline, Collier, Craven, Cullen, Davis, Gonsalves, Hayden, Ray E. Johnson, Lancaster, Lanterman, Lewis, MacGillivray, McAlister, McLennan, Mobley, Nimmo, Powers, Russell, Seeley, Wakefield, and Wood).

An act to amend Section 1018 of, to add Sections 190, 190.1, 190.2, 190.3, 209, 219, and 4500 to, and to repeal Sections 190, 190.1, 209, 219, and 4500 of, the Penal Code, relating to punishment for crimes.

1973

Mar. 14—Introduced. Read first time. To print.
Mar. 19—From print.
Mar. 21—To Com. on JUD.
April 23—From committee with author's amendments. Read second time. Amended. Re-referred to committee.
April 25—From committee: Do pass. (Ayes 9. Noes 2.)
April 26—Read second time. To third reading.
April 30—Made special order for Thursday, May 3, 1973, at 9:30 a.m.
May 3—Read third time. Passed. To Assembly. (Ayes 27. Noes 12. Page 1284.)
May 3—In Assembly. Read first time. To Com. on CRIM.J.
June 4—From committee with author's amendments. Read second time. Amended. Re-referred to committee.
June 6—Heard for testimony only.
June 26—Heard for testimony only.
Aug. 14—Hearing postponed by committee.
Aug. 21—Hearing postponed by committee.
Aug. 29—From committee: Do pass as amended. (Ayes 6. Noes 1.)
Aug. 30—Read second time. Amended. To second reading.
Aug. 31—Read second time. To third reading. Re-referred to Com. on REV. & TAX. From committee with author's amendments. Read second time. Amended. Re-referred to committee. Withdrawn from committee. Ordered placed on third reading. Made Special Order for Thursday, September 6, 1973, at 10 a.m.
Sept. 6—Read third time. Amended. To third reading. Read third time. Passed. To Senate. (Ayes 52. Noes 25. Page 7713.)
Sept. 6—In Senate. To unfinished business.
Sept. 10—Senate concurs in Assembly amendment. To enrollment. (Ayes 29. Noes 11. Page 5990.)
Sept. 13—Enrolled. To Governor at 4:30 p.m.
Sept. 24—Approved by Governor.
Sept. 24—Chaptered by Secretary of State. Chapter 719, Statutes of 1973.

S.B. No. 451—Gregorio.

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1973

Mar. 14—Introduced. Read first tin
Mar. 15—From print.
Mar. 21—To Com. on L.GOV.
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June 20—Read second time. To Co
June 25—Read third time. Urgency
69. Noes 0. Page 5375.)
June 25—In Senate. To enrollment.
June 28—Enrolled. To Governor at
June 29—Approved by Governor.
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S.B. No. 452—Berryhill.

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Mar. 14—Introduced. Read first tim
Mar. 15—From print.
Mar. 22—To Com. on I.R.
June 7—From committee: Be re-re
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Nov. 30—From committee without

S.B. No. 453—Berryhill.

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Mar. 14—Introduced. Read first tim
Mar. 16—From print.
Mar. 22—To Com. on ED.
April 25—From committee: Do pass,
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May 15—Set, first hearing. Held in
June 21—From committee: Do pass
June 22—Read second time. Amend
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SPECIAL HEARING
OF THE
ASSEMBLY COMMITTEE ON CRIMINAL JUSTICE

CONSTITUTIONAL ISSUES RELATIVE
TO
THE DEATH PENALTY

Sacramento, California

January 24, 1977

Kenneth L. Maddy, Chairman
Terry Goggin, Vice Chairman

Richard Alatorre
Paul Bannai
Julian Dixon

Bruce Nestande
Alan Sieroty
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COMMITTEE SECRETARY

SPECIAL HEARING

January 24, 1977
Room 2170
1:30 P.M.

SUBJECT: CONSTITUTIONAL ISSUES RELATIVE TO THE DEATH PENALTY

Witnesses to be called in a convenient order.

William James	Deputy Attorney General
Paul Halvonik	State Public Defender
Harry B. Sondheim	District Attorney's Office Los Angeles County
Mark E. Overland	Public Defender's Office Los Angeles County
Anthony G. Amsterdam	Law Professor, Stanford University

ASSEMBLY COMMITTEE ON CRIMINAL JUSTICE

SPECIAL HEARING

January 24, 1977
Room 2170
1:30 P.M.
State Capitol

CONSTITUTIONAL ISSUES RELATIVE TO THE DEATH PENALTY

CHAIRMAN KEN MADDY: The hearing today was called primarily for this Committee to have a chance to listen to experts in the area of constitutional law, and individuals who have been dealing with the question of the death penalty in California, to discuss the issues that were raised by the United States Supreme Court and State of California Supreme Court decisions of recent time on the question of the death penalty.

I think we have with us an outstanding group of experts who will give us information. It was the intent of the Chairman and Members of the Committee to gain as much information as we can by listening to people to learn at least what we are dealing with in California when we deal with bills that are before us on the question of the death penalty -- the reinstatement of the death penalty.

I will introduce the experts that we have with us. Beginning on my right, Mark E. Overland, Public Defender's Office of Los Angeles County; Mr. Harry B. Sondheim, District Attorney's Office of Los Angeles County; Mr. Paul Halvonik, the State Public Defender; Mr. William James, Deputy Attorney General; and Anthony G. Amsterdam, Law Professor, Stanford University.

We have with us two individuals that are dealing with the

question of the death penalty at the trial level, two that are dealing with it primarily at the appellate level, and Professor Amsterdam who has been involved in cases before the United States Supreme Court and the State Supreme Court on the questions of the death penalty.

Professor, since you hold that rank, perhaps we could ask you to begin by giving us, at least, a brief background on where we have come since the Furman decision and since the Anderson decision in California, and since we attempted to enact a death penalty in California in 1973 in the California Legislature.

PROFESSOR ANTHONY G. AMSTERDAM: Thank you, Mr. Chairman. The history that brings us to the point at which we now are, in the death penalty, briefly, is as follows. In 1972 the California Supreme Court struck down the death penalty statute then on the books as a cruel and/or unusual punishment under the State Constitution. As you all know the State Constitution was subsequently amended by Article I, Section 27, whose purpose was to prevent invalidation of death penalty legislation under the State Constitution. But, of course, it did not and could not prevent the invalidation of such legislation under the federal Constitution, and it is important to note that the statute which was then on the books allowed juries in capital cases to sentence to life or death in their unfettered discretion without guidelines or standards of any sort, and without appellate review. It was subsequently held by the California Supreme Court to be in violation of the federal Constitution, and that is a low visibility holding because it essentially was done in footnotes. The way it came about was after the Supreme Court of California had invalidated the old death penalty under the California Consti-

tution, the United States Supreme Court, 1972, decided the case of Furman vs. Georgia.

That held, specifically, that a statute which gave the jury unfettered discretion without guidelines to sentence convicted defendants for life or death was a cruel and unusual punishment under the federal Constitution. The California Supreme Court had to decide whether the enactment of the initiative measure which ended California constitutional objections to the old death penalty statute obviated federal constitutional objections as well. And, a series of cases held that it did not, that the old California death penalty was bad under the Furman decision of the United States Supreme Court.

Now, as we all know, in 1973 a new death penalty statute was enacted. The new death penalty statute was challenged in the courts. It essentially provided a mandatory death penalty for enumerated offenses. On July 2nd and July 6th of 1976 the Supreme Court of the United States decided six cases. Invalidating the death penalties of three states, North Carolina, Louisiana, and Oklahoma, and holding constitutional the death penalties of three states, Texas, Georgia and Florida. Holding essentially that a death penalty statute is unconstitutional if it is either too discretionary, in the sense that it allows too much leeway for arbitrariness and discrimination in death sentencing, or on the other hand if it is mandatory. The result of those decisions leave a rather narrow channel within which death penalty legislation may be constitutional, and, of course, last December the California Supreme Court applying those July 1976 decisions of the United States Supreme Court invalidated this State's 1973 law.

The bottom line is this -- in the opening paragraph of the Rockwell decision the Supreme Court of California very carefully and explicitly put aside all questions as to cruel and unusual punishment and broader issues of the validity of the death penalty and limited its holding to the application of the July 1976 United States Supreme Court decision.

This Committee is going to face, if it wants to draft a constitutional statute, both the problem of conforming the statute to the standards set forth in the July decision of the United States Supreme Court and also problems that are preserved or hang over, if you will, that were not faced in Rockwell.

I think, Mr. Chairman, it may be useful if I just sketch the outer parameters rather than getting down to specifics and then let matters go forward.

The outer parameters are, I think, number one, any death penalty legislation must have sufficient standards so that juries in imposing the death penalty and courts in reviewing its imposition can guard against arbitrariness and discrimination -- whimsey, freakish fortuity, chance, injustice of that sort in the death sentencing process. An important thing to notice is that the July 1976 decisions do not overrule the 1972 Furman decision. They reaffirm that a death sentencing procedure which does not have standards and guidelines for juries and judges is unconstitutional. Secondly, on the other hand, the statute may not be mandatory. Now, what is therefore required are specific sets of procedures, and also substantive definitions of the crime that meet federal constitutional standards.

Several procedures are important and the Committee ought to consider them. One, the United State Supreme Court has suggested

strongly that a bifurcated sentencing procedure is indispensable. At least as opposed to an unitary procedure. The question of a trifurcated procedure, such as proposed in some bills that have been suggested, is one that, I think, ought to be on the agenda, but rather than address specific issues, now, I simply want to note it because it is very important. A second procedural question has to do with juries who sentence in capital cases. In upholding the constitutionality of the death penalty in July of 1976 the Supreme Court of the United States noted that the reason why the death penalty could not be called cruel and unusual at this point in time is that discretionary death sentencing procedures allowed the evolution of community standards to, in effect, veto capital punishment whenever it becomes unacceptable for particular crimes.

One of the things that the court held was wrong with mandatory death penalties was that juries could not vote their consciences in individual cases and that the death penalty was not conformed to community standards. The function of the jury, then, under the July 1976 death penalty decisions is to reflect the conscience of the community in death sentencing and that suggests a fundamental question as to whether the law of this State need not be changed because it has traditionally allowed the exclusion from juries of any person who has conscientious scruples against the application of the death penalty. It is argued, and I believe it is correctly argued, that any procedure which excludes persons having conscientious scruples against the death penalty from sitting in capital cases so deprives the jury of its function of reconciling the death penalty with evolving standards of decency in the community as to render a statute with such exclu-

sions unconstitutional.

Now, there is legislative precedent, for example, in the State of Maryland, which authorizes persons to sit on capital juries without inquiring as to their conscientious or religious scruples against the death penalty.

My purpose is to be as helpful to the Committee as I can. I have no set piece.

ASSEMBLYMAN KNOX: Professor Amsterdam, several years ago, it was either California's court or somebody said that you may not exclude such people for cause. They can use a preemptive challenge but not a challenge for cause.

AMSTERDAM: No, the decision you are thinking of, Mr. Knox, is the decision in Witherspoon vs. Illinois in which the Supreme Court in 1968 held that exclusion of jurors from capital trials if they had only explored scruples against the death penalty, that is, if they simple said, "Are you against or opposed to it?", was unconstitutional. But, that decision allows the exclusion of jurors who said that their opposition to the death penalty is strong enough that they would refuse to consider it in any case.

ASSEMBLYMAN KNOX: As long as they say they can be fair on the issue of guilt or innocence can they serve on the jury in this State -- can they under that decision?

AMSTERDAM: No, that is not in effect. There are two parts to Witherspoon.

ASSEMBLYMAN KNOX: I carried a bill in 1961 or 1963, I have forgotten which, which would not allow the challenge for cause if somebody had a conscientious feeling about this matter. I have forgotten the wording of the bill now, maybe Mr. Halvonik can recall it.

PAUL HALVONIK: You were going to have separate juries, Jack, for the bifurcation and the trial. But, what Professor Amsterdam is addressing, is the question of whether you can totally "death" qualify a jury at all. The bill you are referring to, I think, would have said that you couldn't "death" qualify a jury that was going to reach the issue of guilt or innocence. And then after they reached that issue then you have a different process in the second portion of the trial.

ASSEMBLYMAN KNOX: O.K. I lost that bill by one vote in the Senate Committee, as I recall. It almost passed. It was during Pat Brown's Administration. Pardon me for interrupting.

AMSTERDAM: The problem is simply not solved by constitutional decisions at the moment. It must be dealt with legislatively. There is no question about that. It is a live and real issue.

ASSEMBLYMAN GOGGIN: Very briefly, if the death penalty verdict is required to be unanimous, and you have one person on there who is conscientiously opposed to the death penalty couldn't it be argued that that in effect is an automatic veto of the death penalty not reflecting community standards?

AMSTERDAM: Well, it depends entirely upon what you provide in the event that the jury hangs, whether you provide for a retrial report on the jury.

ASSEMBLYMAN GOGGIN: What would you suggest? What do you think is fair if you are trying to arrive at a community standard?

AMSTERDAM: I have no hesitation, myself, in suggesting that the veto power is perfectly appropriate. It seems to me that if you cannot get twelve people who will respond, in a particular case, by saying a person's life ought to be extinguished, that

person's life ought not be extinguished. I see no problem, whatsoever, in saying that a veto of that sort should be appropriate.

CHAIRMAN MADDY: Mr. James or Mr. Sondheim, would you like to speak on that issue?

HARRY B. SONDHEIM: Let me start out by saying I don't intend to debate the propriety of having a death penalty, but will start out, really, with the issue of constitutionality and leave it to the Legislature to decide whether it is appropriate to have this penalty in California. I think, as Professor Amsterdam has indicated, the United State Supreme Court has declared certain statutes from certain states to be constitutional which appears to me to lead to the conclusion that at least as far as the federal Constitution is concerned a death penalty statute is constitutional. With regard to the State Constitution, as Professor Amsterdam has indicated, that was left open in the Rockwell case and again seems to me that at least at this time we don't know what the conclusion will be on that issue. Lawyers can debate that. I think we can spend alot of time here. I would suggest, however, that those arguments might be more appropriate for the courts under what might be called the separation of powers. The issue for the Legislature, among other things, it seems to me, is whether it is proper to have the death penalty and then it is up to the courts later on to determine whether or not that is constitutional. I am sure Professor Amsterdam will be there in court on such cases as well as other people.

What I would like to spend my time on today is in terms of the drafting of a bill, what types of issues might be considered and would be of concern to a prosecutor's office. Professor

Amsterdam mentioned the possibility of a bifurcated trial or trifurcated, and he indicated these are to be preferred over unitarian trials. I think that is quite true under the Supreme Court decisions. I would like to consider for a moment the different types of bifurcated or perhaps trifurcated trials that one can have.

In a bifurcated trial you could have guilt and special circumstances and I use special circumstances to indicate those persons whom, or let us say, possible persons upon whom the death penalty might be imposed. You could have the guilt and special circumstances determined in one trial and then the penalty in a separate trial. That is the way it was done in the Texas statute that was under review by the United States Supreme Court.

CHAIRMAN MADDY: Mr. Sondheim, it seemed that in reading Rockwell that there was a discussion about weighing mitigation, aggravation, the special circumstances versus the standards that you establish, if any, in regard to mitigation. If you have a trifurcated or bifurcated situation in which differing triers of fact would have to deal with those problems, how are they going to weigh them?

SONDHEIM: To begin with I would be hopeful that it could be resolved by the same trier of fact, i.e., he would go from one phase of the trial to the next phase using the same trier of fact unless along the way somewhere you end up with an hung jury in which case you have to retry your case in any event.

CHAIRMAN MADDY: Looking at our statutes that we had in 1973 which gave the possibility of having differing triers of the fact -- do you feel that you would have to have the same

trier of fact to meet the standards of the Supreme Court?

SONDHEIM: No.

CHAIRMAN MADDY: When they talk about weighing the two?

SONDHEIM: You don't need the same trier of fact because as I view the different possibilities you start off first, for example, with guilt. And, you can have as part of the guilt phase, if that is the intent of the Legislature, special circumstances determined. Later on you would then have a penalty trial and at that penalty trial you would have the so-called aggravating and mitigating circumstances. But that would be in a separate trial. Now, you could have the penalty issue determined by the same jury or if that jury hung up you could then go to another jury or it may even be a court trial whatever the situation happens to be. Does that answer --

ASSEMBLYMAN ALAN SIEROTY: Professor Amsterdam said there was a narrow channel which has to be met for the Supreme Court test and that unfettered discretion of the jury would not be constitutional. I think what the Chairman is asking is the same question that I have. How can you establish standards with regard to character and mitigating circumstances? Is this not what the Legislature is asked to do by these court decisions? If you are talking about a third phase of this trial are the juries going to be able to decide without any standards just on the basis of their feelings about things -- having heard testimony as to character and mitigating circumstances -- are they going to be able to decide one way or the other without any kind of standards? Are we required to set up standards, and, if so, what kind of standards are envisioned?

SONDHEIM: It seems to me that you can go at this in two

ways. Number one, you can spell it out in terms of the aggravating as well as the mitigating circumstances. That is the way it was done in the Florida statute and that is the way it is in the A.O.I. Model Penal Code. On the other hand you can have undefined standards vis-a-vis the mitigating circumstances so long as you permit the jury to gather evidence and hear evidence, I should say, relating to the crime and the defendant and that is the way it was in the Georgia and Texas statutes.

In Texas they specified that certain types of murders were to be eligible for the death penalty and then they allowed the jury to hear whatever evidence the prosecution and the defense happened to present to the jury relating to the crime itself as well as the background and character of the defendant. That is the way it was in the Georgia statute. So, I think that is an issue that the Legislature has to deal with. It can go either way. As I view the United States Supreme Court decisions either way is correct so long as under whatever method is selected the jury is able to understand and to get information relating to the crime itself and the background and the character of the defendant.

ASSEMBLYMAN SIEROTY: May I ask you, Professor Amsterdam, the same question?

AMSTERDAM: Yes. In responding to it, Mr. Sieroty, I would also like to try to address the Chairman's question as well.

I think there is a very serious question about a trifurcated procedure because what a trifurcated procedure does is to provide that -- first the jury finds aggravating circumstances. Then, only if it finds aggravating circumstances is the defendant eligible for the death penalty. Then, the next stage after that

is to consider mitigating circumstances or as has been suggested, perhaps some additional aggravating circumstances and mitigating circumstances. The problem is that by diffusing the focus from the weighing process in which all of the aggravating are weighed against all of the mitigating. There is a very real question as to whether you would meet the Supreme Court's requirement of weighing. What the United States Supreme Court said in the Texas case was that juries must be free to consider -- true their attention must be focused and guided by standards but they must be free to consider all of the reasons for and all of the reasons against imposition of the death penalty. To take them in bites -- I think that everybody on this Committee knows that if you consider part of an issue and then adjourn for a week and then consider the factors on the other side you get a very different process of weighing than if you put all of the factors into the hopper at the same time.

So, I think there is a very, very serious problem and question with trifurcating the procedure. I think that that therefore, for me, raises the question of what level of definition the Legislature should and can provide in the second stage of a bifurcated procedure which is the one procedure that we know that the Supreme Court of the United States will sustain.

I think this Legislature might very well follow the lead of the Florida statute which the Supreme Court has blessed by providing a limited list of aggravating circumstances. These but only these may be considered. With an open ended list of mitigating circumstances which was the Florida pattern the Supreme Court of the United States seems to have told us that that is the pattern which the Supreme Court will adopt. In fact,

it sustained the Texas statutes specifically because of the fact that the Texas Supreme Court had read into its statute the power to put any mitigating circumstance at all with the jury.

The important thing is that if you vary from the Florida and Georgia models at all you ought to be aware that in the Gregg case the Supreme Court of the United States made very clear and I am quoting from Gregg that "each system for the administration of the death penalty has to be judged on its own . . . procedure". And, if you vary at all from any of the ones that have been enacted you are going to have constitutional problems. Therefore, if you don't use the Florida approach, exactly, you don't use the Georgia approach, exactly, you have got to start from the ground and think through the serious question, "What procedures are necessary to keep the arbitrariness involved in Furman from happening?"

Another one that certainly ought to be on this Committee's agenda -- I don't think any of us have enumerated the moral -- I am not sure of the time which to do that -- but the absence of Supreme Court porportionality in a statute in my judgement, is enough to make it unconstitutional. The United States Supreme Court has remanded to the Arkansas Supreme Court two Arkansas cases under a statute virtually exactly like Georgia's. The only difference was that Arkansas does not have porportionality review in its Supreme Court and Georgia did. So we need not only to talk about the definition of aggravating circumstances and mitigating circumstances at the trial level, we have to provide adequate procedures for review of the trial level decision in an appellate court. This may be where some of your additional controls and safeguards as the United States Supreme Court calls them come into play.

CHAIRMAN MADDY: Mr. Goggin has a question and then I would like Mr. James and Mr. Halvonik to talk about the proposal that essentially has been introduced on behalf of the Attorney General and others. It talks about a trifurcated situation. Perhaps you can address yourself to the same question that has been raised before.

ASSEMBLYMAN GOGGIN: What is proportionality review?

AMSTERDAM: Proportionality review is where an appellate court considers the facts and circumstances of a particular case to determine whether the death penalty is excessive in that case by comparing it with judgements rendered by juries in other cases and saying, is this more or less aggravating than other cases. Is this the kind of case in which juries generally do not give the death penalty. It is distinguished from simple legal review to decide whether there were errors in the sentencing process. And, it is distinguished from an individualized excessiveness review where all the court does is looks at the facts of a particular case and says, "Gee, this is a terrible harsh penalty for this crime." Georgia and Florida Supreme Courts were required by statute and as the United States Supreme Court say it, the Texas Court did not only review penalties in each individual case to determine whether they were excessive on facts but it looked over the pool of cases to see whether the penalty was out of line with penalties applied in similar cases. In other words, what do juries generally do in a felony murder where the defendant is not the trigger man but the wheel man. If the appellate court sees fifty of these cases and only one defendant has been sentenced to death then the court can say, "Gee, that is an excessive penalty." And the United State Supreme Court has indicated that that is a key

safeguard, I think, constitutionally indispensable to prevent arbitrariness in sentencing. That is what proportionality review is. To look to a number of cases and see whether the death penalty in this case is out of proportion to what juries generally do.

WILLIAM JAMES: Thank you, Mr. Chairman. May I just talk about this proportionality for a minute. I think you will find by reviewing the three statutes that were upheld in the United States Supreme Court that only one of them had a built in statutory requirement that the State Supreme Court review the excessiveness or the lack of proportionality in the judgement before the court. Florida provided for an automatic appeal with a full review by its appellate court and Texas, also, provided for an automatic appeal. But, there was no statutory requirement that the Supreme Court view for proportionality the sentence imposed in any particular case. That may be one thing this Committee may want to consider, but I think you have before you at least three statutes that differ in many respects which were all upheld by the United States Supreme Court. The two statutes that were rejected and held unconstitutional were the two in which there was a mandatory death penalty imposed. The Supreme Court in the Gregg case pointed out very carefully that a statute can be drafted and they said carefully drafted -- which provides for a bifurcated trial -- that will permit the sentencing authority be it judge or jury and there is a difference in that one statute required a jury determination, the Florida statute had the judge as the sentencing authority -- provides the sentencing authority with relevant information relating to the imposition of sentence and gives standards on the use of that information. That this would require, of course, is the opportunity for the trier of fact

and the sentencing authority to consider mitigating circumstances and aggravating circumstances and also the circumstances attending the crime and the character and record of the defendant. That is what is required and must be in a constitutional statute. Beside that, as I pointed out, there are marked differences in these three statutes and the United States Supreme Court was looking to see if there was an opportunity by any fashion to afford the defendant an opportunity to present something in mitigation of the ultimate penalty. There was not in the North Carolina case and there was not in the statute of Louisiana. But, there was, at least that is what the United States Supreme Court had found from the interpretation of the Texas statute. The Texas statute didn't mention any list of aggravating circumstances or mitigating circumstances. They provided that if the defendant is found guilty of the capital offense of murder the jury would be required to answer and the state would be required to prove beyond a reasonable doubt the affirmative answer to three questions. And, among these questions was one as to the probability that the defendant would commit acts of criminal violence that would constitute him a continuing threat to society. The Texas statute had been interpreted by their court upon criminal appeals as permitting the introduction of evidence relating to mitigating and aggravating factors and the United States Supreme Court said that this statute as interpreted permitted the consideration by the sentencing authority, in Texas the jury, of these factors. And, the sentences imposed in the Texas case and the statute in Texas was found constitutional.

Now, on trifurcation, if that is what we are referring to, I think, that that would conform with the procedure laid down by

the United States Supreme Court as constitutional taking into consideration the variations in the three statutes that were before the court and that were found constitutional. In California there will be proposed I understand a finding by a jury of the defendant's guilt of murder -- capital crime. But, that would not in itself suffice for the imposition of any capital sentence. It would require first a refining, a narrowing, of the capital offense, a narrowing of the types of murder, first degree murder. That would call for the actual sentencing authority to determine whether there would be life or death as a punishment. And, after a finding beyond a reasonable doubt and the existence of one of these special circumstances, at that point the jury would then be permitted to consider the mitigating factors that might be set forth which would be permitted to be introduced and which would permit the jury to consider the background and record of the defendant.

CHAIRMAN MADDY: Would that be separated into two different hearings? And, if the possibility arose that you would have a separate trier of fact in those latter two hearings would that be able to work under the constitutional dictates? I don't see how one jury could determine special circumstances and consider all of the evidence and after a finding that there are special circumstances, then turn over to some other group to consider mitigation. How do you weigh without reintroducing all of the evidence, again? That is my problem.

JAMES: I think the procedure would contemplate one jury and actually one proceeding divided into the things that we have mentioned. In the event that there would be an hung jury on one of the findings which would require their unanimously agreeing

and being proved beyond a reasonable doubt then you would have to have another jury, probably have to hear the evidence over again. That is the statute that existed before Rockwell, that was the statute as it existed 190.1 before the Anderson decision.

CHAIRMAN MADDY: Do you feel that if there is an hung jury that another jury can be called to decide the same question that was asked the first jury? In some of the statutes, as we read them, that were before the Supreme Court, a hung jury would result in something other than the death penalty. I think there are some of the statutes that say if a jury is hung that the penalty will be something less than death.

JAMES: That is my understanding. But, I think --

CHAIRMAN MADDY: Do you think in California we could have the hung jury concept retained?

JAMES: That is my opinion. I don't know about Mr. Sondheim. Mr. Sondheim do you want to add anything to that?

SONDHEIM: I just want to clarify something on terminology. We speak of bifurcated and trifurcated -- but I think we ought to really talk in terms of the essence of these hearings. Let me just start out by saying as I understand the Texas law, it started out with one hearing at which you determined guilt and then went beyond guilt to determine if there were certain circumstances present which, so to speak, qualified that person for the death penalty. Now, and then it went on to a penalty where you really debated if you want to put it that way by means of argument and evidence what the proper penalty should be for that person.

ASSEMBLYMAN GOGGIN: I really don't understand why -- are we required to have a bifurcated or trifurcated proceeding or can we just keep it all -- really I mean one jury? Do we have

to have two different or three different juries? If so, why?

JAMES: As I read the Gregg opinion they did not put the bifurcated hearing as a constitutional mandate because that would have required probably overruling Crampton vs. Ohio in which they held that there was no constitutional requirement that the jury that determined the guilt as well as the penalty should hear the proceedings separately. I think that actually there could be a situation where they would provide for a unitary hearing. The danger would be that there would be presented at the guilt phase, evidence that would be irrelevant to the question of innocence or guilt. And, evidence that would in many incidences be prejudicial to the defendant. That would create a --

ASSEMBLYMAN GOGGIN: So, Mr. James, you are saying that in your opinion, at least, it is not required by the cases to have two separate or more juries? But, the same jury could decide both the guilt or innocence in the penalty?

JAMES: At the same phase, that's what you mean.

CHAIRMAN MADDY: Mr. Overland.

MARK E. OVERLAND: I would like to add one thing that hasn't been mentioned here. Mr. Chairman, I think you perhaps are operating under a misconception as to what the United States Supreme Court requires. You talk about weighing aggravating versus mitigating circumstances and that is certainly not required.

CHAIRMAN MADDY: I was looking at Rockwell in which they quote at one point the Florida statute which says the trial judge in Florida is directed to weigh eight aggravating factors against seven mitigating factors. Then later on in the same decision they talk about a weighing process. What I want to know is whether or

not we do have someplace in our statute for that weighing process to take place? I am concerned about a possible trifurcated situation in which the same trier of fact would not have the ability to weigh. Maybe you can straighten me out.

OVERLAND: Let me, briefly, talk about the background of that weighing. As you know before the Anderson decision in California, the salient feature of the death penalty statute was that the State was neutral. There was no preference for the death penalty over a penalty for life imprisonment. In other words the jury, no matter what the crime was, no matter what evidence the prosecutor put forth, could in its discretion decide to give the life sentence. Because of the Furman decision the special circumstances statute was enacted which in effect gave the backing of the State to a verdict of death if certain special circumstances were found. But, I think it is very clear, and the United States Supreme Court made it very clear in Gregg vs. Georgia, that even though there is a finding of special circumstances it is constitutional for the jury, even though it has found that special circumstances exist, to decline to impose the death penalty.

So, if you are talking about enacting a statute which goes into weighing aggravating versus mitigating factors you are in effect leaping back into the eighteenth century and going into a statute which is even harsher than the statute that we had here in California. And, it is clear in Gregg vs. Georgia the Supreme Court says, and I am quoting now, "Nothing in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution." So, as a matter of policy, the State could choose that even though special circum-

stances were sufficiently present to enable the jury to find such a verdict the death penalty still may not be imposed. In other words there is a type of discretion which is given to the jury which I suppose is part of the humanizing of the trial and letting the jurors decide to grant an individual defendant mercy in an appropriate case which has a sanction of the United States Supreme Court. So there is really no need to get into the weighing. I think you run into a real can of worms when you are talking about weighing because when you get right down to it, you try to weigh the age of the defendant, which is a mitigating factor according to many of the statutes, against the crime, and there is no possible way of actually weighing. And, I think what you get down to is a gut level decision by the jury anyway. So, I think it is very important to know that death penalty need not be imposed even though specific aggravating circumstances are present. The aggravating circumstances are merely a prerequisite. In other words, if there are no aggravating circumstances the death penalty cannot be imposed. But the converse is not necessarily true. So, I think that is a very important point.

I think with respect to the trifurcated trail that also in effect creates a psychological presumption towards the death penalty. I think as anybody knows who has ever tried a death penalty case -- as far as the guilt or innocence stage is concerned, you start out with the presumption of innocence and you have a defendant sitting beside you who is presumed to be innocent. Once you lose that, that is one strike. Then you go into the penalty phase. In the penalty phase the defendant does not have the presumption of innocence. There is a completely different mood. Anybody who has ever sat through defending

an individual in a case like that can sense that it is completely different than the first stage of the trial.

If you are talking about a third stage, a trifurcated procedure, what you in effect are saying is now you have a defendant that has two strikes on him. At the end the defense attorney is able to argue -- well, remember when I talked to you first when I talked to you about guilt or innocence -- well, you can forget about that. You have already ruled against me on that. When I talk to you about special circumstances, well, you have already ruled against me on that. Now, I want to talk to you about mitigating circumstances. In fact you have pretty well demolished any type of credibility that that individual attorney has on behalf of that defendant. So, I think the more stages you have operate to the detriment of the defendant. And again going back to the original death penalty statute that we had before the Anderson decision it certainly takes away any humanizing influence which a lawyer can have on the jury, that is to let them even in a case where there are aggravating circumstances to let them still decide not to impose the death penalty. Which is constitutionally permissible. So, I think when you are talking about bifurcated or trifurcated procedures you should be well aware of what you are doing in choosing one of the others.

AMSTERDAM: I just have two technical points. Because I disagree with Mr. James on his description of what the United States Supreme Court has held. One in response to Mr. Goggin's question.

I agree that the Supreme Court of the United States did not say that a bifurcated trial was constitutionally required. But,

what it did say was, and I am referring to 96 Supreme Court Reporter at page 2933, that a bifurcated trial -- well, first, those who have studied the question of controlling jury discretion suggest that a bifurcated procedure is the best answer and then over on page 2934, "When a human life is at stake and when the jury must have information prejudicial to the question of guilt but relevant to the question of penalty in order to impose a rational sentence a bifurcated system is more likely to assure elimination of the constitutional deficiencies identified in Furman."

Now, if you look at the discussion of bifurcated trials in this opinion you will notice that the Supreme Court walks around its earlier Crampton and McGautha decision without even citing it, as though it were a hot potato. Frankly, as an opponent of the death penalty who will, and I will be candid with you, I will challenge anything that emerges in this Legislature. I will tell you that I will be delighted to have you pass a unitary trial procedure. I think the Supreme Court of the United States would knock it out. I admit that it hasn't said so and if you want to be sucked into that vacuum, be my guest. But, the court pretty much laid it on the line that it doesn't like a unitary procedure and I agree that I'm not sure a trifurcated procedure is good either. I think bifurcated is probably where you end up. Now on appellate review I also disagree with Mr. James. If you look at -- and again I would like to refer you to the specific pages of the Supreme Court decision. If you look at Proffitt v. Florida, 96 Supreme Court Reporter, page 2966. The United States Supreme Court describes the Florida procedure. It says, "The Supreme Court of Florida

like its Georgia counterpart considers its function to be in reviewing death sentences to guarantee that the aggravating and mitigating circumstances present in one case will reach a similar result to that reached under similar circumstances in another case." And, then if you look at page 2969 of 96 Supreme Court Reporter you will see that the Florida procedure is described as follows. "Finally, the Florida statute has a provision designed to assure -- that is appellate review -- that the death penalty will not be imposed on a capriciously selected group of convicted defendants. The Florida Supreme Court reviews each death sentence to insure that similar results are reached in similar cases." So, Mr. James, I believe, is not correct. He is correct in saying that the Georgia statute was the only one that required the court to engage in this kind of review but the implication that it was the only procedure of the three that had that kind of review is wrong. The Florida Supreme Court by judicial construction had it as well.

Now, in Texas we are much less clear as to what the form of review in the Texas statute was. However, I know that the Supreme Court of the United States in describing the Texas statute said that the Texas statute provided prompt judicial review of the sentencing decision. In accord with statewide -- the sentencing decision -- not simple the review of the guilt determination -- in accord with statewide jurisdiction as a means to promote the even handed, rational and consistent imposition of death sentences under law. Which again implies a review for proportionality. Again, I think it would be a serious mistake to suspect that you will get a constitutional statute that does not provide for a review by the California

Supreme Court of the proportionality of death sentences imposed in individual cases. Every procedure that the United States Supreme Court has sustained has had it and in Arkanasas we didn't have it -- the Supreme Court of the United States has sent that case back for reconsideration by the Arkansas Supreme Court which had applied Gregg to sustain its statute.

CHAIRMAN MADDY: Mr. Halvonik, how about your thoughts.

PAUL HALVONIK: I think Mr. James answered his own remarks remarkably because it made it seem so comprehensible, and then I notice some confusion on the Committee and then we get into specifics and it doesn't seem all that comprehensible. And, it really isn't. I'm not able to predict very well where that U. S. Supreme Court is going. Professor Amsterdam said they stepped around the McGautha decision. Well, in McGautha they held that the Constituion requires standards or guidelines in order to impose a death penalty. And, in these decisions, in a footnote, they said they are not really overruling that because that was a fourteenth amendment standard's decision and this is an eighth amendment standard's decision. It is a good thing that in their rationalization after the fact that it didn't really kill Mr. McGautha.

But, that is just about where the U. S. Supreme Court is. I wouldn't ignore anything in these decisions that they say they like. They don't seem to be saying that just casually, and each member of that court's confusion about what is important ought to be important to you. You might, with your staff, and as you are reviewing these bills as they come back, look at Mr. Justice White's decision. Because, Justice White as I read him makes it clear that he is not saying any of these

statutes are necessarily constitutional even though he is upholding them. He is saying that in the past the way discretion worked it worked in a way that was totally at odds with the Constitution and that discretion worked to kill certain kinds of people and let other kinds of people off. And, they permitted juries to use standards that were not articulated, but were constitutionally impermissible, resulting in a lot of blacks getting killed, poor people -- that sort of thing. The wealthy people who would lie in wait to kill their wife or might torture their wife to death they weren't getting the death penalty. Something was wrong. One did have the impression then that mandatory death sentences were all there were. Now, the U. S. Supreme Court said no to that and some sort of discretion comes back in. But, White in his opinions says well I haven't seen how this kind of discretion works yet. You know he is going to wait to see where the sun comes up. That is what he is telling you. If you provide a system in which as I suspect you cannot help but provide, one where the sun is going to come up again, Mr. Justice White has told you he is going to reverse his role. If you are trying to fashion a statute consistent with those rather confusing decisions of last July, I think it, well, indiscreet, to ignore any factor that any Justice of that Supreme Court said influenced his final judgement -- that the statute was indeed constitutional.

JAMES: I certainly don't want to leave the impression that I am asking you to accept Professor Amsterdam's invitation to adopt a unitary trial -- a single trial. I merely pointed out that the United States Supreme Court did not say that a bifurcated trial was constitutionally required. It did refer to the three statutes that were before them provided for it. It pointed out

that this was the preferable method. It also pointed out that the American Law Institute under thier Model Penal Code has suggested this as the best procedure. And, I think that a procedure which would provide for three phases would also be constitutional.

I certainly want to stress the fact that there is only one statute here that required -- the statute itself -- that the appellate court hold a proportionality hearing on review. There were two statutes that did not provide for it and in effect the appellate court, the Supreme Court of Florida and the Court of Criminal Appeals did review for the proportionality on the appeal. I think that is something we can consider.

SONDHEIM: To get back to what I was trying to nail down before, namely, instead of using words unitary, bifurcated, trifurcated, I think we ought to consider what they really mean. As far as unitary trail is concerned, while I agree that it was left open I would certainly concur in Professor Amsterdam's view that you are just begging for constitutional problems if you buy that. It is possible, but frankly you create more problems that in my opinion it is worth, because when you get down to what it is worth just consider what you a re doing. You have one trial, you are telling a jury now, find out whether this man is guilty, find out whether there are aggravating circumstances and then end up trying to decide penalty. You are opening the door, it seems to me, for all sorts of compromise instead of trying to get a verdict on what each of the issues in the case ought to be. And, then when they are all done, and now they have

decided, for example, after agonizing over it, imposed the death penalty, now you tell them, now you are going to decide whether this man is insane because you still have to take care of the insanity issue. It just wouldn't make any sense to go that way. So, lets get down to what I think perhaps are the two choices in this area -- the bifurcated and trifurcated. I don't like to use those terms because we have to understand what is meant by them. As I view the quote "bifurcated trial" as distinguished from the trifurcated trial, the trifurcated would be most closest to Texas because what happened there was this, and I would like to quote the Supreme Court because I think it is important to understand what it means when you have a bifurcated trial. What you are doing in essence is you are saying, now look, you are guilty or innocent. Then you go ahead and all of these people who are guilty of murder are now possible persons who will be subjected, perhaps, to a penalty trail. But, that is not the way it was in Texas and this is what the Supreme Court said about the Texas system. Because in Texas you went ahead first and you considered the guilt together with whether this person had committed a type of murder which qualified for the special circumstances of Texas. In other words, it narrowed the number of people who would be subjected to the penalty trial and this is what the U. S. Supreme Court said about that. So far as consideration of aggravating circumstances is concerned therefore one principle difference between Texas and the other two states is that the death penalty is an available sentencing option even potentially for a smaller class of murderers in Texas. That is the net result of the trifurcated trial. You are reducing the number

of people who have to go through the penalty phase of the case. That is one consideration that I think you should have. Another consideration is by mixing up a number of these issues you are in effect opening up the door to compromises on all sorts of things and it seems to me in our system we ought to have juries decide yes or no on some of these issues up to the point of penalty. At the time of the penalty I agree with Mr. Overland and that is when you get to this issue of how the penalty should be determined it is difficult at least for me to conceptualize the weighing process that is apparently envisioned both in the Florida statute and in the Model Penal Code. I would suggest one might look at the Georgia statute which -- for that part of the trial -- which in essence says here is the evidence to the jury and tells the jury then to pick the particular penalty and does not say anything about weighing one againt the other because I really -- whenever I think of weighing I think of a scale and like Mr. Overland I have difficulty putting age on the one side and whether it be old or young for that matter -- another factor such as the elements of the crime, the background of the defendant.

CHAIRMAN MADDY: Do you think it is necessary in a statute then to specify the factors of mitigation that a jury must consider?

SONDHEIM: No.

CHAIRMAN MADDY: Or can we just be very broad?

SONDHEIM: I am saying that as one alternative is to specify. That is the way Florida went, and that is the way the Model Penal Code goes. Another possibility is to do what they did in Georgia and Texas and that is to permit the jury to hear all of the circumstances relevant to to penalty and in essence as I think Professor Amsterdam pointed out about Texas, just open it up, let the jury hear the evidence presented and then let the jury choose

without specifying in the statute, these are the only items you can consider.

CHAIRMAN MADDY: In other words you think we probably would be more susceptible to challenge if we try to specify certain factors or if we said not limited to, but consider the following, or however you want to word it?

SONDHEIM: Both are options are available to you. I think it is a matter of policy. I personally know how I would choose, but you know that is your decision not mine. I can just tell you as a lawyer either system is defensible and as I understand it has been upheld by the United States Supreme Court.

CHAIRMAN MADDY: Would others agree? Professor Amsterdam and then Assemblyman Knox.

AMSTERDAM: I disagree that either has been upheld by the Supreme Court. I believe that it is true that you are free to either define mitigating circumstances or to leave them undefined. Provided that you have a broad enough rostrum. That is you couldn't have simply one mitigating circumstance -- the defendant is eighteen years or under. It is pretty clear that wouldn't pass. But, you are free if you have a broad enough range to define or leave them undefined. I do not agree that you are free to leave aggravating circumstances undefined. The Supreme Court has not sustained any statute in which aggravating circumstances were left undefined.

I think that the approach which defines exclusively and exhaustively your aggravating circumstances and then gives a list of mitigating circumstances which however is open ended, these and anything else is most likely to withstand constitutional challenge. That would be my assessment.

CHAIRMAN MADDY: You tend to agree with Mr. Overland then that if a jury wants to grant mercy they can do so for almost any reason?

AMSTERDAM: I would quite agree with everyone else as to the ultimate result that will happen. The jury does sit down and puts this all in a pool. What I really think you are doing is designing a statute for constitutionality more than for effect. The jury is going to do that under any of these procedures. But I think it is more likely to be constitutional --

CHAIRMAN MADDY: That may be what we do anyway.

ASSEMBLYMAN KNOX: I am intrigued with a trial particularly with the open ended list. Because you could get the character of the victim in the evidence, there is no question about that, as well as the character of the accused. You would have ability to ask almost any question on almost any subject and get all of this before the jury in one grand, 'fantasma gloria' of serialized troubles of everybody and then the jury would come up with a simple form of country justice and allow them to live or die or go free or whatever. Is that what is being proposed?

CHAIRMAN MADDY: We were asking the question, Mr. Knox, whether or not it was necessary in terms of drafting a statute whether or not we should specify certain mitigation factors.

ASSEMBLYMAN KNOX: I understand that, but as I understand the answer to that question, that it is being suggested that we either not specify and simple say evidence of mitigation with and/or aggravation which leaves it totally open ended or we are saying, as Professor Amsterdam suggests, that for the guidance of the jury and the court instructions we give a

list of whatever we can think of, but then make it open, just not limited to those items and you can go into anything else if you can convince the judge that on some basis --

CHAIRMAN MADDY: You can correct me if he is wrong, but I think the Professor is saying that the aggravation must be specific, and not open ended. The mitigation can be specific but it also must be open ended at some point. Am I correct, Professor?

AMSTERDAM: That is correct.

ASSEMBLYMAN GOGGIN: And, this takes place after a decision as to guilt or innocense?

ASSEMBLYMAN KNOX: Not necessarily as I understand it. It could be both ways. You could just throw the whole thing, the whole case in front of a jury. Characters of the people involved you know whether or not the defendant had a mother and all of that sort of thing and then all of the evidence of the alleged crime and then the jury kind of goes into a room and figures out what the right thing to do is. That is as I understand what the proposal is.

CHAIRMAN MADDY: Mr. James, please respond to Mr. Knox.

JAMES: Well, I'm not responding to Mr. Knox, Mr. Chairman, I am sort of responding to Professor Amsterdam. I think if you examine the Texas statute you will find that Texas didn't provide for any enumerated aggravating or mitigating circumstances. Texas in effect limited the categories of first degree murder for which the death penalty could be imposed and named five specific capital murder types. And, when the defendant was found guilty of that then you had the second hearing at which the jury had to answer affirmatively these three questions and at that time the Texas court had interpreted at least one of the questions to permit the

introduction of any mitigating factors, any character and background of the defendant that might be relevant to the sentencing authority and the United States Supreme Court upheld that statute.

AMSTERDAM: Technically, I believe that wrong. Again, the question to which Mr. James refers isn't in the aggravating circumstance. The Texas procedure, I think,has been accurately described as one in which the jury first decided both guilt and the aggravating circumstance within one of the categories, so-called capital murder. I think that is right, that is done at one stage. The second stage which is tantamount to a finding og aggravating and mitigating circumstances is that the Texas jury had to answer three questions. Number one, was the act to kill known to the defendant or reasonably should have been known to result in death. Number two, was the defendant in effect a likely recidivist in the demension of violence, that is, was he a continuing danger to the community, and number three, was there provocation. Now that is the aggravating circumstance procedure. Yes, or not to that, is aggravating circumstance. Now, in interpreting those, the Texas court also read in mitigating circumstances, by saying that, well relevant to those considerations, are the defendant's good record, and that sort of thing, but I quite disagree that the court has ever sustained a statute which did not identify aggravating circumstances. So, as to say that out of the total pool of those eligible for the death penalty specific factual findings have to be made, that the person -- within that class is somebody special -- a person is bad, but special, that the case is especially aggravated before the death penalty can be applied. That existed in every procedure the United States Supreme Court has sustained. Every one.

HALVONIK: I agree with what Professor Amsterdam has said but

I also agree that on the mitigation side that is not much of a guideline you get out of Texas. But, I emphasize again that the court seems to be saying let's see how this works, and I don't think that you could assume, that you could adopt a statute necessarily like Texas and get it sustained by the U. S. Supreme Court.

In all of this, one has the impression that there was a lot of log rolling going on and they are not consistent opinions. They seem to say that they like bifurcated trials, they like a reviewing court to be able to compare the cases proportionately, that there has to be an opportunity for the introduction into evidence of mitigating circumstances, there must be some room for discretion and if discretion should once again show that the poor and those in minority groups are discriminated against they are going to knock it down again. It is very hard to tell you precisely what they did, but it is my hope that you are not going pass a statute at all, but if you ignore any of the factors in any of those decisions that they like you are taking a big chance.

SONDHEIM: To answer your question, Mr. Knox, while I can't tell you what the law may be the Supreme Court does envision, it seems to me, the sort of circumstance that you have indicated. In the Texas case they have a footnote in which they say, "This might be construed to allow the jury to consider circumstances which though not sufficient as a defense to the crime itself might nevertheless have enough mitigating force to avoid the death penalty -- a claim for example, that a woman who hired an assassin to kill her husband was driven to it by his continued cruelty to her." We cannot, however, construe that the stuatute, that power is reserved for the Texas courts. It seems to me that the United State Supreme Court had envisioned the possibility

for Texas to have this sort of broad open ended system that you had, I think, alluded to in your question.

ASSEMBLYMAN KNOX: I was sort of intrigued by Mr. Halvonik's thought that I thought he was expressing to us that what is constitutional in Texas may not be constitutional in California. I remember from law school that Texas has the longest cooling off period for manslaughter as I recall of any state in the union. That is, you can shoot somebody with your Colt 45 in the burst of passion, but the provocation may have occured two days earlier or something and you just hadn't cooled off yet. If you shoot the meanest man in town in Texas I guess that can be used as mitigation. Now, maybe we should adopt that for California law, too. I don't know. But, I think if you get into character of the victim then we just finished the Robbins Rape Evidence Act, as I recall several years ago, which makes it very clear you can't go into the character of the victim in rape, but you can for murder. That is kind of interesting. I don't know. The cycle of the law intrigues me.

CHAIRMAN MADDY: That is why you are a Member of this Committee. That interest that you have in this whole subject.

HALVONIK: I just want to respond to the quote Mr. Sondheim put forth. What he quoted led me to the opposite notion that they are waiting to see how Texas glosses it. What Texas is going to say -- is good mitigation or bad. How those courts construe that statute. I don't think that you can magically say, here we are going to take these words and put them in and they are going to work. They seem to be leaving a lot of room to see how those courts in those states develop their standards. I don't see how you can predict it, but one thing I think that you can predict is that you just can't leave it too open ended.

AMSTERDAM: I would like to underline Mr. Halvonik's point, with several observations. Number one, the decisions in the United States Supreme Court in Gregg and Proffitt say very plainly we sustain these statutes on their face. We can't say that on their face they are unconstitutional. The court went out of its way to do that, reserving, I think, the question whether if when they were applied they were not applied fairly and even-handedly and where the pattern built up of arbitrary enforcement the court was leaving it open in the future. The second point I want to make is that the court - although in a strange manner -- reaffirmed this lately, you may have read about it in the newspapers in front of the United States Supreme Court the case Gardner vs. Florida, several months ago, in which Mr. Justice Stewart was widely reported as having said from the bench, and he did indeed, "Well, look, when we sustained this statute we thought that this was an open, fair process. Now we get a case up here in which the defendant appears to have been sentenced to death on the basis of an undisclosed presentencing report. If we are going to get that kind of thing we may just change our votes and have to knock that statute down." What he was saying, I think, was reinforcing Mr. Halvonik's point, that it is one thing to get a statute which will pass muster on its face.

It is another thing to get a statute which will stay constitutional in its application. I think this Committee both wants a statute which will be fairly even-handedly and non-arbitratily administered because the contrary is bad. Discrimination is bad. Whether it is constitutional or not it is bad. And this Committee ought not countenance. Besides that if you have a statute that doesn't have adequate safeguards you run the

risk of even though it is sustained on its face it is going to be knocked out as applied. So, I agree with Mr. Halvonik that all of the safeguards you can built in, judicial review by the trial judge after the jury sentencing of the jury sentencing decision. Appellate review -- I would strongly urge the procedure that the Georgia statute used which was to have reports filed in every case. And, I would have reports filed not in cases in which the death sentence was imposed, but in case it was papered as a capital case. A report filed on the facts and circumstances of that case to be kept in a safe or repository with a judicial conference or eventually filed with the Supreme Court of California so that comparison review by the California Supreme Court would be possible. You do all of those things, you will not only make a statute more fair in its administration, but in the long run increase the chances it will be held constitutional. I am not suggesting for one moment that you have to have such a reporting requirement in order to pass muster on its face. I would bet Mr. James will quickly say that only one of the three states has such a requirement, and I agree, only one did, but I am going to say, also, that the only thing that was done in those three cases was to sustain these statutes on their faces. And, if six months or ten months or two years or three years later a pattern of discriminatory enforcement emerges the Supreme Court has clearly left it open, as Mr. Halvonik says, to strike those statutes down. If you want a constitutional statute I would suggest that the Committee better be very careful about procedures that will prevent arbitrariness in fact and in and/procedures one, judicial review at both levels, trial and appellate level, reporting requirements and that sort of thing are vital if you want to not only get a constitutional statute but keep it constitutional.

GOGGIN: I would like the witnesses to respond on the issue of arbitrariness, capriciousness and discrimination against indigent defendants that if we required in the death penalty bill certain standards for representation of indigents in capital cases whether that would substantially help in dealing with the constitutionality question in those areas. Specifically, for example, requiring that you have an attorney with five years criminal experience, that adequate investigative procedures and people for the defense be supplied to the defendant, and so on. Does that type of standard for representation being in the statute help against the challenge of unconstitutionality?

HALVONIK: I think it is possible that it would affect the result. I certainly think -- I don't think it is probably the province of the Legislature to say somebody has to have so many years of experience or not. I have certainly seen lawyers with a lot of experience I wouldn't want handling my life before a jury and some with a lot less who I would feel a little more secure with. And, I suppose that is ultimately a question really for the bar to decide -- whether it has to be somebody who is certified to that sort of thing. I think as far as making sure that the person who is on trial has resources, adequate investigatory resources and that sort of thing is very important, but I must say that ultimately I think it is a will-'o-the-wisp. The death penalty is always going to be imposed in a discriminatory manner. Because what really goes on in the human mind is a drawing of a line and deciding that somebody is not within the class of humans otherwise they wouldn't be killing them. They are somehow beyond the pale and that means they are going to be sort of out of it, probably physically

repulsive, not too smart, you know, maybe a group that most of us don't belong to, very rarely somebody who has a college degree, not very many articulate people. Not many of us sitting here really are in danger of getting killed by that death penalty, hardly by anything we do, but the way death penalties are ultimately going to work you can't avoid them being discriminatory. That is part of the reason why I hope ultimately what you do is not send a bill out

-- let's let the other states waste their resources on this thing and let's not get back into the slaughter here. Let's pause awhile and look it over and see if in fact what occurs is what in fact it seems to me is predictable that Mr. Justice White as he sits there now and says, let's see how this works. He is going to find out how it works and they are just going to come back to the same result they did before -- knock out those death penalty. And, we would have wasted alot of energy in this State for nothing.

CHAIRMAN MADDY: Does anyone else care to answer Mr. Goggin's question?

AMSTERDAM: Just briefly. I think -- two ways, procedural protections of that sort would improve the constitutionality of the bill. Number one, atmospherically, any court is more sensitive and receptive to a constitutional claim of some poor guy who got shafted in the process of trial. And if you can keep the cases well tried with good lawyering and a good presentation of the defense's case the sympathy reaction that causes a court to knock out a statute is less likely to be effected. Secondly, in a more doctrinal sense, what the Supreme Court of the United States has said is that a defendant has to have an opportunity to present mitigating circumstances. Now, it is true that the context in which they said that is in knocking down statutes

that provided a mandatory death penalty with no mitigating circumstances at all. But a defendant is equally deprived of the opportunity to provide mitigating circumstances if he hasn't had the resources to bring in the evidence of them. And, if for example, a defendant with means could employ a 'shrink' to come in and testify at great length about how he fell on his head when he was a child and how he had a mother and all of these other things and thereby avoid the death penalty. Now, I wouldn't mind if this Committee saw fit to limit the death penalty only to those who did not have a mother. In any event, if you allow a defendant without means adequate resources so that a poor defendant can come in with the same defenses, same opportunity of proving mitigating circumstances I think he goes immediately and directly to the question whether or not the statute allows fair consideration of mitigating circumstances. I think it would increase the likelihood that the bill would be constitutional if you provide adequate means to make a defense. I also think it is desirable because I think if this Committee and this Legislature is going to kill people it darn well ought to give them a fair trial before they do.

CHAIRMAN MADDY: Do any of you think what we have in the Code -- Section 190.2 which is the listing of special circumstances -- any constitutional defects that you can see? Should it be more limited or could it be broader?

ASSEMBLYMAN ALATORRE: Or whether they should have categories at all?

OVERLAND: With respect to that list -- as far as the constitutional question is concerned -- I am sure that that list would be constitutional in as much as it narrows down the categories of eligibile candidates for the death penalty. However, as a

practical matter there are several problems with that list. Three of them come to mind . Number one, the killing of a witness is listed in 190.2. I think that is subject to abuse. I know that in Los Angeles County and in some of the other counties prosecutors have been filing that type of special circumstances. Any killing where the -- any robbery where the individual is killed or any rape -- on the theory that the victim was a witness to the crime itself which the defendant committed, thereby he was a witness to that particular crime and was killed. I think that particular part should be reconsidered and perhaps redrawn on a more narrow basis.

The second one is the multiple murder theory. Traditionally, I think the type of defendant that did not receive the death penalty -- when I say traditionally I mean prior to the enactment of the special circumstances statute was the arson murder. The individual who sets a fire -- twenty or thirty people are killed. That is precisely the type of individual that covered by the multiple murder section. I think certainly it is a little bit incongruent that an individual who places a bomb at the Los Angeles Airport and kills three people is eligible for the death penalty whereas if he places a bomb and kills only one person he is not eligible, which is the effect of that multiple murder -- those two are the ones that come to mind. There is another one -- I made a note here someplace.

SONDHEIM: To follow up with what Mr. Overland has said with regard to the killing of a witness. There is some ambiguity in the law, as a matter of fact, there has been an appellate court decision which was later taken over by the Supreme Court so it isn't the law, but nevertheless, I think perhaps the Committee could have one of its consultants look in this area. I will give

you the name of the case and citation. It is called People vs. Bratton - 54 Cal App.3rd 536. I think that pretty well points out the problem with that particular issue. With regard to the multiple killing, again, this has been the subject of some litigation -- there is a case called People vs. Superior Court (Brodie) in 48 Cal 3rd at 195 that points up that issue. And, there are a couple other aspects of this, and I want to make it clear that what I am suggesting are not constitutional defects, but you might say some clean up legislation is required in this area if you do keep the special circumstances that now exist in the law. Another problem is that in Section 209 you can end up with a death penalty without -- just based on the kidnapping itself and at least I think an overlap between that and 190.2 and that really ought to be clarified. I don't think it was the intent, at least I hope not in my own view, of the Legislature originally to just make it on a 209 that you needed the 190.2, but nevertheless it is there in the law and it ought to be cleaned up. The final thing is again something out of this Bratton case and that is whether or not the prosecution should present evidence at the preliminary hearing of the special circumstances. That isn't really clear from the law and I think that might be an area the Legislature might indicate its intent. I would mention a couple of other things. I think if you are going to work in this area you ought to clean up some of the other possible death penalty sections that are involved. You have those relating to subordination of perjury, treason, killing by a life prisoner and train wrecking - there are a number of other sections that ought to all be integrated, which really wasn't done.

As far as expanding it or contracting it I think there are other questions that you can consider, for example, peace officers

given a certain definition for purposes of the death penalty. It doesn't include other people who otherwise are peace officers. Does that make any sense? These are areas I would suggest you look into.

OVERLAND: The third one I was thinking of was is the murder for hire section. I think there is ambiguity in the statute as to whether or not it applies to the person who does the hiring or the person who is being hired. It has been the subject of some litigation.

JAMES: I agree with Mr. Sondheim in his observations and the citations that he has given to the Committee. Obviously the intent in drafting the special circumstances was to include the most heinous type crimes. If people committed outlandish murders and perhaps you may want to see if there are others that were omitted at the time that this bill was first drafted. The old 190.2 and perhaps such murders which would include torture murders might be included. As Mr. Sondheim said there are other sections that probably should be integrated into a bill that deal with the death penalty. He has mentioned treason, Penal Code Section 37, the perjury that results in the execution of innocent persons, 128, train wrecking, 219. He has mentioned the kidnapping Section 209, and of course 4500 which deals with killing by a life termer of a non inmate. There should be also added 12310 which deals with the firing of an incendiary device, the bombers. Military and Veterans Code Section 1672 has provision regarding the death penalty for someone who is engaged in sabotage. These should be integrated into, perhaps, a comprehensive bill covering this.

HALVONIK: I really think you ought to get that perjury in there that results in the execution of an innocent witness and presupposes you are executing innocent people which I suppose is

probably the truth.

AMSTERDAM: Let me also respond to the Chairman's question and disagree with some of the othersMembers of this eminent panel on whether the enumeration in 190.2 would be constitutional.

I would refine my answer to that by saying I think that the approach taken in 190.2, that is the idea of enumerating categories such that if you don't find one of those categories the death penalty may never be imposed. That as it has rightly been pointed out was the Texas approach. I think that general approach is O.K. The problem is that some of the categories are too broad. If you take a look at the opinion of Gregg v. Georgia again I am quoting from 96 Supreme Court Reporter, 2932, the Court rejects the claim that the death penalty is disproportionate for crime, but it says, "We are concerned here only with the imposition of capital punishment, with a crime of murder, and when a life has been taken deliberately by the offender." Now, think of the elements of that. Murder, deliberate killing by the offender. That is no accidental language. I think that is meant to reserve the question of constitutionality -- vicarious liability for example -- the wheel man versus the trigger man. I think it is meant to reserve the question of liability for non deliberate killing. I think you ought to take a real hard look again at 190.2. Because, although, presence at the scene of the crime is required for a number of those 190.2 categories. Intentional killing is not. For example, the multiple murder situation. When a killing need not be deliberate and intentional for the 190.2.

Secondly, you ought to look at the question of -- under 190.2 -- what on earth is meant by the key phrase or passage in there -- the murder was intentional and was carried out --

I'm sorry this is from old 190.2 -- the defendant was personally present during the commission of the act causing death and directly committed or physically aided in such act or acts in any of the following circumstances. That is a key provision because it qualifies most of the rest of the section.

I am not sure that participation in the acts is equivalent to the defendant personally committing the crime or murder deliberately. Now, again, I want to say that the Gregg decision

reserves the question and I think you ought to look very carefully at those provisions. I am not prepared to say they are all constitutional. I think they may not be.

JAMES: I think the court was just zeroing in on the actual facts before them in the Gregg case and in the cases before them they all involve first degree murder in which the defendant had been found guilt of a killing during the perpetration of a felony. And, it is indicated that it was not considering other crimes for which the death penalty may be imposed.

Currently before the United States Supreme Court is a case also from Georgia called Coker vs. Georgia in which the crime is that of rape. Where a person was not deprived of life or the victim was not deprived of life and so they are considering this term -- at least a number of these issues that they left open in Gregg. I think we don't have to concern ourselves with some of the language there. They were merely pointing out that in Gregg this existed. They are not excluding as possibly unconstitutional the imposition of the death penalty for some other crime or under other circumstances.

SIEROTY: Mr. James, do you feel the death penalty in California should be applied for something other than homicide?

JAMES: Well, it hasn't been applied that I know of in recent years. It was applied for 209 kidnapping where there was great bodily injury and no death. At least in three instances. It is provided for in the crime of treason. It has been traditionally and there isn't necessarily a death involved there. And in the statutes, two of them that I have mentioned here, the death penalty was at the discretion of the jury where death resulted or great bodily injury.

HALVONIK: I think, Mr. Sieroty asked if you favored --

JAMES: Oh, my personal view?

SIEROTY: Well, the Attorney General's point of view.

JAMES: I think we are in favor of the bill, one of the bills before the Committee which provides for it in murder cases only where a homicide resulted.

SIEROTY: So the treason provision is no longer necessary, the kidnapping provision --

JAMES: Well, I can't get too exercised. I don't know of any reported instance of a prosecution for treason in this State.

SIEROTY: Do you think we should clean that up at the same time?

JAMES: That would be a consideration --

CHAIRMAN MADDY: I think that the bill that has been introduced by Assemblyman McAlister on our side does attempt to deal with that section if I'm not mistaken. It has just come into print. We will try to get it to Members of the Committee. I want to reserve some of the opinions, Mr. Sieroty, to the day we actually have the bills before us and to deal with the constitutional issues if we

can.

ASSEMBLYMAN GOGGIN: We haven't addressed the issue that concerns me the most which is what sorts of crimes may reasonably be argued to be deterred by the death penalty. Now, clearly -- arguably, at least. A killing of a kidnap victim to prevent that person from testifying, that has been argued to be clearly in the realm of adding some deterrents. Also, the killing of a prison guard by a life termer. I think this Committee has to decide if we are going to impose death what sorts of crimes is it that are going to be effectively deterred by death. Are we going to discuss that at all.

CHAIRMAN MADDY: I think that is the whole argument that we are going to reserve when we actually have the bills. We were discussing whether or not the special circumstances listed in 190.2 --

is sufficiently limited under the decisions to be constitutional rather than

deterrents versus something else --

HALVONIK: I am not going to speak on the deterrents question, I just wanted to say that the example you raised is an interesting one -- why you don't want to have a death penalty for kidnapping because we don't know what the death penalty might deter. But, we do know if you make it the death penalty for kidnapping you give a lot of incentive to kill the victim. That is problem with making it a death penalty to kidnap.

ASSEMBLYMAN GOGGIN: That is the arguments that I would like to hear.

CHAIRMAN MADDY: No, I thought we would use the expertise of these men to tell us what we could put into a statute. We will

get down to the policy question when we get the bills before us. I am sure most of these men will be back.

ASSEMBLYMAN GOGGIN: Are we going to get witnesses to address that generally as well as specifically?

CHAIRMAN MADDY: We will probably have more witnesses who desire to testify than you and I would like to see.

ASSEMBLYMAN GOGGIN: I guess I know that. Is the Chairman going to have a part in deciding who is going to testify?

CHAIRMAN MADDY: The Chairman is just the Chairman. The author of the bill, Assemblyman McAlister, is in the back of the room, Assemblyman McVittie and Antonovich were here, Assemblyman Cordova. Those are all authors of death penalty legislation. Senator Deukmejian, all authors of bills that are going to be before this Committee. And, I am sure Mr. Halvonik and Professor Amsterdam and Mr. Overland and others who are opposed -- and others I see in the audience that would be opposed to the death penalty will come forth and testify. I don't really have a campaign to bring witnesses before us because we are getting enough without my help. If you have some, bring them forth.

ASSEMBLYMAN NESTANDE: Might I suggest that at the termination of this meeting and as a result of this meeting that the staff prepare a check off list of items that we have discussed here so when we consider a death penalty bill we can see if the elements/that have been discussed today are incorporated and how they are incorporated in a bill that may before us.

CHAIRMAN MADDY: We will try to get that staff work done for you. We are not necessarily ready to quit. I know that one or two of the witnesses have to catch planes so we will probably go on for another thirty minutes.

SIEROTY: One of the witnesses made some reference to the special circumstances relating to the killing by a paid killer and the question, I think that was raised, was whether the death penalty could be imposed on both the person who paid and the person who does the killing. Is there a question in the law, in the California statute right now, with regards to that? Will you expand on that a little bit for me, please.

OVERLAND: I don't have the bill before me --

SIEROTY: Are there some cases on this?

OVERLAND: No, there are no cases on it, although I was personally involved in a case that was argued in the Superior Court.

I think if you look, Mr. Sieroty, at 190.2 subdivision (a) it defines a murder for hire and the words there are, "The murder was intentional and was carried out pursuant to an agreement with the defendant." It uses the word defendant. Then the second paragraph says, "An agreement as used in this subdivision means an agreement by the person who committed the murder to accept a valuable consideration." The person who committed the murder there -- the language is different from the language defendant. So, it seems to indicate that the person who committed the murder is not the defendant. Secondly, I think that that subdivision (a) -- is the only instance in 190.2 where the death penalty pursuant to that statute could be imposed on somebody who -- had not personally committed the act that caused the death, which is in subdivision (b). So, it seems to be directed at the hirer, that is, the person who hires somebody else to kill the victim, and is not present at the time of the act which caused the death, was committed, and is not the one who personally committed the act.

SIEROTY: Doesn't subdivision (b) require the defendant to personally commit the act?

OVERLAND: That is right, but subdivision (a) is independent of subdivision (b).

SIEROTY: It doesn't have to be both of those? Either (a) or (b)?

OVERLAND: That is correct.

JAMES: Prior to the Rockwell opinion -- at least the number of cases involving hired killings and each instance that I reviewed the killer and the hirer were both given the death sentence. In fact, in one that arose in Yolo County there was a middle man between the hirer and the actual killer, and all three of them had the death penalty imposed.

OVERLAND: No, I think, Mr. James, that -- I am not familiar with those cases, but the killer may have had the sentence imposed pursuant to subdivision (b) or some other special circumstance other than the circumstance described in subdivision (a).

JAMES: It is my understanding it was not under subdivision (a).

HALVONIK: In any event the State Supreme Court never had an opportunity to pass on it because it was dropped.

CHAIRMAN MADDY: I want to go back to a question that was touched on by Professor Amsterdam in his opening statement. The first paragraph of the Rockwell decision essentially begins by saying that the petition raises none of the issues that were considered by this court in People vs. Anderson related to whether capital punishment violates Article I, Section 17 of the California Constitution and he said, "We do not have before us", including that paragraph, "Whether the question of capital punishment is cruel and unusual punishment per se". Do any of you believe that the Calif-

ornia Supreme Court can invalidate a death penalty statute based upon the California Constitution? In light of Article I, Section 27, which was the Initiative, Proposition 17.

HALVONIK: I believe it. I believe it is very questionable whether Proposition 17 is constitutional, yes.

AMSTERDAM: That is something that kind of predates the Legislature and everybody else. I think it is certainly cause for questioning concern, but I don't think there is anything to be done about it.

CHAIRMAN MADDY: We probably can't, but perhaps some of us on the Committee would like to have your opinion, anyway, just for our own consideration.

JAMES: For one, I am firmly of the opinion that the Proposition was constitutional, and that Article I, Section 27 will meet all of the requirements of the State Constitution. And, I see no impediment as far as the United States Supreme Court is concerned or the United States Constitution. This was something drafted and presented to the people and by Initiative the people amended the Constitution.

ASSEMBLYMAN ALATORRE: That is not answering the question -- because the people voted for something, we have seen things that even the Legislature has voted for that have in fact been unconstitutional. By your statement here that the people voted and knew really what they were voting for, and they knew that they were voting for something that was constitutional is not really true.

JAMES: Well, they amended by their vote the Constitution of the State. That is something different than what the Legislature --

ASSEMBLYMAN ALATORRE: But, does that mean that that is in fact constitutional, whatever they amended?

JAMES: It certainly would govern the basic law of the State. Now, whether it would infringe any provision of the United States Constitution would be determined by the United States Supreme Court.

ASSEMBLYMAN ALATORRE: I am not a lawyer and I stipulate that right from the beginning, but what you are saying is that because it Article and the Initiative was in fact what they voted for and was put into the Constitution makes it constitutional. It may be included in the Constitution but then when it goes to the court it might be a totally different thing.

JAMES: Well, this is, of course, a basic fundamental document upon which our government is formed and it can be amended by the provision in the State Constitution by an Initiative measure and the power in the people to exercise the Initiative. It was exercised back in November of 1972.

ASSEMBLYMAN ALATORRE: Fine, let us stipulate that it was exercised, but that still doesn't make it constitutional.

HALVONIK: Mr. Alatorre, I think you are correct. You can amend the California Constitution different ways and there are certain things that you cannot amend by Initiative, and that is the dispute that revolves around Proposition 17. One of them, whether that was the sort of thing you can amend by Initiative. I think Professor Amsterdam is right. You get very involved in the technicalities of separation of powers and whether a power was taken away from one branch and given to another and if so and if that was done it would be unconstitutional. All of that is what the court did not resolve and what the court said specifically it was not resolving in Rockwell. I think the ultimate

question, whether to say you can -- when you pass -- let's say that you should pass a bill, I hope you don't, but let's say you do, and let's say it can even pass muster before the U. S. Supreme Court. It needn't necessarily pass muster before the State Supreme Court. There still is a State Constitutional issue that submerged there and has been for a number of years and has never yet been addressed by the court.

AMSTERDAM: There are several issues in fact and they are very complicated, including the question, for example, of whether -- Mr. James described particularly -- as voting, the people knowing what they were voting for. One of the very issues presented that Mr. Halvonik refers to is that the Initiative was miscaptioned by the Attorney General. That the petition which was circulated did not even state the California Supreme Court review.

That is one of the major issues in it.

I think this Committee would be getting into a thorn bush if it went into all of those questions, with all due respect, Mr. Chairman, I think it would be relevant and important if the Legislature could do something about them, but I think it is out of --

CHAIRMAN MADDY: It probably falls in the realm of the area that there may be some Members who are like Mr. Halvonik who said that we ought to go slow in California and let the other states battle it out with the United States Supreme Court. There may be some Members who feel that if the State Supreme Court is going to strike down whatever we propose as being unconstitutional because it is cruel and unusual per se or whatever reason they may feel we shouldn't go through the exercise at all.

AMSTERDAM: For that purpose I think it is very important to negate any notion of urgency legislation here, whiffling

this thing through, because it is going to have to undergo attack in the United States Supreme Court, the California Supreme Court. It is going to be a long, long, long process. And, there are very serious grounds for attack under the California Constitution.

CHAIRMAN MADDY: I think to be realistic about the urgency clause, the urgency clause presents the question of whether you need 54 votes or 41 votes and in view of the Governor's statement that he would veto, you may have a political reason for an urgency clause as much as a practical reason for an urgency clause. That is just my own commentary. Others may disagree.

HALVONIK: There is though in relation to that when you vote on the urgency clause the Governor can then veto it even though you have passed it with an urgency clause. It seems to be a valid consideration whether you are really passing something that can take that sort of effect and will move that quickly and whether you are really doing something that can be taken care of quickly. That is supposed to be one of your duties as a Legislature to make the determination that there is that kind of urgency. I think, also, and I just want to suggest that you shouldn't consider the California Constitutional question. I didn't come prepared to discuss them today, but you have all taken oaths to uphold the State and federal Constitutions and I think that at some point surely your own views of what the Constitution is, whether you are a lawyer or not, have to be taken into account when you vote. I would be very happy to return another time if this Committee wants to address the issue of the constitutionality under the State Constitution of any death penalty bill, and also the general question of constitutionality as you might perceive the eighth amendment, because it is your duty to

construe it, too. I think all of those questions are there. I was just under the impression today we weren't going to discuss them that much.

SONDHEIM: Let me just suggest that I am beginning to think we are going to be coming back here to sit before the Legislative Supreme Court and it seems to me that perhaps we can't resolve it here. I have seen the briefs in this case.

HALVONIK: You can resolve it by not passing a bill.

SONDHEIM: That merely says that the courts do not have an opportunity to determine whether it is constitutional. But the question whether it is or isn't constitutional is one rightfully placed in the hands of the courts under our separation of powers. That is the role that they will play if and when a bill is enacted. Just on the urgency clause -- we speak of speeding justice and Professor Amsterdam indicates it is going to take a long time, well, if it is done on an urgency basis it goes into effect that much sooner and it is before the State Supreme Court that much earlier.

JAMES: I agree with Mr. Sondheim. I think the urgency clause is important. I think these issues should be solved. This matter was briefed in the first case that was tried under the old death penalty bill and the bill went into effect in January of 1974, the case was tried and judgement entered in June of 1974, the case was briefed during the course of the remainder of the year, and it has not been scheduled for argument before the State Supreme Court. It is a year and a half since the last brief was filed on that case and it was never scheduled for argument. So, I think that if something is done now we will at least precipitate a ruling on these issues that were briefed in that case, the constitutionality of Proposition 17 and the effectiveness of Article I, Section 27.

CHAIRMAN MADDY: We will consider that when we take the bills up.

SONDHEIM: I would like to perhaps just highlight the issues that you might consider without debating them one way or the other. Just to give you what I think are the issues for a draftsman in this area. Some of them have been touched upon, some of them have not.

I think the first thing you ought to consider is how many phases do you want in this particular type of death penalty legislation if there is to be death penalty. We have debated that or discussed it, I should say unitary, bifurcated, trifurcated. That is an issue.

Second issue relates to what types of special circumstances should there be. Should you continue with the present list or should you make some changes.

The third issue it seems to me relates then to the penalty phase. What should / the aggravating and mitigating circumstances be. Should you spell them out or are they to be undefined as they were in Georgia and Texas. Then if you do come to some conclusion on that then how are these factors to be used. Are they to be weighed, which Mr. Overland touched upon earlier, or is the jury basically supposed to be told, now, you have heard the evidence on both sides, come back and make a decision without telling them to weigh one against the other.

Another issue in that regard is the burden of proof. Who has the burden? Shall there be no burden at all as it was in Georgia? Shall the prosecution have a burden? Or, shall the defendant have a certain burden?

Then finally, who should determine the penalty, the judge, the jury or in a sense, both as was done in Florida where the

jury was advisory.

And finally you have the question of review that was mentioned by Professor Amsterdam. You might want to consider whether the trial judge should have the power to review a jury's decision and finally whether an appellate court should have the power to review and compare the particular imposition of the death penalty against other cases, as well.

ASSEMBLYMAN KNOX: Is the method of putting people to death legislative, also? Whether you gas them, hang them, shoot them, or whatever?

SONDHEIM: Yes.

ASSEMBLYMAN KNOX: Well, I think you ought to add that in the list of issues.

SONDHEIM: Yes. I would agree.

HALVONIK: You might want to give the defendant his choice as they do in some other states, for example. My guess is if there were some like boiling in oil, even if somebody came up with the notion that it was a deterrent it probably wouldn't go over very well.

I just want to emphasize again -- I have been trying to remark thoughout that as you analyze these U. S. Supreme Court decisions for those of you whose purpose is to come up with what you hope is a constitutional law -- anything that that U.S. Supreme mentioned that it liked, any justice. If you want to leave that out on the grounds that they were just talking at that point or it wasn't the facts of the case. Well, that will be fine with me because I am going to need some arguments and everyone of those you leave out of the bill is one I am going to have an argument for any client who is on death row and putting an urgency clause on and then leaving those things out

strikes me as really kind of contradictory.

ASSEMBLYMAN MADDY: We took you out of the budget this year.

HALVONIK: But, you haven't taken away my license to practice law.

AMSTERDAM: Mr. Chairman, I would not have spoken at the end except that I am a little worried that by enumerating a list may end up with the idea that that is the comprehensive list and if there is any thrust or notion of that I've got some very definite candidates to add to it.

I think it is also important to consider the question of jury qualification and disqualification. Whether or not persons with conscientious scruples should or should not be excluded. I think it is important to consider not only who decides, but also what kind of relationship there is between the decision maker. Shall we provide, for example, that the jury makes the sentencing in the first instance, but a judge may reverse a jury death sentence and impose a life sentence instead. That was California law for many years. The relationships of the decision makers is very important.

I think that procedures to insure the regularity and to record the regularity procedure in court, the sort of record keeping requirements which I suggest is also definitely to be on the agenda.

And, finally, I think that some of the questions that Mr. Goggin raised about procedures, providing adequate resources, for a defendant, adequate counsel, adequate assistance in making a case on mitigating circumstances and that sort of thing are also vitally important and are on the list.

So, I would not like to see the list that we just got be a closed list. I think that if you are going to have a statute which as I said, not only is constitutional, but stays that way in a sense that it will not end up by being enforced in such a way that the court will strike it down. You have to consider procedural questions in addition to having a statute that looks good. Those procedural questions are important.

CHAIRMAN MADDY: Nothing is closed and I would ask if any of you as we proceed down the road have additional things to add feel free to communicate with the Committee because we are pleased to receive all of your input.

JAMES: Before the benediction could I just add one little statement.

I think we ought to take cognizance of the fact that the United States Supreme Court finally determined the question of the constitutionality of the death penalty under the eighth amendment and held under the circumstances indicated that it was constitutional. And, they said that when the Legislature chooses the penalty to be imposed and that this choice is clothed with a strong presumption in favor of its constitutionality and that a heavy burden lays upon those who would challenge that constitutionality.

HALVONIK: The U. S. Supreme Court didn't finally do anything in this area, I don't think.

ASSEMBLYMAN SIERORY: Mr. Halvonik's comments, I think, leave open or suggest to leave open the fact that the Supreme Court is changing all of the time. As new people come on to the courts we may have new decisions in this area.

I have mentioned this to Professor Amsterdam a little earlier,

but you may recall, Mr. Chairman, and Mr. Knox, when we were in Israel on our study mission one of the things we were looking at was how Israel law and Judaic law treated problems of the death penalty. We find this is an issue which has been with people for more than 5,000 years. I don't know that we can settle it forever either this year. But, the fact is that in ancient Jewish law death penalty was provided for, but according to the historians with whom we spoke, who is also a Justice of the Supreme Court in Israel, in actuality very few people were executed. So apparently they had the same difficulties in those days as we are finding here today. So, I am not sure we are going to be able to resolve this.

CHAIRMAN MADDY: That is our benediction. I want to thank all of our witnesses. We appreciate very much you being here. The Members of the Committee will be provided with all of the information possible. I hope you will have time to read it.

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TOM BANE
ASSEMBLYMAN, FORTIETH DISTRICT

COMMITTEES
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Select Committee on
Genetic Diseases

May 23, 1977

Mr. Mark Waldman
Legislative Counsel
American Civil Liberties Union
633 South Shatto Place
Los Angeles, CA 90005

Dear Mr. Waldman:

Thank you for your letter regarding SB 155. It was a very difficult and painful vote. I believe if this bill is not enacted the eventual result will be far worse. The people of California will support an initiative which will not have the protections of SB 155.

Taking into consideration all of the protections detailed in SB 155 and what would occur if it is not enacted, I feel that its passage is the better course.

Sincerely,

TOM BANE

TB:sc

OFFICE OF THE GOVERNOR
Sacramento, Calif. 95814
Elisabeth Coleman, Press Secretary
916-445-4571

5/27/77

RELEASE: Immediate

#146

Gov. Edmund G. Brown today vetoed:

SB 155 - Deukmejian, R-Long Beach -- This measure would have restored the death penalty in California.

The Governor's veto message is as follows:

> Statistics can be marshalled and arguments propounded. But at some point, each of us must decide for himself what sort of future he would want. For me, this would be a society where we do not attempt to use death as a punishment.
>
> Accordingly, I am returning Senate Bill No. 155 without my signature.

Volume 1

STATUTES OF CALIFORNIA

AND DIGESTS OF MEASURES

1977

Constitution of 1879 as Amended

General Laws, Amendments to the Codes, Resolutions, and Constitutional Amendments passed by the California Legislature

1977–78 Regular Session

Compiled by
BION M. GREGORY
Legislative Counsel

D—Continued

A.	S.B. No.	Author
16	—	Fazio
—	8	Song
—	316	Dunlap (Coauthor: Assemblyman Fazio)
—	319	Behr
—	1033	Vuich
16	—	Hayden
13	—	Vasconcellos
17	—	Chappie (Senator Johnson, coauthor)
13	—	Gualco and Keysor
16	—	Fazio
—	69	Nejedly (Principal coauthors: Senator Rains; Assemblyman Dennemeyer)
—	128	Alquist
—	178	Stiern
—	397	Beverly
—	471	Holmdahl
—	475	Foran
—	541	Dills
—	619	Song
—	661	Foran
—	795	Stiern (Coauthor: Assemblyman William Thomas)
7	—	Chimbole
8	—	Vincent Thomas
0	—	Egeland
9	—	Hayden and Gualco
7	—	Arnett
9	—	Lewis (Senator Paul Carpenter, coauthor)
7	—	Suitt
1	—	Chimbole
2	—	Dennemeyer
0	—	McAlister
9	—	Hallett
8	—	Nestande
7	—	Bates
8	—	Bostwright
5	—	Vicencia
7	—	Hart (Senator Rains, coauthor)
8	—	Tucker
2	—	Mangers (Senator Robbins, coauthor)
6	—	Stirling
1	—	Deddeh
5	—	Knox
2	—	Thurman
3	—	Special Subcommittee on Aging (Chel, Chairman; Agnos, Hayden, Lanterman, Mangers, Suitt, and Thurman) Papan, Rosenthal, and Torres
1	—	Arnett
—	41	Rodda
—	335	Foran, Rodda, and Stull (Coauthors: Assemblymen Berman, Craven, Duffy, and Gualco)
—	373	Holden, Behr, Dills, Greene, and Robbins (Principal coauthor: Assemblyman Bane; Assemblymen Chel, Miller, Rosenthal, Torres, Vasconcellos, and Vicencia)
1	—	Hayden, Calvo, Antonovich, Arnett, Bannai, Cline, Hughes, Kapiloff, Lancaster, Lewis, Mangers, Nestande, Priolo, Rosenthal, Ryan, Stirling, Tucker, and Vasconcellos (Senators Behr, Gregorio, Nejedly, and Petris, coauthors)
1	—	Chel
1	—	Chappie
1	—	Bostwright
—	851	Song
—	—	Chimbole
—	—	Antonovich, Chel, Cordova, Imbrecht, and Stirling
—	—	Mello (Senator Nimmo, coauthor)
—	—	Duffy
—	307	Foran
—	408	Nejedly
—	165	Dunlap (Coauthor: Assemblyman Fazio)
—	288	Bill Greene
—	301	Caramendi
—	339	Rains
—	369	Campbell, Deukmejian, and Dills (Coauthors: Assemblymen Alatorre, An-

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222	85	—	McAlister and McVittie
223	197	—	Fazio and Norman Waters (Senator Garamendi, coauthor)
224	153	—	Craven
225	226	—	Knox
226	443	—	Wray
227	458	—	Bannai
228	506	—	Vicencia
229	577	—	Gualco
240	619	—	Hallett
241	634	—	Maddy
242	645	—	Leroy Greene
243	673	—	Chel
244	682	—	Antonovich
245	734	—	Vicencia
246	816	—	Mello
247	825	—	Mori
248	905	—	Knox
249	988	—	Kapiloff
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251	1226	—	Perino
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253	1249	—	Stirling
254	1253	—	Statham (Senator Johnson, coauthor)
255	1213	—	Dixon
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269	—	1181	Zenovich
270	—	1200	Marks
271	101	—	Leroy Greene, Alatorre, Chacon, Chimbole, Craven, Deddeh, Dixon, Egeland, Fazio, Fenton, Gage, Hart, Hughes, Keene, Knox, Lewis, Perino, Robinson, Rosenthal, Suitt, William Thomas, Thurman, Torres, Tucker, Vasconcellos, Vicencia, Norman Waters, Wornum, and Wray (Senators Paul Carpenter, Gregorio, Holden, Marks, Presley, Rains, Stiern, and Stull, coauthors)
272	113	—	Gualco
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276	1027	—	Perino, Norman Waters, and Fazio (Senator Garamendi, coauthor)
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281	—	574	Beverly
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284	—	1059	Stull, Mills, and Wilson
285	—	1157	Stiern
286	—	1193	Dills
287	801	—	Vicencia and Lanterman
288	144	—	Wornum
289	250	—	Chimbole
290	286	—	Suitt (Senator Stull, coauthor)
291	370	—	Nestande
292	630	—	Duffy
293	779	—	Chappie (Senator Wilson, coauthor)
294	846	—	Cullen

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296	1130	—	Cordova and McAlister
297	1178	—	Hayden
298	1275	—	Chappie
299	1285	—	Chel
300	1729	—	Maddy (Senator Zenovich, coauthor)
301	1925	—	Lehman (Senator Vuich, coauthor)
302	1903	—	Keene
303	16	—	Rosenthal, Agnos, Alatorre, Berman, Bostwright, Brown, Chappie, Dixon, Fazio, Fenton, Gage, Hart, Hayden, Hughes, Imbrecht, Kapiloff, Knox, Lanterman, Lehman, McVittie, Montoya, Stirling, Vincent Thomas, Torres, Vasconcellos, Norman Waters, Wornum, Wray, and Young (Senators Holden, Rains, Robbins, Roberti, and Stiern, coauthors)
304	234	—	Gage and Berman
305	423	—	Kapiloff
306	770	—	Chacon, Deddeh, Craven, Ellis, Kapiloff, and Suitt (Senator Stull, coauthor)
307	948	—	McVittie
308	1784	—	Hart
309	99	—	Craven
310	951	—	Torres
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313	1537	—	Mangers
314	218	—	Chappie
315	1137	—	Rosenthal
316	—	155	Deukmejian (Principal coauthors: Senator Beverly and Assemblyman McAlister) (Coauthors: Senators Briggs, Campbell, Dennis Carpenter, Cusanovich, Johnson, Nejedly, Nimmo, Presley, Richardson, Robbins, Russell, Song, Stull, and Wilson; Assemblymen Perino, Antonovich, Bostwright, Chappie, Chimbole, Cline, Collier, Cordova, Craven, Cullen, Duffy, Ellis, Hallett, Hayden, Imbrecht, Lancaster, Lanterman, Lewis, McVittie, Nestande, Robinson, Statham, Stirling, Vincent Thomas, William Thomas, Thurman, Norman Waters, and Wray)
317	1925	—	Bostwright
318	378	—	McVittie
319	874	—	Hughes
320	1017	—	Antonovich
321	20	—	Knox
322	186	—	Wornum
323	218	—	Knox (Senator Nejedly, coauthor)
324	945	—	Gualco
325	256	—	Maddy
326	315	—	Chappie
327	440	—	Vicencia
328	675	—	William Thomas
329	658	—	Chel
330	761	—	Knox
331	756	—	Vicencia
332	1269	—	Maddy
333	1675	—	Mangers, Dennemeyer, Nestande, Robinson, Wray, Egeland, Hughes, Montoya, and Suitt
334	1716	—	Chel
335	1806	—	Chacon
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338	—	171	Song
339	607	—	Nestande
340	72	—	Leroy Greene
341	85	—	Fenton
342	109	—	Chacon
343	114	—	Deddeh
344	165	—	William Thomas
345	—	99	Holmdahl and Rains (Coauthors: Senators Dills, Marks, and Roberti) (Principal coauthors: Assemblymen Lockyer, Hughes, and Mori) (Coauthors: Assemblymen Arnett, Cullen, Hayden, Keysor, Robinson, Vincent Thomas, Young,

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The people of the State of California do enact as follows:

SECTION 1. Section 14998.5 of the Government Code is amended to read:

14998.5. The council shall have the powers and authority necessary to carry out the duties imposed upon it by this chapter including, but not limited to, the following:

(a) To adopt such rules and regulations as it deems advisable with respect to the conduct of its own affairs.

(b) To hold hearings, and to do or perform any acts which may be necessary, desirable or proper to carry out the purpose of this chapter.

(c) To request and obtain from any department, division, board, bureau, commission, or other agency of the state or of any city or county within the state such assistance and data as will enable it properly to carry out its powers and duties hereunder.

(d) To accept any federal funds granted, by act of Congress or by executive order, for all or any of the purposes of this chapter.

(e) To accept any gifts, donations, bequests, or grants of funds from private and public agencies for all or any of the purposes of this chapter.

(f) To coordinate the activities of similar councils or boards appointed by any city or county within the state for all or any of the purposes of this chapter.

(g) To employ, pursuant to laws and regulations governing state civil service, such staff as may be necessary to carry out its duties imposed upon it by this chapter.

SEC. 2. The sum of forty-four thousand six hundred forty dollars ($44,640) is hereby appropriated from the General Fund to the Motion Picture Development Council for expenditure by the council in performing its functions, powers, and duties.

SEC. 3. This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting such necessity are:

In order to expressly authorize the Motion Picture Development Council to employ staff necessary to carry out its functions and duties, it is necessary that this bill take effect immediately.

CHAPTER 316

An act to amend Section 1672 of the Military and Veterans Code, to amend Sections 37, 128, 209, 219, 1018, 1050, 1103, 1105, 4500, and 12310 of, to repeal Sections 190, 190.1, 190.2, and 190.3 of, and to add Sections 190, 190.1, 190.2, 190.3, 190.4, 190.5, and 190.6 to, the Penal Code, relating to punishment for crimes, and declaring the urgency thereof, to take effect immediately.

[Passed over Governor's veto August 11, 1977. Filed with Secretary of State August 11, 1977.]

The people of the State of California do enact as follows:

SECTION 1. Section 1672 of the Military and Veterans Code is amended to read:

1672. Any person who is guilty of violating Section 1670 or 1671 is punishable as follows:

(a) If his act or failure to act causes the death of any person, he is punishable by death or imprisonment in the state prison for life without possibility of parole. The penalty shall be determined pursuant to the provisions of Sections 190.3 and 190.4 of the Penal Code. If the act or failure to act causes great bodily injury to any person, a person violating this section is punishable by life imprisonment without possibility of parole.

(b) If his act or failure to act does not cause the death of, or great bodily injury to, any person, he is punishable by imprisonment in the state prison for not more than 20 years, or a fine of not more than ten thousand dollars ($10,000), or both. However, if such person so acts or so fails to act with the intent to hinder, delay, or interfere with the preparation of the United States or of any state for defense or for war, or with the prosecution of war by the United States, or with the rendering of assistance by the United States to any other nation in connection with that nation's defense, the minimum punishment shall be imprisonment in the state prison for not less than one year, and the maximum punishment shall be imprisonment in the state prison for not more than 20 years, or by a fine of not more than ten thousand dollars ($10,000), or both.

SEC. 2. Section 37 of the Penal Code is amended to read:

37. Treason against this state consists only in levying war against it, adhering to its enemies, or giving them aid and comfort, and can be committed only by persons owing allegiance to the state. The punishment of treason shall be death or life imprisonment without possibility of parole. The penalty shall be determined pursuant to Sections 190.3 and 190.4.

SEC. 3. Section 128 of the Penal Code is amended to read:

128. Every person who, by willful perjury or subornation of perjury procures the conviction and execution of any innocent person, is punishable by death or life imprisonment without possibility of parole. The penalty shall be determined pursuant to Sections 190.3 and 190.4.

SEC. 4. Section 190 of the Penal Code is repealed.

SEC. 5. Section 190 is added to the Penal Code, to read:

190. Every person guilty of murder in the first degree shall suffer death, confinement in state prison for life without possibility of parole, or confinement in state prison for life. The penalty to be applied shall be determined as provided in Sections 190.1, 190.2, 190.3, 190.4, and 190.5. Every person guilty of murder in the second degree is punishable by imprisonment in the state prison for five, six,

or seven years.

SEC. 6. Section 190.1

SEC. 7. Section 190.1

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SEC. 6. Section 190.1 of the Penal Code is repealed.

SEC. 7. Section 190.1 is added to the Penal Code, to read:

190.1. A case in which the death penalty may be imposed pursuant to this chapter shall be tried in separate phases as follows:

(a) The defendant's guilt shall first be determined. If the trier of fact finds the defendant guilty of first degree murder, it shall at the same time determine the truth of all special circumstances charged as enumerated in Section 190.2, except for a special circumstance charged pursuant to paragraph (5) of subdivision (c) of Section 190.2 where it is alleged that the defendant had been convicted in a prior proceeding of the offense of murder of the first or second degree.

(b) If the defendant is found guilty of first degree murder and one of the special circumstances is charged pursuant to paragraph (5) of subdivision (c) of Section 190.2 which charges that the defendant had been convicted in a prior proceeding of the offense of murder of the first or second degree, there shall thereupon be further proceedings on the question of the truth of such special circumstance.

(c) If the defendant is found guilty of first degree murder and one or more special circumstances as enumerated in Section 190.2 has been charged and found to be true, his sanity on any plea of not guilty by reason of insanity under Section 1026 shall be determined as provided in Section 190.4. If he is found to be sane, there shall thereupon be further proceedings on the question of the penalty to be imposed. Such proceedings shall be conducted in accordance with the provisions of Sections 190.3 and 190.4.

SEC. 8. Section 190.2 of the Penal Code is repealed.

SEC. 9. Section 190.2 is added to the Penal Code, to read:

190.2. The penalty for a defendant found guilty of murder in the first degree shall be death or confinement in the state prison for life without possibility of parole in any case in which one or more of the following special circumstances has been charged and specially found, in a proceeding under Section 190.4, to be true:

(a) The murder was intentional and was carried out pursuant to agreement by the person who committed the murder to accept a valuable consideration for the act of murder from any person other than the victim;

(b) The defendant, with the intent to cause death, physically aided or committed such act or acts causing death, and the murder was willful, deliberate, and premeditated, and was perpetrated by means of a destructive device or explosive;

(c) The defendant was personally present during the commission of the act or acts causing death, and with intent to cause death physically aided or committed such act or acts causing death and any of the following additional circumstances exists:

(1) The victim is a peace officer as defined in Section 830.1, subdivision (a) or (b) of Section 830.2, subdivision (a) or (b) of Section 830.3, or subdivision (b) of Section 830.5, who, while engaged in the performance of his duty was intentionally killed, and the

defendant knew or reasonably should have known that such victim was a peace officer engaged in the performance of his duties.

(2) The murder was willful, deliberate, and premeditated; the victim was a witness to a crime who was intentionally killed for the purpose of preventing his testimony in any criminal proceeding; and the killing was not committed during the commission or attempted commission of the crime to which he was a witness.

(3) The murder was willful, deliberate, and premeditated and was committed during the commission or attempted commission of any of the following crimes:

(i) Robbery in violation of Section 211;

(ii) Kidnapping in violation of Section 207 or 209. Brief movements of a victim which are merely incidental to the commission of another offense and which do not substantially increase the victim's risk of harm over that necessarily inherent in the other offense do not constitute a violation of Section 209 within the meaning of this paragraph.

(iii) Rape by force or violence in violation of subdivision (2) of Section 261; or by threat of great and immediate bodily harm in violation of subdivision (3) of Section 261;

(iv) The performance of a lewd or lascivious act upon the person of a child under the age of 14 years in violation of Section 288;

(v) Burglary in violation of subdivision (1) of Section 460 of an inhabited dwelling house with an intent to commit grand or petit larceny or rape.

(4) The murder was willful, deliberate, and premeditated, and involved the infliction of torture. For purposes of this section, torture requires proof of an intent to inflict extreme and prolonged pain.

(5) The defendant has in this proceeding been convicted of more than one offense of murder of the first or second degree, or has been convicted in a prior proceeding of the offense of murder of the first or second degree. For the purpose of this paragraph an offense committed in another jurisdiction which if committed in California would be punishable as first or second degree murder shall be deemed to be murder in the first or second degree.

(d) For the purposes of subdivision (c), the defendant shall be deemed to have physically aided in the act or acts causing death only if it is proved beyond a reasonable doubt that his conduct constitutes an assault or a battery upon the victim or if by word or conduct he orders, initiates, or coerces the actual killing of the victim.

SEC. 10. Section 190.3 of the Penal Code is repealed.

SEC. 11. Section 190.3 is added to the Penal Code, to read:

190.3. If the defendant has been found guilty of murder in the first degree, and a special circumstance has been charged and found to be true, or if the defendant may be subject to the death penalty after having been found guilty of violating subdivision (a) of Section 1672 of the Military and Veterans Code, or Section 37, 128, 219 or 4500 of this code, the trier of fact shall determine whether the penalty shall be death or life imprisonment without possibility of parole. In the

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proceedings on the question of penalty, evidence may be presented by both the people and the defendant as to any matter relevant to aggravation, mitigation, and sentence, including, but not limited to, the nature and circumstances of the present offense, the presence or absence of other criminal activity by the defendant which involved the use or attempted use of force or violence or which involved the expressed or implied threat to use force or violence, and the defendant's character, background, history, mental condition and physical condition.

However, no evidence shall be admitted regarding other criminal activity by the defendant which did not involve the use or attempted use of force or violence or which did not involve the expressed or implied threat to use force or violence. As used in this section, criminal activity does not require a conviction.

However, in no event shall evidence of prior criminal activity be admitted for an offense for which the defendant was prosecuted and was acquitted. The restriction on the use of this evidence is intended to apply only to proceedings conducted pursuant to this section and is not intended to affect statutory or decisional law allowing such evidence to be used in other proceedings.

Except for evidence in proof of the offense or special circumstances which subject a defendant to the death penalty, no evidence may be presented by the prosecution in aggravation unless notice of the evidence to be introduced has been given to the defendant within a reasonable period of time, as determined by the court, prior to the trial. Evidence may be introduced without such notice in rebuttal to evidence introduced by the defendant in mitigation.

In determining the penalty the trier of fact shall take into account any of the following factors if relevant:

(a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true pursuant to Section 190.1.

(b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the expressed or implied threat to use force or violence.

(c) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(d) Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.

(e) Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct.

(f) Whether or not the defendant acted under extreme duress or under the substantial domination of another person.

(g) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of

mental disease or the affects of intoxication.

(h) The age of the defendant at the time of the crime.

(i) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.

(j) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.

After having heard and received all of the evidence, the trier of fact shall consider, take into account and be guided by the aggravating and mitigating circumstances referred to in this section, and shall determine whether the penalty shall be death or life imprisonment without the possibility of parole.

SEC. 12. Section 190.4 is added to the Penal Code, to read:

190.4. (a) Whenever special circumstances as enumerated in Section 190.2 are alleged and the trier of fact finds the defendant guilty of first degree murder, the trier of fact shall also make a special finding on the truth of each alleged special circumstance. The determination of the truth of any or all of the special circumstances shall be made by the trier of fact on the evidence presented at the trial or at the hearing held pursuant to subdivision (b) of Section 190.1.

In case of a reasonable doubt as to whether a special circumstance is true, the defendant is entitled to a finding that it is not true. The trier of fact shall make a special finding that each special circumstance charged is either true or not true. Wherever a special circumstance requires proof of the commission or attempted commission of a crime, such crime shall be charged and proved pursuant to the general law applying to the trial and conviction of the crime.

If the defendant was convicted by the court sitting without a jury, the trier of fact shall be a jury unless a jury is waived by the defendant and by the people, in which case the trier of fact shall be the court. If the defendant was convicted by a plea of guilty the trier of fact shall be a jury unless a jury is waived by the defendant and by the people.

If the trier of fact finds that any one or more of the special circumstances enumerated in Section 190.2 as charged is true, there shall be a separate penalty hearing, and neither the finding that any of the remaining special circumstances charged is not true, nor if the trier of fact is a jury, the inability of the jury to agree on the issue of the truth or untruth of any of the remaining special circumstances charged, shall prevent the holding of the separate penalty hearing.

In any case in which the defendant has been found guilty by a jury, and the jury has been unable to reach a unanimous verdict that one or more of the special circumstances charged are true, and does not reach a unanimous verdict that all the special circumstances charged are not true, the court shall dismiss the jury and shall order a new jury impaneled to try the issues, but the issue of guilt shall not be tried by such jury, nor shall such jury retry the issue of the truth of

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any of the special circumstances which were found by a unanimous verdict of the previous jury to be untrue. If such new jury is unable to reach the unanimous verdict that one or more of the special circumstances it is trying are true, the court shall dismiss the jury and impose a punishment of confinement in state prison for life.

(b) If defendant was convicted by the court sitting without a jury, the trier of fact at the penalty hearing shall be a jury unless a jury is waived by the defendant and the people, in which case the trier of fact shall be the court. If the defendant was convicted by a plea of guilty, the trier of fact shall be a jury unless a jury is waived by the defendant and the people.

If the trier of fact is a jury and has been unable to reach a unanimous verdict as to what the penalty shall be, the court shall dismiss the jury and impose a punishment of confinement in state prison for life without possibility of parole.

(c) If the trier of fact which convicted the defendant of a crime for which he may be subjected to the death penalty was a jury, the same jury shall consider any plea of not guilty by reason of insanity pursuant to Section 1026, the truth of any special circumstances which may be alleged, and the penalty to be applied, unless for good cause shown the court discharges that jury in which case a new jury shall be drawn. The court shall state facts in support of the finding of good cause upon the record and cause them to be entered into the minutes.

(d) In any case in which the defendant may be subjected to the death penalty, evidence presented at any prior phase of the trial, including any proceeding upon a plea of not guilty by reason of insanity pursuant to Section 1026, shall be considered at any subsequent phase of the trial, if the trier of fact of the prior phase is the same trier of fact at the subsequent phase.

(e) In every case in which the trier of fact has returned a verdict or finding imposing the death penalty, the defendant shall be deemed to have made an application for modification of such verdict or finding pursuant to subdivision (7) of Section 1181. In ruling on the application the judge shall review the evidence, consider, take into account, and be guided by the aggravating and mitigating circumstances referred to in Section 190.3, and shall make an independent determination as to whether the weight of the evidence supports the jury's findings and verdicts. He shall state on the record the reason for his findings.

The judge shall set forth the reasons for his ruling on the application and direct that they be entered on the Clerk's minutes.

The denial of the modification of a death penalty verdict pursuant to subdivision (7) of Section 1181 shall be reviewed on the defendant's automatic appeal pursuant to subdivision (b) of Section 1239. The granting of the application shall be reviewed on the peoples appeal pursuant to paragraph (6) of subdivision (a) of Section 1238.

The proceedings provided for in this subdivision are in addition to

any other proceedings on a defendant's application for a new trial.

SEC. 13. Section 190.5 is added to the Penal Code, to read:

190.5. (a) Notwithstanding any other provision of law, the death penalty shall not be imposed upon any person who is under the age of 18 years at the time of commission of the crime. The burden of proof as to the age of such person shall be upon the defendant.

(b) Except when the trier of fact finds that a murder was committed pursuant to an agreement as defined in subdivision (a) of Section 190.2, or when a person is convicted of a violation of subdivision (a) of Section 1672 of the Military and Veterans Code, or Section 37, 128, 4500, or subdivision (b) of Section 190.2 of this code, the death penalty shall not be imposed upon any person who was a principal in the commission of a capital offense unless he was personally present during the commission of the act or acts causing death, and intentionally physically aided or committed such act or acts causing death.

(c) For the purposes of subdivision (b), the defendant shall be deemed to have physically aided in the act or acts causing death only if it is proved beyond a reasonable doubt that his conduct constitutes an assault or a battery upon the victim or if by word or conduct he orders, initiates, or coerces the actual killing of the victim.

SEC. 14. Section 190.6 is added to the Penal Code, to read:

190.6. The Legislature finds that the imposition of sentence in all capital cases should be expeditiously carried out.

Therefore, in all cases in which a sentence of death has been imposed, the appeal to the State Supreme Court must be decided and an opinion reaching the merits must be filed within 150 days of certification of the entire record by the sentencing court. In any case in which this time requirement is not met, the Chief Justice of the Supreme Court shall state on the record the extraordinary and compelling circumstances causing the delay and the facts supporting these circumstances. A failure to comply with the time requirements of this section shall not be grounds for precluding the ultimate imposition of the death penalty.

SEC. 15. Section 209 of the Penal Code is amended to read:

209. (a) Any person who seizes, confines, inveigles, entices, decoys, abducts, conceals, kidnaps or carries away any individual by any means whatsoever with intent to hold or detain, or who holds or detains, such individual for ransom, reward or to commit extortion or to exact from relatives or friends of such person any money or valuable thing, or any person who aids or abets any such act, is guilty of a felony and upon conviction thereof shall be punished by imprisonment in the state prison for life without possibility of parole in cases in which any person subjected to any such act suffers death or bodily harm, or shall be punished by imprisonment in the state prison for life with the possibility of parole in cases where no such person suffers death or bodily harm.

(b) Any person who kidnaps or carries away any individual to commit robbery shall be punished by imprisonment in the state

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SEC. 16. Section 219 of

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SEC. 16. Section 219 of the Penal Code is amended to read:

219. Every person who unlawfully throws out a switch, removes a rail, or places any obstruction on any railroad with the intention of derailing any passenger, freight or other train, car or engine and thus derails the same, or who unlawfully places any dynamite or other explosive material or any other obstruction upon or near the track of any railroad with the intention of blowing up or derailing any such train, car or engine and thus blows up or derails the same, or who unlawfully sets fire to any railroad bridge or trestle over which any such train, car or engine must pass with the intention of wrecking such train, car or engine, and thus wrecks the same, is guilty of a felony and punishable with death or imprisonment in the state prison for life without possibility of parole in cases where any person suffers death as a proximate result thereof, or imprisonment in the state prison for life with the possibility of parole, in cases where no person suffers death as a proximate result thereof. The penalty shall be determined pursuant to Sections 190.3 and 190.4.

SEC. 17. Section 1018 of the Penal Code is amended to read:

1018. Unless otherwise provided by law every plea must be entered or withdrawn by the defendant himself in open court. No plea of guilty of a felony for which the maximum punishment is death, or life imprisonment without the possibility of parole, shall be received from a defendant who does not appear with counsel, nor shall any such plea be received without the consent of the defendant's counsel. No plea of guilty of a felony for which the maximum punishment is not death or life imprisonment without the possibility of parole shall be accepted from any defendant who does not appear with counsel unless the court shall first fully inform him of his right to counsel and unless the court shall find that the defendant understands his right to counsel and freely waives it and then, only if the defendant has expressly stated in open court, to the court, that he does not wish to be represented by counsel. On application of the defendant at any time before judgment the court may, and in case of a defendant who appeared without counsel at the time of the plea the court must, for a good cause shown, permit the plea of guilty to be withdrawn and a plea of not guilty substituted. Upon indictment or information against a corporation a plea of guilty may be put in by counsel. This section shall be liberally construed to effect these objects and to promote justice.

SEC. 18. Section 1050 of the Penal Code is amended to read:

1050. The welfare of the people of the State of California requires that all proceedings in criminal cases shall be set for trial and heard and determined at the earliest possible time. To this end the Legislature finds that the criminal courts are becoming increasingly congested with resulting adverse consequences to the welfare of the people and the defendant. It is therefore recognized that the people and the defendant have reciprocal rights and interests in a speedy trial or other disposition, and to that end shall be the duty of all courts

and judicial officers and of all counsel, both the prosecution and the defense, to expedite such proceedings to the greatest degree that is consistent with the ends of justice. In accordance with this policy, criminal cases shall be given precedence over, and set for trial and heard without regard to the pendency of, any civil matters or proceedings.

To continue any hearing in a criminal proceeding, including the trial, a written notice must be filed within two court days of the hearing sought to be continued, together with affidavits or declarations detailing specific facts showing that a continuance is necessary, unless the court for good cause entertains an oral motion for continuance. Continuances shall be granted only upon a showing of good cause. Neither a stipulation between counsel nor the convenience of the parties is in and of itself a good cause. Provided, that upon a showing that the attorney of record at the time of the defendant's first appearance in the superior court is a Member of the Legislature of this State and that the Legislature is in session or that a legislative interim committee of which the attorney is a duly appointed member is meeting or is to meet within the next seven days, the defendant shall be entitled to a reasonable continuance not to exceed 30 days. A continuance shall be granted only for that period of time shown to be necessary by the evidence considered at the hearing on the motion. Whenever any continuance is granted, the facts proved which require the continuance shall be entered upon the minutes of the court or, in a justice court, upon the docket. Whenever it shall appear that any court may be required, because of the condition of its calendar, to dismiss an action pursuant to Section 1382 of this code, the court must immediately notify the chairman of the Judicial Council.

SEC. 19. Section 1103 of the Penal Code is amended to read:

1103. Upon a trial for treason, the defendant cannot be convicted unless upon the testimony of two witnesses to the same overt act, or upon confession in open court; nor, except as provided in Sections 190.3 and 190.4, can evidence be admitted of an overt act not expressly charged in the indictment or information; nor can the defendant be convicted unless one or more overt acts be expressly alleged therein.

SEC. 20. Section 1105 of the Penal Code is amended to read:

1105. (a) Upon a trial for murder, the commission of the homicide by the defendant being proved, the burden of proving circumstances of mitigation, or that justify or excuse it, devolves upon him, unless the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that the defendant was justifiable or excusable.

(b) Nothing in this section shall apply to or affect any proceeding under Section 190.3 or 190.4.

SEC. 21. Section 4500 of the Penal Code is amended to read:

4500. Every person undergoing a life sentence in a state prison of this state, who, with malice aforethought, commits an assault upon

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SEC. 22. Section 12310 o

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the person of another with a deadly weapon or instrument, or by any means of force likely to produce great bodily injury is punishable with death or life imprisonment without possibility of parole. The penalty shall be determined pursuant to the provisions of Sections 190.3 and 190.4; however, in cases in which the person subjected to such assault does not die within a year and a day after such assault as a proximate result thereof, the punishment shall be imprisonment in the state prison for life without the possibility of parole for nine years.

For the purpose of computing the days elapsed between the commission of the assault and the death of the person assaulted, the whole of the day on which the assault was committed shall be counted as the first day.

Nothing in this section shall be construed to prohibit the application of this section when the assault was committed outside the walls of any prison if the person committing the assault was undergoing a life sentence in a state prison at the time of the commission of the assault and was not on parole.

SEC. 22. Section 12310 of the Penal Code is amended to read:

12310. (a) Every person who willfully and maliciously explodes or ignites any destructive device or any explosive which causes the death of any person is guilty of a felony, and shall be punished by imprisonment in the state prison for life without the possibility of parole.

(b) Every person who willfully and maliciously explodes or ignites any destructive device or any explosive which causes mayhem or great bodily injury to any person is guilty of a felony, and shall be punished by imprisonment in the state prison for life.

SEC. 23. If any word, phrase, clause, or sentence in any section amended or added by this act, or any section or provision of this act, or application thereof to any person or circumstance, is held invalid, such invalidity shall not affect any other word, phrase, clause, or sentence in any section amended or added by this act, or any other section, provisions or application of this act, which can be given effect without the invalid word, phrase, clause, sentence, section, provision or application and to this end the provisions of this act are declared to be severable.

SEC. 24. If any word, phrase, clause, or sentence in any section amended or added by this act, or any section or provision of this act, or application thereof to any person or circumstance, is held invalid, and as a result thereof, a defendant who has been sentenced to death under the provisions of this act will instead be sentenced to life imprisonment, such life imprisonment shall be without possibility of parole. The Legislature finds and declares that those persons convicted of first degree murder and sentenced to death are deserving and subject to society's ultimate condemnation and should, therefore, not be eligible for parole which is reserved for crimes of lesser magnitude.

If any word, phrase, clause, or sentence in any section amended or

added by this act, or any section or provision of this act, or application thereof to any person or circumstance is held invalid, and as a result thereof, a defendant who has been sentenced to life imprisonment without the possibility of parole under the provisions of this act will instead be sentenced to life imprisonment with the possibility of parole.

SEC. 25. If this bill and Assembly Bill 513 are both chaptered, and both amend Section 1050 of the Penal Code, Section 18 of this act shall become operative only if this bill is chaptered and becomes operative before Assembly Bill 513, and in such event Section 18 of this act shall remain operative only until the operative date of Assembly Bill 513.

SEC. 26. This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting such necessity are:

The California Supreme Court has declared the existing death penalty law unconstitutional. This act remedies the constitutional infirmities found to be in existing law, and must take effect immediately in order to guarantee the public the protection inherent in an operative death penalty law.

CHAPTER 317

An act relating to school district taxes, and declaring the urgency thereof, to take effect immediately.

[Approved by Governor August 15, 1977. Filed with Secretary of State August 15, 1977.]

The people of the State of California do enact as follows:

SECTION 1. The second paragraph of Section 42245 of the Education Code shall not apply to a school district located in a county which uses the alternative method of distributing tax levies and collections and tax sale proceeds specified by Chapter 3 (commencing with Section 4701) of Part 8 of Division 1 of the Revenue and Taxation Code.

SEC. 2. It is the intent of the Legislature that this act should not be construed to permit any school district to receive revenues greater than it would have received if Chapter 125 of the Statutes of 1975 had not been enacted.

SEC. 3. This act shall remain operative until either A.B. 65, S.B. 525, or S.B. 809 is enacted and, upon the effective date of the first of such bills to be enacted, this act is repealed.

SEC. 4. This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into

immediate effect. The fa

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CALIFORNIA LEGISLATURE

AT SACRAMENTO

1977–78 REGULAR SESSION

SENATE FINAL HISTORY

SHOWING ACTION TAKEN IN THIS SESSION ON ALL SENATE BILLS CONSTITUTIONAL AMENDMENTS, CONCURRENT, JOINT RESOLUTIONS AND SENATE RESOLUTIONS

CONVENED DECEMBER 6, 1976
ADJOURNED SINE DIE NOVEMBER 30, 1978

DAYS IN SESSION	260
CALENDAR DAYS	725

LT. GOVERNOR MERVYN M. DYMALLY
President of the Senate

SENATOR JAMES R. MILLS
President pro Tempore

Compiled Under the Direction of
DARRYL R. WHITE
Secretary of the Senate

By
DAVID H. KNEALE
History Clerk

S.B. No. 155—Deukmejian (Principal coauthors: Senator Beverly and Assemblyman McAlister) (Coauthors: Senators Briggs, Campbell, Dennis Carpenter, Cusanovich, Johnson, Nejedly, Nimmo, Presley, Richardson, Robbins, Russell, Song, Stull, and Wilson; Assemblymen Perino, Antonovich, Boatwright, Chappie, Chimbole, Cline, Collier, Cordova, Craven, Cullen, Duffy, Ellis, Hallett, Hayden, Imbrecht, Lancaster, Lanterman, Lewis, McVittie, Nestande, Robinson, Statham, Stirling, Vincent Thomas, William Thomas, Thurman, Norman Waters, and Wray).

An act to amend Section 1672 of the Military and Veterans Code, to amend Sections 37, 128, 209, 219, 1018, 1050, 1103, 1105, 4500, and 12310 of, to repeal Sections 190, 190.1, 190.2, and 190.3 of, and to add Sections 190, 190.1, 190.2, 190.3, 190.4, 190.5, and 190.6 to, the Penal Code, relating to punishment for crimes, and declaring the urgency thereof, to take effect immediately.

1977

Jan. 19—Introduced. Read first time. To print. (Corrected January 20, 1977.)
Jan. 20—From print.
Jan. 25—To Com. on JUD.
Jan. 26—Set for hearing February 22.
Feb. 17—Art. IV, Sec. 8(a), of Constitution suspended. Joint Rule 55 suspended. From committee with author's amendments. Read second time. Amended. Re-referred to committee.
Feb. 22—Testimony taken. Further hearing to be set. Set for hearing March 1.
Mar. 1—Hearing postponed by committee. From committee with author's amendments. Read second time. Amended. Re-referred to committee. Set for hearing March 8.
Mar. 9—From committee: Do pass as amended. (Ayes 7. Noes 2. Page 776.)
Mar. 10—Read second time. Amended. To third reading.
Mar. 17—Made Special Order for Thursday March 24, 1977 at 10 a.m., for amendment and Thursday, March 31, 1977 at 10 a.m.
Mar. 24—Read third time. Amended. To third reading.
Mar. 31—Read third time. Urgency clause adopted. Passed. To Assembly. (Ayes 29. Noes 10. Page 1103.)
Mar. 31—In Assembly. Read first time. To Com. on CRIM.J.
April 11—Hearing postponed by committee.
April 13—From committee with author's amendments. Read second time. Amended. Re-referred to committee.
April 20—Hearing postponed by committee.
April 28—From committee with author's amendments. Read second time. Amended. Re-referred to committee.
May 5—From committee: Do pass as amended. (Ayes 5. Noes 4.)
May 9—Read second time. Amended. To second reading. Made special order for Monday, May 16, at 10 a.m.
May 10—Read second time. To third reading.
May 12—Read third time. Amended. To third reading.
May 16—Read third time. Urgency clause adopted. Passed. To Senate. (Ayes 54 Noes 23. Page 3378.)
May 16—In Senate. To unfinished business.
May 26—Made special order for Friday, May 27, at 9:30 a.m.
May 27—Senate concurs in Assembly amendment. To enrollment. (Ayes 27. Noes 10. Page 2661.)
May 27—Enrolled. To Governor at 10:45 a.m.
May 27—Vetoed by Governor.
May 27—In Senate. To unfinished business.
June 21—Made Special Order for Thursday, June 23, 1977, at 10 a.m.
June 23—Senate overrides Governor's veto. (Ayes 27. Noes 12. Page 3895.)
June 23—In Assembly. To unfinished business.
Aug. 4—Made Special Order for Thursday, August 11, 1977, at 1:30 p.m.
Aug. 11—Assembly overrides Governor's veto. (Ayes 54. Noes 26. Page 6553.)
Aug. 11—To Governor at 5:10 p.m.
Aug. 11—Chaptered by Secretary of State. Chapter 316, Statutes of 1977.

S.B. No. 156—Presley (Coauthor: Assembl

An act to amend Sections 9888.4, 9889.51, 9889.56, 9889.57, 9889.58, 9889.60, and 9889. Code, and to amend Sections 4602.1 and 11 to air pollution.

1977

Jan. 19—Introduced. Read first time. To p
Jan. 20—From print.
Jan. 25—To Com. on TRANS.
Feb. 14—Set for hearing February 22.
Feb. 17—Set, first hearing. Hearing cancel hearing February 22.
Mar. 24—Set for hearing April 12.
Mar. 29—From committee with author's Amended. Re-referred to commi
April 18—From committee: Do pass as ame to Com. on FIN. (Ayes 5. Noes 2
April 19—Read second time. Amended. Re
May 25—Set for hearing June 6.
May 27—Hearing postponed by committe
May 31—Set for hearing June 13.
June 20—From committee: Do pass as ame
June 21—Read second time. Amended. To
June 23—Read third time. Passage refuse Amended pursuant to Joint Rule
June 24—Read third time. Passage refuse Motion to reconsider made by granted.
Aug. 1—Placed on inactive file on reque

1978

Jan. 5—From inactive file to second rea
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Feb. 28—Hearing postponed by committe
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Aug. 15—From committee: Do pass as ame to Com. on W. & M. (Ayes 9. No to consider without reference to Re-referred to Com. on W. & M
Aug. 21—Joint Rule 61 suspended.
Aug. 23—From committee: Do pass as an
Aug. 24—Read second time. Amended. T
Aug. 28—Read third time. Passed. To Sen
Aug. 28—In Senate. To unfinished busine consider without reference to Assembly amendments. (Ayes appoints Conference Committ Sieroty. Joint Rule 29.5 suspend
Aug. 28—Assembly appoints Conference and Calvo. Joint Rule 29.5 susp
Aug. 30—Senate adopts conference repo
Aug. 30—Assembly adopts conference re
Aug. 30—To enrollment.
Sept. 1—Enrolled. To Governor at 12:15
Sept. 25—Approved by Governor.
Sept. 26—Chaptered by Secretary of Stat

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BUSINESS AND PROFESSIONS
ELECTIONS AND REAPPORTIONMENT
TRANSPORTATION

California Legislature

STATE SENATOR
JOHN V. BRIGGS
THIRTY-FIFTH DISTRICT

Dear Concerned Citizen:

If a bloodthirsty criminal like Charles Manson had you or your family brutally murdered, that criminal would not face the death penalty under current California law. In fact, he could be back on the streets in 7 years!

We can change the law and give Californians the protection of a tough, effective death penalty through the initiative process. To succeed, 312,000 concerned citizens must sign petitions like the one which I have enclosed.

If you agree that criminals who slaughter innocent people should not be set free to kill again, do two things right now:

FIRST: sign the special enclosed petition. I have numbered it for you and filled in the name of your county to help save time. If there is another registered voter in your household, ask that person to sign also. Don't forget to sign, again, as Circulator at the bottom of the petition.

SECOND: return the petition immediately in the postage-paid envelope together with a two dollar donation to Citizens for an Effective Death Penalty. Your two dollars will be used to send out ten more petitions. In fact, we will mail to you the names and addresses of the ten families who receive petitions as a result of your generous contribution. If you can afford to send as much as five dollars, we can expand the program to reach 25 families.

Your life is being threatened by the hardened, violent criminals who are stalking the streets of your community. You can act against them today.

Sincerely,

John V. Briggs

Senator John V. Briggs
Co-Chairman, Citizens for an
Effective Death Penalty

P.S. Act now to enact an effective death penalty law. Sign and mail your petition today in the enclosed postage-paid envelope.

Not Printed at Taxpayers Expense
Citizens for an Effective Death Penalty, 505 E. Commonwealth, Fullerton, CA. L. Jones, Tr. Printed by Day Printing Corp., Pomona, CA.