

California's Death Penalty

People v. Masters v. The California Supreme Court's Carefulness Con

Clifford Johnson, December 19, 2016

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I. The California Supreme Court's Carefulness Con



The California Supreme Court, San Francisco

The imposition of the penalty of death demands the greatest reliability which the law can require. U.S. Supreme Court.¹

1. The “Careful Examination” Confidence Trick

On July 16, 2014, in [Jones v. Chappell](#), Judge Cormac Carney (a George W. Bush appointee) startled the legal world with a 29-page [Order Declaring California’s Death Penalty System Unconstitutional](#),² as arbitrarily selective, under the landmark case of [Furman v. Georgia](#),³ which in 1972 conditionally nixed the death penalty nationwide. Carney’s Order states (at 2; emphasis in orig.):

[T]he dysfunctional administration of California’s death penalty system has resulted, and will continue to result, in an inordinate and unpredictable period of delay preceding [] actual execution. Indeed, for most, systemic delay has made their execution so unlikely that the death sentence carefully and deliberately imposed by the jury has been quietly transformed into one no rational jury or legislature could ever impose: life in prison, with the remote possibility of death. As for the random few for whom execution does become a reality, they will have languished for so long on Death Row that their execution will serve no retributive or deterrent purpose and will be arbitrary.

Much of the substance of Carney’s Order appeared a year later, in Justice Breyer’s dissent in [Glossip v. Gross](#),⁴ which reinvigorated anti-death penalty advocates nationwide. Joined by Justice Ginsberg, Breyer stated that:

[R]ather than try to patch up the death penalty’s legal wounds one at a time, I would ask for full briefing on a more basic question: whether the death penalty violates the Constitution [which] forbids the ‘inflict[ion]’ of ‘cruel and unusual punishments.’ Amdt. 8.

¹ [Johnson v. Mississippi](#), 486 U.S. 578, 584 (1988). See also: [People v. Keenan](#) 31 Cal.3d 425, 430 (1982), citing [Gardner v. Florida](#) 430 U.S. 349, 357 (1977); [Ford v. Wainwright](#) 477 U.S. 399, 414 (1986); [Beck v. Alabama](#) 447 U.S. 625 (1980).

² [Jones v. Chappell](#), 31 F.Supp.3d 1050 (2014). Herein, only the United States constitution and its amendments are pertinent. The Fifth Amendment guarantees due process and the right against self-incrimination; the Sixth Amendment guarantees the rights to counsel, to confrontation, and to a speedy jury trial, with every element of a crime proved beyond reasonable doubt; and the Eighth Amendment prohibits cruel and unusual (which includes arbitrary) punishment. These amendments, plus the right to equal protection under the laws, apply to the states through the Fourteenth Amendment. (To try serious crimes, a five year wait is usually “speedy” enough; and the “speedy” clause does not apply to sentencing delays after a guilty verdict. See: [Barker v. Wingo](#), 407 U.S. 514 (1972); [U.S. v. Alexander](#) (9th Cir. 14-50576, Apr. 1, 2016); [Betterman v. Montana](#) (U.S. 2016-05-19).)

³ [Furman v. Georgia](#), 408 U.S. 238 (1972).

⁴ [Glossip v. Gross](#), 14-7955 (U.S. 6-29-2015).

California of course appealed Carney's Order. A week before the oral argument before the Ninth Circuit, in [People v. Seumanu](#) the California Supreme Court (CSC) went out of its way to squarely repudiate Carney's Order by a unanimous, in-depth, and unequivocal (albeit only advisory) opinion, culminating in the core advice that

*allowing each case the necessary time, based on its individual facts and circumstances, to permit this court's careful examination of the claims raised is the opposite of a system of random and arbitrary review.*⁵

I call this the CSC's death penalty carefulness con, for all the reasons that follow. It is far from new, and *Seumanu*'s advisory part was recently reaffirmed in a binding decision.⁶

In [Jones v. Davis](#), the Ninth Circuit pathetically avoided the merits of Carney's Order, dropping the ball as follows:

*Because Petitioner asks us to apply a novel constitutional rule, we may not assess the substantive validity of his claim.*⁷

The dispositive finding of novelty was a cop out. Without contrivance, Carney's Order plainly and directly invoked both *Furman*'s care-in-sentencing mandate and its freakishly-rare-execution bar.⁸ Ironically and idiotically, in ruling that Carney's Order was not within *Furman*'s compass, the Ninth Circuit *did* dismiss it on the merits.⁹

Thereafter, in [Boyer v. Davis](#),¹⁰ Breyer addressed California's extreme delays, quoting his *Glossip* dissent:

*[O]nly a small, apparently random set of death row inmates ha[ve] been executed. A vast and growing majority remain[] incarcerated, like Boyer, on death row under a threat of execution for ever longer periods of time. . . California's costly "administration of the death penalty" likely embodies "three fundamental defects" about which I have previously written: "(1) serious unreliability, (2) arbitrariness in application, and (3) unconscionably long delays that undermine the death penalty's penological purpose."*¹¹

On May 31, 2016, Breyer and Ginsberg reiterated their *Glossip* dissent in [Tucker v. Louisiana](#). However, in a Jul. 8, 2016 [AP interview](#), Ginsberg foresaw no other justices joining the pair in the near term; and President-elect Trump has gone beyond the bounds of decency and law in promoting the death penalty.¹² See also [The Court after Scalia](#):

⁵ [People v. Seumanu](#), 61 Cal.4th 1293, 1368-1375 (2015).

⁶ [People v. Clark](#), S066940 (Cal. 6-27-2016, at 161).

⁷ [Jones v. Davis](#), 806 F.3d 538, 553 (9th Cir. 2015). For superficial reports, see [Federal Appeals Panel Overturns Anti-Death Penalty Ruling in California](#), New York Times, and [Federal appeals court upholds California's death penalty reviews](#), Los Angeles Times, both Nov. 12, 2015. For in-depth analysis, see my article [Judge Carney v. The Death Penalty](#).

⁸ *Furman* can be reduced to four black-letter rules, two of which are violated by California's current death penalty, as explained in [Judge Carney v. The Death Penalty: Ninth Circuit Panel Suppresses Furman's Repudiations Of Dysfunctional Sentencing And Freakishly Rare Execution Regimes](#), at 10-15, 20-27.

⁹ *Furman* announced that it applies to "the imposition and carrying out of the death penalty"; but *Jones* held that *Furman* says nothing binding about the "carrying out" period. "Carrying out" a death sentence cannot begin until appellate review is finished, when the sentence becomes final; but *Jones* held that *Furman*'s "carrying out" period begins at close of trial. *Jones* concluded that, because *Jones* complains of post-trial, appellate dysfunction, *Furman* does not apply; and that, because *Furman* is *Jones*' sole authority, the claim is novel. Contrarily, both pluralities in [Gregg v. Georgia](#), 428 U.S. 153 (1976) provisionally held that Georgia's upgraded death penalty regime satisfied the requirements of *Furman* not only because of new trial court sentencing procedures, but importantly because *Furman*'s standards were *seemingly* secured by an adequate right of appeal. In [Godfrey v. Georgia](#), 446 U.S. 420 (1980), these appellate processes, as applied, were found insufficient under *Furman*.

¹⁰ [Boyer v. Davis](#), 578 U.S. ____ (U.S. 2016-05-02).

¹¹ The constitutionality of the *Federal Death Penalty Act* was considered in a two-week trial in July 2016; the verdict is still pending. See [Federal judge to hear death penalty challenge](#), Jul. 9, 2016, AP. For federal death row details, see [The problem with Hillary Clinton's stance on the death penalty](#), Los Angeles Times, Feb. 5, 2016.

¹² In 1989, Trump took out a full page advertisement in the [New York Times](#), The Daily News, The New York Post, and New York Newsday, calling for the reinstatement of the state death penalty to execute five very young black men who confessed to a murder-rape in Central Park. Even after the real culprit was identified and the five were exonerated, Trump refused to fault the police for having coerced their confessions. Early in the presidential campaign, Trump announced that he would order that all cop killers receive the death penalty executed, as though such an order was beyond presidential power. Trump is of course expected

[Will a liberal appointment to the Court matter in decisions of life and death?](#), a Sep. 1, 2016 SCOTUS blog article which concludes that the high court's

pendulum has swung too far, giving unwarranted deference to state court rulings, providing prosecutors with absolute immunity, and foreclosing relief even in the face of clear systemic, racial bias. [N]early all of the current members of the Court served as [mostly federal] prosecutors in some fashion. Only Justice Sonia Sotomayor ever litigated [as a prosecutor] state criminal cases. There is a noticeable absence of a countervailing force on the Court.

As a matter of law, the CSC's careful-examination-to-assure-accuracy excuse for decades of delay is beside the point. Such delay differences are arbitrary under *Furman* simply because, in executing less than 2% of the condemned,¹³ the selection for execution is driven by factual and procedural incidentals *that have nothing to do with the reprehensibility of the crime or the criminal*.¹⁴

What this article shows is that, as a matter of fact, there is no such “careful examination of the claims raised.”

Federal courts simply accept the CSC's careful examination excuse for delay at face value, as in [Jones](#), where the Ninth Circuit panel, citing *Seumanu*, without discussion parroted that

*such delays are the product of a constitutional safeguard, not a constitutional defect, because they assure careful review of the defendant's conviction and sentence.*¹⁵

Even the most concerned and best informed populace is conned, as evident in a recent announcement by the bishops of California, which implicitly accepts that death penalty review delays reflect a higher degree of care:

*In the long – but absolutely necessary – process of ensuring an innocent person is not put to death, we have seen many accused persons being exonerated as new forms of forensic investigation have enabled us to better scrutinize evidence.*¹⁶

In fact, as detailed in point 3, California's death sentence review processes are not only the longest in the nation, but also by far the least likely to exonerate the innocent—and California's death row has its full share of mistaken convictions. Disregarding lessons learned from DNA exonerations, California persists in permitting convictions based on highly unreliable evidence.

The primary reason for California's death penalty review delays is certainly not time spent taking additional care. It is time spent waiting for counsel and then for argument before and a decision by the CSC. There are now about 350 appeals and 150 habeas corpus petitions pending before the CSC due to the requirement—ironically touted as a superior right—that all death penalty review proceedings be before CSC. The result is not greater care, but unending pressure on the CSC to dispose of death penalty appeals rapidly, when at long last they are heard de novo, without having been trimmed into key legal issues by a regular court of appeal. For political reasons, there is no prospect of having appeal courts do the job they were designed for, even though routing death penalty cases directly to the CSC deprives convicts of the two-step state review that is ordinarily due, and even though the result is both less speed and less accuracy, due to the impossible CSC burden.¹⁷

to reinvigorate the death penalty nationwide, not only through federal court and justice department appointments, but also by releasing confiscated lethal drugs, etc. See [How Donald Trump Could Revitalize The Death Penalty](#), Buzzfeed, Nov. 10, 2016.

¹³ Per state, actual [Executions Per Death Sentence](#) from 1977-2010 are published by the [Death Penalty Information Center](#). California's rate is 1.5%. Highest is Virginia (72.5%), followed by Texas (49.8%), Utah (36.8%), Missouri (34.7%), Delaware (31.1%), Oklahoma (30.5%), and Montana (30%). Of the 32 current death penalty states, 14 have rates below 10%.

¹⁴ There is no first-convicted-first-executed regularity. Whether an inmate exhausts review remedies before natural death (or death by suicide/murder) depends on if/when arguable new evidence comes to light; on how long it takes to appoint counsel; on how old the inmate is when convicted; on case complexity; on CSC justices' seeming whims; etc.

¹⁵ [Jones](#), at 25-26.

¹⁶ [California Bishops Announce Support for Prop 62](#), California Catholic Conference, Jul. 14, 2016.

¹⁷ See the amicus brief of state legislators [Loni Hancock, et al.](#) (at 13 *et seq.*) in *Jones*, re failed bills and hopeless prospects for “reducing the burdens on the California Supreme Court by providing for [appeal] and habeas relief in lower courts.”

2. Pathological Politics Promote An Exceptionally Error-Prone System

In the 1970s, then hip governor Jerry Brown appointed liberal Chief Justice Rose Bird. By the mid-1980s, Bird's consistent refusals to affirm death sentences (for lack of absolute certainty) gave business interests an effective excuse to recall her *and* two liberal fellow justices. [The Pathological Politics of Criminal Law](#)¹⁸ calls this "the famous Rose Bird election in California." It initiated Chamber-of-Commerce-crafted death-penalty-based recalls of liberal justices and judges nationwide.¹⁹ California's common law about-faced, and the political force proved enduring, as elaborated in the San Jose Mercury article reproduced in point 4, and in the academic paper [Expanding the Integrated Model of Judicial Decision Making: The California Justices and Capital Punishment](#), which begins:

*Researchers have long dispelled the notion that judges at the appellate level rely solely on legal factors in deciding cases. Such decisions, constrained as they are by legal issues and facts of specific court cases, are also influenced by ideology, the broader political environment, and by judicial elections.*²⁰

No appellate court is more politicized than a supreme court, and outside of the state and federal judiciaries, no-one disputes that California's death penalty is dysfunctional. The November 2016 ballot included Proposition 62, to eliminate it, and Proposition 66, to "mend not end" the death penalty by accelerating it.²¹ Nationwide, a recent PEW poll reports that only 49% of Americans now support the death penalty—the first time this figure has been below 50% since 1972.²² Yet Proposition 62 failed with only 42% in favor, while Proposition 66 passed by a 51% vote. This article discusses these propositions insofar as they implicate the accuracy of the jury verdict, and the plight of innocent convicts.

Proposition 62, [The Justice That Works Act of 2016](#), proposed to replace the death penalty with life without parole (LWOP), as follows (§ 2 ¶ 11):

By replacing the death penalty with life in prison without the possibility of parole, we would save the state \$1 billion in five years without releasing a single prisoner - \$1 billion that could be invested in crime prevention strategies, services for victims, education, and keeping our communities and families safe.

Proposition 62, now dead, allocated much of its \$150 million per year savings to law enforcement, but none to alleviate a crisis in funding public defenders, let alone to exhaustively defend LWOP inmates having credible claims based on innocence.²³ Nevertheless, opponents of Proposition 62 imaginatively anticipated a redirection of resources along these lines.²⁴ However, going forward, it did guarantee that first appeals would be decided by regular courts of appeal, and that there would be no irreversible executions of the innocent.²⁵

Proposition 66, [The Death Penalty Reform And Savings Act](#), over-promises to save money by double-bunking inmates, by compelling them to work, and by *mandating a five year limit to complete state review*, as follows:

Within five years of the adoption of the initial rules or the entry of judgment, whichever is later, the state courts shall complete the state appeal and the initial state habeas corpus review in capital cases.

¹⁸ [The Pathological Politics of Criminal Law](#), Michigan Law Review, Vol. 100, No. 3 (Dec., 2001), 505-600, 540.

¹⁹ See also the book review: ["The Case of Rose Bird," and the Continuing Power of Money in Judicial Elections](#), DPIC.

²⁰ [Expanding the Integrated Model of Judicial Decision Making: The California Justices and Capital Punishment](#), Chicago Journal of Politics, Vol. 60, No. 4 (Nov., 1998), at 1166-1180.

²¹ For a resume of these competing propositions, see [Ballotpedia](#).

²² [Support for death penalty lowest in more than four decades](#), Pew Research, Sep. 29, 2016.

²³ See [ACLU Sues Over Failing Public Defense System in Fresno: Tens Of Thousands Go Without Legal Representation That The Constitution Guarantees](#), Jul. 15, 2015. In Louisiana, a local public defender funding crisis recently caused the redirection of some death penalty funding to regular public defense. See [Lawmakers look to shift money to public defenders -- from death penalty appeals](#), Times-Picayune, Apr. 7, 2016.

²⁴ See [Will end of death penalty bring campaign against life imprisonment?](#), Sacramento Bee, Sep. 28, 2016.

²⁵ For a resume of Proposition 62, see [Death Penalty Initiative Statute](#), California Legislative Analysts' Office, May 17, 2016.

The five year mandate allows an exception for innocence-based claims, which substantially waters it down. Even so, it is a hopelessly impractical and seemingly unconstitutional sham. The “initial rules” take 18 months to draft, and must somehow provide for working through the extant CSC backlog of 350 appeals—an unaddressed and unfunded process that would cost tens of millions of dollars annually for many years. In 2015, California led the nation with 14 (of 49) new death sentences, and the CSC did not significantly reduce its death row backlogs.²⁶ Proposition 66 offers no funding for expeditious review, not even for the prompt preparation of the trial court record (which in *Masters* took a decade), let alone for qualified counsel—all and any publicly appointed criminal defense attorneys will be required to accept death penalty cases.²⁷

But the greatest problem with Proposition 66 ironically lies in its one clear virtue, namely, the requirement that state habeas petitions be first heard by the original trial court, rather than by the CSC, as is the current practice.²⁸ Being familiar with the case, trial courts are best placed to fairly and expeditiously decide such petitions, and regular rights of review assure greatest accuracy. This was recommended in a 184-page article by deceased Ninth Circuit Judge Arthur Alarcón, on which Proposition 66 was modeled.²⁹ It would fix the present traffic of CSC summary denials, whose inscrutable nature greatly burdens the federal courts that must figure out a proper basis for each apparently thoughtless denial. On the other hand, the change would add not only a great burden on the trial courts, but another layer of review, by a court of appeal before the CSC. More importantly, as passed, the change is *statutory*, and so is trumped by California’s *constitutional* grant of original habeas jurisdiction to higher courts.³⁰

All of the above and a few other substantial objections to Proposition 66 are already the subject a lawsuit seeking to stop the implementation of Proposition 66. Although deeply interested as long and high standing anti-death penalty advocates, the plaintiffs allege only taxpayer standing and seek an immediate injunction to preclude unconstitutional expenditures. See [Legal petition against California's Proposition 66](#).

In 1976, four years after *Furman* had nixed Georgia’s death penalty, *Gregg v. Georgia* reinstated it. In particular, a direct automatic appeal to the state supreme court “seem[ed]” to provide for fit and proper review.³¹ However, after another four years, *Godfrey v. Georgia* held that this appeal process was deficient, as applied;³² and in practice, direct appeals to a state supreme court have generally meant *less* than usual care, even in states where it has also meant less speed. In 1994, Arizona’s supreme court bottleneck for deciding direct death penalty appeals was held unconstitutional in a dissent by Ninth Circuit Judge Noonan—a precursor to Carney’s Order holding California’s bottleneck unconstitutional, in 2014.³³ Most recently, Ohio introduced direct automatic death penalty appeals to its supreme court. A claim that this provides unequal protection on appeal—i.e. *less* protection than usual, due to skipping over the court designed for direct appeal—has been rejected by a trial court.³⁴

Extra careful accuracy is warranted in death penalty cases not only because executions are irreversible, but also because capital convictions are not least but *most* prone to error.

²⁶ See: [California death penalty is broken, sides agree, but how to fix it?](#), Orange County Register, Nov. 13, 2015; [Proposition 66, The "Death Penalty Reform and Savings Act of 2016," is Fool's Gold for Californians](#), JURIST, Jul. 6, 2016.

²⁷ See [Death Penalty Lawyers Don't Grow On Trees](#), The Hill, Sep. 15, 2016.

²⁸ Habeas corpus petitions can be filed in *any* state court, but counsel is funded only for filings in the CSC.

²⁹ [Executing The Will Of The Voters?: A Roadmap To Mend Or End The California Legislature's Multi-Billion-Dollar Death Penalty Debacle](#), Loyola L. R., Vol. 44 (2011). *Incomprehensibly*, the article nakedly states (at S190) that depriving state appellate courts and the CSC of original jurisdiction does not violate [Cal. Const. Art 6 § 10](#). See the next footnote.

³⁰ “The Supreme Court, courts of appeal, superior courts, and their judges have original jurisdiction in habeas corpus proceedings.” [Cal. Const. Art 6 § 10](#). Judge In addition, mandating death penalty finality within five years arguably usurps inherently judicial discretionary powers, which ordinarily enable courts to extend time as required in exceptional cases—to accommodate not only case complexity, but also unfortunate incidentals, such as the death of counsel. The death penalty review process would be uniquely time constrained, and the CSC would be far less able to pretend that it reviews death penalty sentences the due diligence required under *Furman*—on the other hand, the high court itself declines to stay executions to allow the time it takes for that court to decide last-shot petitions for a writ of certiorari. [Muhammad v. Kelly](#), 130 S.Ct. 541 (2009). Stevens dissented, joined by Ginsberg and Sotomayer.

³¹ [Gregg v. Georgia](#), 428 U.S. 153, 198, 223-224 (1976).

³² [Godfrey v. Georgia](#), 446 U.S. 420 (1980).

³³ [Jeffers v. Lewis](#), 38 F.3d 411, 425-428 (9th Cir. *en banc*, 1994).

³⁴ See [Judge rules against defense in Seman death penalty motion](#), Vindy.com, Apr. 16, 2016.

*The basic cause for the comparatively large number of errors in capital cases is a natural and laudable human impulse: We want murderers to be caught and punished. In some cases that impulse drives police and prosecutors to lie and cheat, but more often it simply motivates them to work harder to catch killers and to convict them. It works: More cases are cleared, more murderers are convicted. But harder cases are more likely to produce errors—still exceptions, no doubt, but not as rare as for other crimes, where the cases that are prosecuted are mostly skimmed off the top.*³⁵

In reviewing capital cases, care is required regarding both the verdict of guilt and the sentence of death. This article focuses on care with respect to the verdict of guilt, to which the strictest evidential standards should apply, but in practice don't. In particular, it addresses the plight of the inevitable few innocents, and their chances of exoneration.

In California, an innocent death row inmate is less likely to be executed than in other states, because the delays are such that dying of natural causes on death row is in any case seven times more likely than being executed. Since 1978, only 13 of the state's 951 condemned inmates have been executed, whereas 71 have died of natural causes, 25 have committed suicide, and 8 (described as "other") have presumably been murdered.

To the innocent, this tortuously uncertain de facto commutation to life without parole is small comfort. What matters more is the probability and promptness of exoneration. California's execution delays are notorious. *What is generally not recognized is California's equally extreme failure to exonerate its inevitable innocents, of which it has a full share.*

To demonstrate California's systemic lack of care with respect to claims based on innocence, part II of this article at length presents [People v. Masters](#).³⁶ *Masters* is a politically extreme case because it concerns the murder of a prison guard. Despite a lack of statistical support, prison guards naturally perceive the death penalty as a sole deterrent to murder by lifers.³⁷ On one academic murder "depravity scale" of 1-3, the murder of a prison guard scored the 3 point

³⁵ [The Risks of Death: Why Erroneous Convictions are Common in Capital Cases](#), 44 Buff. L. Rev. 469, 499-500 (1996). See also [A Broken System, Part II--Why There is So Much Error in Capital Cases, and What Can Be Done About It](#) (2002), J. Liebman et al.

³⁶ [People v. Masters](#) (Cal. 02-22-2016, No. S016883). Similar carelessness is evident re *Masters*' death sentencing, but this is not discussed in detail, nor is it of much concern to *Masters*, who vigorously *opposes* elimination of the death penalty (per Proposition 62) because he would lose guaranteed representation through the exhaustive federal habeas petitions on which his fate now rests. Nor is *Masters* alone. See [California Death Row Inmates Weigh In On Vote, Most Conflicted Over To Keep Or Abolish Death Penalty](#), The Inquisitr, Sep. 14, 2016. See also: [A Mockery Of Justice For The Poor](#), New York Times, Apr. 29, 2016; and [Rate of False Conviction](#), *infra*:

Death sentences represent less than one-tenth of 1% of prison sentences in the United States, but they accounted for about 12% of known exonerations of innocent defendants from 1989 through early 2012, a disproportion of more than 130 to 1. A major reason for this extraordinary exoneration rate is that far more attention and resources are devoted to death penalty cases than to other criminal prosecutions, before and after conviction. The vast majority of criminal convictions are not candidates for exoneration because no one makes any effort to reconsider the guilt of the defendants. Approximately 95% of felony convictions in the United States are based on negotiated pleas of guilty (plea bargains) that are entered in routine proceedings at which no evidence is presented. [Draconian mandatory minimum sentence threats have become routinely abused to coerce innocents to cop pleas.] Few are ever subject to any review whatsoever. Most convicted defendants are never represented by an attorney after conviction, and the appeals that do take place are usually perfunctory and unrelated to guilt or innocence. . . . With few exceptions, capital defendants have lawyers as long as they remain on death row. Everyone, from the first officer on the scene of a potentially capital crime to the Chief Justice of the United States, takes capital cases more seriously than other criminal prosecutions—and knows that everybody else will do so as well. And everyone from defense lawyers to innocence projects to governors and state and federal judges is likely to be particularly careful to avoid the execution of innocent defendants. . . . Capital defendants who are removed from death row but not exonerated—typically because their sentences are reduced to life imprisonment—no longer receive the extraordinary level of attention that is devoted to death row inmates. If they are in fact innocent, they are much less likely to be exonerated than if they had remained on death row.

³⁷ See [Why Are Prison Guards Backing The Death Penalty?](#), Capital and Main, Oct. 26, 2016.

maximum, whereas the murder of a police officer scored only 2.³⁸ Moreover, members of the Black Guerilla Family (BGF) prison gang, which to this day threatens prison guards, was responsible for the murder.³⁹

Masters' conviction rests on two prosecutor-picked BGF snitches.⁴⁰ In *Masters*, a wait of 26 years for an automatic appeal to the CSC recently resulted in what reads as a rote affirmation of verdict and sentence. In unanimous laundry list mode, without addressing crucial factual and legal contentions, [the opinion](#) reproduces the state's tailored version of the facts, perfunctorily discounts each of several claims of fundamental trial court error, and stupidly adds that, even had the trial court made every constitutional mistake claimed, the cumulative errors would beyond reasonable doubt have been harmless—i.e. beyond reasonable doubt, no reasonable doubt could have been raised in a reasonable juror's mind.⁴¹

Small wonder that, for all California death row inmates convicted from 1978-1997 whose federal habeas claims have been finally decided, about 60% of the death sentences have been vacated by federal courts for constitutional error,⁴² and this despite the extraordinarily high deference to state decisions required by the [Anti-terrorism And Effective Death Penalty Act of 1996](#), as extremely interpreted by the U.S. Supreme Court.⁴³ Where it might count, DNA testing is now available, but otherwise California has made no legislative progress towards mitigating several criminal law evidentiary shortfalls that DNA exonerations have exposed,⁴⁴ or an epidemic of prosecutorial misconduct,⁴⁵ especially re the employment of jailhouse informants⁴⁶ to manufacture evidence.⁴⁷

³⁸ McCord, [Lightning Still Strikes](#), 71 Brooklyn L. Rev. 797, 833-836 (2005). A like “egregiousness measure” was constructed by Donohue in [An Empirical Evaluation of the Connecticut Death Penalty System Since 1973](#), Journal of Empirical Legal Studies (Dec. 2014). Donohue assigned a team of 18 coders to each rate 205 murders on four 1-3 scales: victim suffering; victim characteristics (e.g. age, frailty, *whether law enforcement*); defendant's intent/culpability; and the number of victims. The scores were added to obtain an egregiousness sum in the range 4-12, which was then averaged over the 18 coders. Neither study found any significant correlation between whether a murder resulted in a death sentence and its egregiousness. Both studies were cited in Breyer's dissent in *Glossip*.

³⁹ See [‘Black August’ Bulletin Warns Of Potential Violence Against Police, Prison Guards](#), CBS, Aug. 4, 2016.

⁴⁰ For corroboration, the only other direct evidence is a coded writing by Masters *that the prosecution's star snitch necessarily translated and swore to have been an original and voluntary writing, rather than the product of a copying chore of a sort that, as a BGF boss, he routinely assigned*.

⁴¹ Exonerating Masters would embarrass the state; and *if* accompanied by a finding of non-culpability, it would trigger a statutory award of about \$625,000 for false imprisonment. After deducting time served for the armed robberies that sent him to San Quentin, Masters has served more than 12 years in jail. Compensation is set at a tax-free \$140 per day. [Cal. Penal Code § 4900](#). But a non-culpability finding is doubtful, not because of the statutory standard—proof of actual innocence by a mere preponderance of evidence—but due to the *de novo* exercise of discretion by an unelected victims compensation board. See [A tale of two exonerates: Their struggles to be paid for years spent in prison](#), Sacramento Bee, Jul. 16, 2016.

⁴² Carney's Order (at 5).

⁴³ AEDPA was not retroactive, and the 60% statistic primarily reflects the disposition of pre-AEDPA filings. However, all federal habeas petitions *heard* after 1996 have been decided “in a manner consistent with [AEDPA's] objects.” [Calderon v. Thompson](#), 523 U.S. 538, 554 (1998). For AEDPA details, see [Judge Carney v. The Death Penalty](#), at 8-9. See also [The Demise Of Habeas Corpus And The Rise Of Qualified Immunity](#), 113 Mich. L. Rev. 1219 (2015), by Ninth Circuit Judge Reinhardt, which begins:

The collapse of habeas corpus as a remedy for even the most glaring of constitutional violations ranks among the greater wrongs of our legal era. Once hailed as the Great Writ, and still feted with all the standard rhetorical flourishes, habeas corpus has been transformed over the past two decades from a vital guarantor of liberty into an instrument for ratifying the power of state courts to disregard the protections of the Constitution.

In [Killian v. Poole](#), 282 F.3d 1204 (9th Cir., 2002), a first degree murder conviction with a sentence of 32 years to life was reversed, based on recanted testimony—by fluke, an outraged private party funded the federal habeas litigation. In 2004, the California State Bar issued an admonishment for prosecutorial misconduct in *Killian*. See: [Gloria Killian's page](#), in the National Registry of Exonerations; and the misnamed (there was no death penalty) video [Death Penalty Stories: Gloria Killian On Death Row](#). AEDPA deference did not apply because the CSC had refused an evidentiary hearing in the state habeas proceeding. Thus the evidentiary question raised was undecided. Thereby the CSC was informed that it must hold an evidentiary hearing in order to ordinarily avoid federal review—as it already has in Masters' habeas proceeding, which is also based on recanted testimony. However, the CSC continues to deny the great majority of habeas petitions summarily.

⁴⁴ See [Schwartzenegger Vetoes Justice](#), Washington Post, Nov. 5, 2007:

In 2004, the California state senate created the California Commission on the Fair Administration of Justice, a panel of current and former judges, prosecutors, defense attorneys, and police officials. The legislators were concerned about the recent spate of DNA exonerations and death row releases . . . A 2004 report . . .

Since 1976, prosecutors have enjoyed absolutely immunity from civil liability for all and any such misconduct, professional disciplinary organizations have not done their job, and California courts have not attempted to tighten judicial doctrine.⁴⁸ See [After 40 Years, Is It Time To Reconsider Absolute Immunity For Prosecutors?](#), American Constitution Society Blog, Jul. 19, 2016, which traces the national “epidemic of prosecutorial misconduct” to *Imbler v. Pachtman*,⁴⁹ which gave prosecutors absolute immunity, and observes:

In 1999, the Chicago Tribune examined 381 cases in which courts overturned homicide convictions due to prosecutors concealing evidence or presenting false testimony and found that none of the prosecutors involved faced criminal sanctions or disbarment. In 2010, the Northern California Innocence Project’s review found that the California State Bar “publicly disciplined only one percent of the prosecutors in the 600 cases in which the courts found prosecutorial misconduct.”

Other studies have found misconduct far more likely to be followed by promotion than by any punishment.

The illogic and language of the careful accuracy excuse for death penalty delays predates DNA exonerations, which did not get going until the mid-1990s. The excuse repackages the rationale for dismissing so-called *Lackey* claims, which allege that decades of delay on death row amount to unconstitutional mental torture. The CSC repudiates *Lackey* claims with the careful examination excuse as follows:

identified 200 cases over 15 years in which someone in California had been unjustly convicted, then freed—more than the number of exonerations in the next two states combined. . . In 2006 . . . three modest, sensible reforms made their way to the state legislature, and were passed by both the state’s house and senate earlier this year. The reforms were backed by politicians from both parties. They were backed by both prosecutors and police officials who served on the commission. The reforms would have added some formidable defenses against wrongful convictions in California. Naturally, they were opposed by the state’s police organizations. And so last month, Gov. Arnold Schwarzenegger vetoed all three.

⁴⁵ See [Jerry Brown vetoes bill aimed at holding prosecutors more accountable](#), Washington Post, Oct. 1, 2014: *Seven years ago*, then-California Gov. Arnold Schwarzenegger vetoed three bills that would have imposed some simple, inexpensive criminal justice reforms in California. . . They would have required police interrogations to be recorded. Prosecutors would have been obligated to find corroborating evidence before calling as witnesses jailhouse informants who had been given time off their sentences in exchange for testimony. The bills also would have created a commission to study the reliability of eyewitness testimony. . . *A 2010 study* by the Northern California Innocence Project found 707 instances of prosecutorial misconduct in California courts between 1997 and 2009. And those were merely cases where misconduct had been found by appellate courts. The study also found that over that same period, just 10 state prosecutors were disciplined by the California State Bar. *A follow-up study* the following year documented 102 cases of misconduct found by California judges in 2010 alone. *In a ruling last December*, Judge Alex Kozinski of the U.S. Court of Appeals for the Ninth Circuit — which includes California — decried an “epidemic” of Brady violations in America. (“Brady” is shorthand for the Supreme Court decision requiring prosecutors to turn over exculpatory evidence.) . . California has since elected an allegedly more progressive governor in Jerry Brown. This year, the state legislature again passed a bill aimed at reining in wrongful convictions, this time by allowing judges to inform juries when prosecutors have been caught intentionally withholding exculpatory evidence, which is already a breach of ethics and arguably illegal. It was modest reform that even *some state prosecutors supported*. Yet Gov. Brown vetoed it.

Brown’s rationale was transparent nonsense. See n. 91.

⁴⁶ The term “snitch” as used herein refers to informants generally, whether or not what they say is true or false, and whether or not they are accomplices. In prison jargon, a “snitch” is an informant who more or less truthfully rats out his mates.

⁴⁷ Systemic prosecutorial abuse of jailhouse snitches to manufacture false evidence came to light in Los Angeles in the late 1980s—the same time that snitch evidence in *Masters* was obtained, albeit from San Quentin. In 2006, the California Commission On The Fair Administration Of Justice published a [Report And Recommendations Regarding Informant Testimony](#). None of the recommendations (such as requiring that snitching be recorded) have been implemented, other than the addition of Cal. Penal Code § 1111.5—which would have reproduced the commission’s 2006 recommendation to guard against inherently most unreliable jailhouse snitch testimony, were it not for the late addition of an all but eviscerating two-snitch exception to the corroboration standard proposed (and endorsed verbatim in a 2007 California Bar Association [Resolution](#)), as explained below.

⁴⁸ Judicial nominations are also inadequately vetted. See [Calif. Supreme Court Sets Funding for Bar Discipline System](#), The Recorder, Nov. 18, 2016.

⁴⁹ *Imbler v. Pachtman*, 424 US 409 (1976).

[T]he automatic appeal process following judgments of death is a constitutional safeguard, not a constitutional defect...because it assures careful review of the defendant's conviction and sentence...[A]n argument that one under judgment of death suffers cruel and unusual punishment by the inherent delays in resolving his appeal is untenable. If the appeal results in reversal of the death judgment, he has suffered no conceivable prejudice, while if the judgment is affirmed, the delay has prolonged his life.⁵⁰

It is true that the passage of time is often necessary for evidence of innocence to come to light. In *Masters*, it was not until a decade after conviction that the state's two witnesses recanted and other witnesses, including his two co-defendants, were prepared to testify. In seven of the last ten U.S. exonerations, proof of innocence did not emerge for over 24 year. For all 156 death row exonerations since 1973, an average of 11.4 years was spent on death row.⁵¹

That said, virtually no exonerations have resulted from California's extreme delays. Moreover, the casual claim that the innocent suffer "no conceivable prejudice" from the decades of delay brazenly disregards not only their being doomed to grow old on death row, but also the far more common and fatal *impairment* of their capacity to prove innocence and/or disprove capital aggravations. For, under *Herrera v. Collins*, the decay of evidence presumptively outweighs new exonerating evidence—except maybe where DNA is conclusive, or a different culprit is indisputably identified. For *Herrera* affirmed that, even where *strongly* exonerating new evidence is discovered, the original jury had a better chance of getting it right than a second jury would, so late in the game.⁵² In reviewing guilty verdicts, proof beyond reasonable doubt burdens not the prosecution but the defendant, regardless of blamelessness in not discovering exonerating evidence until after trial.⁵³ It's a too-late tough-luck death doctrine.

3. California's Dishonorable 3-in-951 Exoneration Rate

In all criminal cases, the Sixth Amendment exclusively delegates to local juries of peers the evidence-weighting, fact-deciding role of finding guilt beyond reasonable doubt. It is not the job of reviewing courts to exonerate or acquit, provided only that *some and any* reasonably believable evidence of guilt was presented at trial. This law is foundational and long settled, as set forth in *People v. Tapia*:⁵⁴

[Over] questions of fact, the trial judge had full jurisdiction, while this court has appellant jurisdiction in criminal cases "on questions of law alone." [Citation.] "He (the trial judge), too, had to be satisfied that the evidence, as a whole, was sufficient to sustain the verdict; if he was not, it was not only the proper exercise of a legal discretion, but his duty, to grant a new trial." [Citations.] The sufficiency of the evidence is a "question of law" only where the question is whether there is any evidence to support the verdict, or whether the evidence is so unsubstantiated as to practically amount to no evidence.

How, then, does a factually innocent convict obtain relief on review? Only by an order from the reviewing court, vacating (aka setting aside or reversing) the verdict based on *either* (1) a procedural/legal due process sort of error at

⁵⁰ *People v. Anderson*, 25 Cal.4th 543, 606 (2001), referring back to *People v. Hill*, 3 Cal.4th 959, 1014-1016 (1992) and *Richmond v. Lewis*, 921 F.2d 933 (9th Cir.1990).

⁵¹ See the Death Penalty Information Center's [Innocence List](#).

⁵² *Herrera v. Collins*, 506 U.S. 390, 403-404, 417, 426 (1993) notoriously held that even in a death penalty case even "strong" new evidence of actual innocence is insufficient for federal habeas relief—*only* extraordinarily strong or "truly persuasive" new evidence *only might* suffice. (As a dictum, five justices strongly suggested that it would suffice.) *Herrera's* rationale affirmed that state clemency procedures provided an effective ultimate fallback remedy and that, in a new trial,

there is no guarantee that the guilt or innocence determination would be any more exact. To the contrary, the passage of time only diminishes the reliability of criminal adjudications.

To this day, whether extraordinarily strong or truly persuasive new evidence of actual innocence suffices for federal courts to vacate a state death sentence remains a shockingly open question. However, the Supreme Court suggested so in *In re Davis*, 557 U.S. 952 (2009), after which the district court so held, in *In re Davis* (S.D. Ga., 2010-08-24).

⁵³ The decay-of-evidence doctrine against retrial, combined with AEDPA's rule (28 U.S.C. § 2254(e)(1)) that state court findings of fact must be rebutted by clear and convincing evidence, effectively compound to require disproof beyond a reasonable doubt.

⁵⁴ *People v. Tapia*, 131 Cal. 647 (1901).

trial, which permits a retrial if the prosecutor so elects, or (2) evidence so unsubstantiated as to practically amount to no evidence.⁵⁵ In the rare latter case, in which a court of appeal finds the evidence insufficient to sustain the verdict, then the reversal is equivalent to an acquittal, and double jeopardy prevents retrial.⁵⁶

The Death Penalty Information Center (DPIC) publishes an [Innocence List](#) containing all death row exonerations since 1973—i.e. post-*Furman*. An “exoneration” is recognized by the DPIC only if and when (1) *all* charges related to the crime are dismissed by the prosecution, (2) a retrial or appeal results in acquittal on *all* charges related to the crime, or (3) a pardon issues *because of exculpatory evidence*.⁵⁷

As of October, 2015, there were 951 California post-*Furman* death sentences, with *no* pardons, *one* full acquittal ([Shujaa Graham](#)), and *two* full dismissals ([Troy Jones](#) and [Oscar Morris](#)). Note that the DPIC definition of exoneration is extremely strict, especially in its requirement that “*all* charges related to the crime that placed them on death row” be roundly purged. Being cleared of the charge of murder and released is not enough. Were it enough, the number of California exonerations would be doubled, from 3 to 6⁵⁸—as would the counts for other states.

Since the 1970s, outside of California 150 of 6,916 death sentences (i.e. 2.17%) have terminated in exonerations. However, the exoneration rate for California is only 0.32% (3 of 951), one *seventh* of the out-of-state rate.⁵⁹ Here are the exoneration rates for all states that handed out more than 200 death sentences from 1977:⁶⁰

⁵⁵ See [Kotteakos v. United States](#), 328 U.S. 750, 763-65 (1946):

It is not the appellate court's function to determine guilt or innocence. . . Those judgments are exclusively for the jury, given always the necessary minimum evidence legally sufficient to sustain the conviction unaffected by [an] error. But this does not mean that the appellate court can escape altogether taking account of the outcome. . . [I]f one cannot say, with fair assurance . . . that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.

As shown in part II, in *Masters*, the erroneous exclusion of Richardson’s confession per se gives rise to such a grave doubt.

⁵⁶ See [When Double Jeopardy Protection Ends](#), Findlaw.

⁵⁷ “Exonerate” is not a definite legal term. It colloquially refers to criminals released with their verdict of guilt set aside (or perhaps pardoned) *because of exculpatory evidence*. At law, this is equivalent to an affirmative “not legally culpable” ruling, rather than a “not guilty” ruling. However, “not guilty” is often implicit in the evidence, especially where DNA is decisive or where the real culprit is found. Exonerated parties inevitably include a few actually guilty parties. See, e.g., [Rate of False Conviction](#), at 7234, which introduces several crude but reasonable numerical estimates:

Estimating false convictions from exonerations. *Because there is no general method to accurately determine innocence in a criminal case, we use a proxy, exoneration: an official determination that a convicted defendant is no longer legally culpable for the crime for which he was condemned. There will be misclassifications. Some exonerated defendants are guilty of the crimes for which they were sentenced to death. We expect that such errors are rare, given the high barriers the American legal system imposes on convicted defendants in persuading authorities to reconsider their guilt [citations]. . . If 10% of exonerated defendants were in fact guilty, the mean cumulative rate of innocence for death-sentenced defendants would be 3.7% rather than 4.1% (95% confidence interval of 3.3–4.0%); if 20% were guilty, the mean rate would be 3.3% (95% confidence interval of 2.8–3.7%). . . On the other side, some innocent defendants who remained on death row for more than 21.4 yr. [the period studied,] but were not exonerated are misclassified as guilty. Some may still be exonerated; some may be executed; and most will likely die in prison, on death row or off, of natural causes or suicide. In the absence of better data we assume that the probability of a legal campaign to exonerate any prisoner under threat of death who has a plausible innocence claim is 1, and we assume that the probability of success for an innocent prisoner who remains under such threat for at least 21.4 yr. is also 1. These are necessarily conservative assumptions. To the extent that these probabilities are in fact less than 1, our estimate will understate the actual rate of false convictions.*

⁵⁸ The three additionally qualifying cases are recounted in [Death Penalty Ban Seeks To Answer Doubts](#), SF Gate, Sep. 16, 2012.

⁵⁹ California is also an outlier in other sorts of post-trial abandon. For example, the drug-related death rate in California prisons is seven times the rate in the rest of the nation. See [San Quentin death row faces flow of illegal drugs despite security](#), Los Angeles Times, Aug. 25, 2016:

A San Quentin administrator in 2013 told a federal judge that a surge in psychiatric hospitalizations involving psychotic, homicidal and suicidal condemned prisoners was not proof of untreated mental illness but “a bad batch of meth.” . . Nevertheless, state corrections records show that in 2013 not a single visitor, volunteer or worker was caught trying to smuggle drugs into San Quentin [and a] spokesman for the Marin

DEATH ROW EXONERATION RATES BY STATE

STATES WITH 200+ DEATH SENTENCES FROM 1977	NUMBER OF DEATH SENTENCES (appeal)		% EXONERATED
	decided	EXONERATED	
ILLINOIS	304	20	6.58%
OKLAHOMA	314	10	3.18%
ARIZONA	312	9	2.88%
FLORIDA	959	26	2.71%
OHIO	335	9	2.69%
GEORGIA	234	6	2.56%
NORTH CAROLINA	450	9	2.00%
PENNSYLVANIA	380	6	1.58%
TEXAS	971	13	1.34%
ALABAMA	466	6	1.29%
CALIFORNIA	951 (489)	3	0.32% (0.61%)
ALL DEATH PENALTY STATES EXCEPT CALIFORNIA	6916	150	2.17%

Sources:

<http://www.deathpenaltyinfo.org/innocence-list-those-freed-death-row>
<http://www.deathpenaltyinfo.org/death-sentences-united-states-1977-present>

For Inclusion on DPIC's Innocence List:

Defendants must have been convicted, sentenced to death and subsequently either-

- Been **acquitted** of all charges related to the crime that placed them on death row, or
- Had all charges related to the crime that placed them on death row **dismissed** by the prosecution, or
- Been granted a complete **pardon** based on evidence of innocence.

Note: Exonerations include some for a few pre-1977 sentences (but no future expectations)

Extreme delay in California's death penalty review processes accounts for less than half of this exoneration rate gap. On its face, a mere 3 exonerations in 951 death sentences (with 489 already affirmed on appeal)—would seem to show a virtually meaningless right of review. Because (as follows) the state's capital trials are apparently less accurate than the norm, adopting conservative assumptions of equal accuracy inside and of prompt appeals outside California, this means that *an innocent on California's death row not only has twice the nationwide chance of dying before his innocence claims are resolved, but, even if he survives to have his first appeal decided, he has only about a quarter of the chance of exoneration that such an innocent has outside of California.*⁶¹

As already noted, Even after California's death penalty review processes have been exhausted, fully 60% of federal habeas corpus petitions have found prejudicial constitutional error due to ineffective counsel, prosecutorial misconduct, judicial mistake, etc. Nationwide, the federal reversal rate, although large, is significantly *lower*, at

County district attorney also said he could not recall any drug smuggling cases against San Quentin staff. . . Because of the high security on death row, some who have worked at San Quentin suspect that the drug trade is abetted by prison staff. During his tenure as a death row psychologist, Patrick O'Reilly said in an interview that he discovered a psychiatric technician bartering alcohol and amphetamines for inmates' prison-prescribed opiates. Similarly, the inspector general's office reported that a death row officer in 2011 was accused of buying morphine from condemned inmates. The report states she paid with ramen noodles and candy. . . The state prison guard union has long raised objections to vigorous screening of guards as they arrive and leave work, noting that the state would have to pay large amounts for the extra time that would add to each shift.

Assassinated prison guard Burchfield particularly campaigned against staff drug smuggling.

⁶⁰ Note that the next lowest exoneration rate is 1.29%, for Alabama—four times California's rate. States with under 200 death sentences are less significant, but only two are arguably comparable: Nevada (1 of 151=0.66%) and Arkansas (0 of 122=0%). Perhaps surprisingly, Louisiana has one of the highest exoneration rates (10 of 166 = 6.02%), twenty times California's rate.

⁶¹ There are (at time of writing) 462 "No Action" rows in the state's [list of condemned inmates](#). Counting only those sentenced to death whose appeals have been decided, California's exoneration rate is 3 in 489 (951-462) = 0.61%. The exoneration rates given for other states also include significant counts of as-yet-undecided appeals. I very conservatively estimate that excluding these cases would raise the extrinsic exoneration rate from 2.17% only to 2.44%, to obtain my *quarter* estimate (0.61% is a quarter of 2.44%). I would more realistically guess that the true factor would be a fifth or sixth. To calculate the exact figure requires deducting the as-yet-undecided appeal counts (which I do not know) from each state's death sentence totals.

40%.⁶² Thus, California's uniquely low exoneration rate correlates with death penalty review processes already adjudged to be exceptionally *inaccurate*.

California's dearth of death row exonerations is certainly not due to incomparably accurate trials. DNA revelations caused some other states to upgrade evidentiary standards, but (aside from making DNA testing itself a right) California failed to do this, based not on reason, but on police and prosecutors pressing governors to veto minimal commonsense bipartisan reforms. See n. 44, 45. Yet the state has been plagued by police and prosecutorial misconduct scandals *especially* in the very few counties that dish out the vast majority of death sentences.⁶³ Nor are those counties' crime laboratories trustworthy.⁶⁴ California also has an exceptional record of prisoner abuse, with which its own courts have persistently found no fault, despite recurrent federal admonishments.⁶⁵ In addition, California is an outlier for secretive and ineffective procedures for complaints against judges and attorneys.⁶⁶

⁶² [A Broken System: Error Rates in Capital Cases, 1973-1995](#) (2000), J. Liebman et al. (at i; boldface in orig.):

Capital trials produce so many mistakes that it takes three judicial inspections to catch them—leaving grave doubt whether we do catch them all. After state courts threw out 47% of death sentences due to serious flaws, a later federal review found “serious error”—error undermining the reliability of the outcome—in 40% of the remaining sentences.

⁶³ See [Too Broken To Fix \(Part 1\)](#), a study by Harvard's [Fair Punishment Project](#). Nationwide, only 16 (of 3,143) counties have issued five or more death sentences from 2010-2015. Five of them—Kern, Los Angeles, Orange, Riverside, and San Bernardino counties—are in California. These counties have seen successive scandals involving the use of snitches to fabricate evidence; and San Bernardino County is responsible for the highly controversial conviction of Kevin Cooper by Attorney General candidate Mike Ramos (see point 8). The study identifies three key features in such counties, namely, ~~corrupt~~ “Overzealous Prosecutors,” “Inadequate Defense,” and “Racial Bias.” In particular:

[I]n America, a tiny handful of prosecutors account for a wildly disproportionate number of death sentences. Indeed, just three prosecutors personally obtained a combined 131 death sentences, the equivalent of one in every 25 people on death row in America today. Those same prosecutors amassed findings of misconduct in 33 percent, 37 percent, and 46 percent of their cases, respectively. . .

[Death row e]xonerations are common in jurisdictions with overly aggressive prosecutors and inadequate defenders.

To the last sentence I would add “except in California, where death row exonerations are all but non-existent.” A major problem in California is the political nexus between law enforcement and the judiciary. For example, in Riverside County, which has the state's highest per capita rate of death sentences:

Three-fourths of the county judges who have upheld death sentences since 2011 previously worked as prosecutors. And seven judges presiding over trials in which 39 defendants were condemned had been death penalty prosecutors.

[How Riverside County became California's death penalty leader](#), Los Angeles Times, Nov. 5, 2016. Note that this political nexus does not comport with local public opinion. In the November 2016 ballot, Proposition 62, to eliminate the death penalty, received 57.5% of the vote. Statewide, the measure failed, receiving on 46.1% of the vote. (Mail-ins may slightly change the numbers.) These figures nix the argument of Thomas in [Glossip](#), that counties with exceptionally high death sentence rates constitutionally reflect the local public will, rather than the peculiar vindictiveness of particular prosecutors. County-specific variation is of course up against the fundamental fact that penal codes and their interpretation are set state-wide.

⁶⁴ See [Orange County's Crime Lab Accused of Doctoring DNA Analysis In Murder Cases](#), OC Weekly, Sep. 27, 2016. Senior Forensic Scientist Mary Hong gave completely inconsistent testimony in two cases. Yet:

Hong's career includes receiving California statewide honors for her crime-solving forensic-science work in murder cases, serving as a past president of the California Association of Criminalists (CAC), and being the subject of a glowing 2012 Orange County Register feature. In 2009, she authored a CAC column advocating the importance of forensic-science ethics. . . The crime lab is a division of the Orange County Sheriff's Department, in which deputies have been caught conducting unconstitutional scams against pretrial inmates, hiding evidence, disobeying lawful court orders and committing perjury to cover up misdeeds. In Nov. 2015, more than three dozen legal experts and scholars called on Attorney General Loretta Lynch to launch a U.S. Department of Justice (DOJ) investigation into the operations of District Attorney Tony Rackauckas and Sheriff Sandra Hutchens. They argued that neither Rackauckas nor Hutchens could be trusted to act ethically. DOJ officials have acknowledged they are aware of the scandal, but haven't formally announced any action.

⁶⁵ Besides gang warfare, maximum security California prisons are notorious for inhumane overcrowding, rape, and staged inmate fights. See: [Prison Overcrowding State of Emergency Proclamation](#), Governor Schwarzenberger, Oct. 26, 2006; [California's 'Cruel and Unusual' Prisons](#), reason.com, Feb. 2015; [Staged fights, betting guards, gunfire and death for the gladiators: 'Cockfights' and shootings investigated by FBI](#), Independent, Aug. 21, 1996; [San Francisco jail inmates allegedly forced into 'gladiator-style' fights: County public defender asks the US Department of Justice to investigate claims of 'sadistic' treatment](#)

From all the above, it follows that two nationwide studies conservatively estimating that about 4% of death row inmates are actually innocent,⁶⁷ apply at least as conservatively in California.⁶⁸ Assuming the 4% rate, the state's

[including threats of violence if inmates did not comply](#), The Guardian, Mar. 27, 2015. California's brutal solitary confinement regime and arguably worse-than-death mental health segregation units have also required federal intervention. See [Summary of Ashker v. Governor of California Settlement Terms](#), Center for Constitutional Rights, Sep. 1, 2015. ([No. 4:09-cv-05796](#); N.D. Cal., 2012); [Coleman v. Brown](#), (E.D.Cal 4-5-2013 and 4-11-2014) 938 F. Supp.2d 955, 970 and 28 F.Supp.3d 1068 (deliberate indifference to inmates' serious mental health care needs); and ["Systemic Failures Persist" in California Prison Mental Health Care, Judge Rules](#), Solitary Watch. A federally-ordered death row mental health facility has just been completed in San Quentin. See also [America's 10 Worst Prisons: LA County](#); [Pelican Bay](#); and [San Quentin](#) (respectively ranked 5th, 6th, and dishonorable mention); Mother Jones, May 8, 2013. See also [Appealing to Justice: Prisoner Grievances, Rights, and Carceral Logic](#), a 2014 book by Calavita and Jenness, which writes up a study of California prison grievances, reporting that in 2005-2006 only 2% of grievances were directly successful, and:

What we find is a system fraught with impediments and dilemmas that delivers neither justice, nor efficiency, nor constitutional conditions of confinement.

⁶⁶ See [Watchdog for errant CA judges has no bite, no bark](#), First Amendment Coalition, May 9, 2016:

Arizona's overall discipline rate was four times higher than California's and its public discipline rate was five times higher. Texas investigated three times as many complaints, publicly disciplined three times as many judges, and removed six times as many judges. New York had more than 10 times as many complaints (358) as California (34) result in judges leaving the bench with complaints pending — a likely indication that New York's judges know their watchdog has teeth, while California's watchdog may be asleep. The [California] Commission on Judicial Performance is as secretive about its operations as the CIA. In response to a public records request from First Amendment Coalition . . . the panel refused to disclose complaints or even the number of complaints filed by judge or by county.

California's watchdog for errant counsel (the California Bar Association) is similarly scandalized. See [California's Top Ethics Prosecutor, Jayne Kim, Resigns Her Post](#), Findlaw, May 17, 2016:

That suit [by an allegedly wrongfully discharged prior prosecutor] alleges that Kim removed some 270 cases from her disciplinary group's backlog in order to give the illusion that her team was highly effective in prosecuting ethics violators. . . The [state] auditor intimated that, in Kim's zeal to shorten backlogs, her office would routinely skim over disciplinary cases and hand out slap-on-the-wrist punishments.

⁶⁷ "Actually" or "factually" innocent means not guilty—i.e. someone else was guilty, or there was no crime. "Legally" or "presumed" innocent means not yet (properly) tried and convicted—i.e. awaiting trial, or maybe retrial after a finding of constitutional error in a prior trial. In this article, "innocent" means actually innocent, unless otherwise qualified. An "actual innocence" claim is the same as a "miscarriage of justice" claim or a "false (versus merely wrongful) conviction" claim. See: [The Age of Innocence: Actual, Legal and Presumed](#), LLRX.com, by Ken Strutin, May 5, 2011, which contains a bibliography of law journal articles on innocence claims; and [The Rhetoric of Innocence](#), 70 Wash. L. Rev. 329, 389-90 (1995), by William Laufer, which correlates such innocence nomenclature with burdens of proof. Cf. [Innocence Unmodified](#), by Emily Hughes (SSRN 2010) re "the need to reclaim an understanding of innocence unmodified by qualifiers such as "actual" or "legal." "

⁶⁸ Breyer's dissent in [Glossip v. Gross](#), 14-7955 (U.S. 6-29-2015), points out (at 7):

*[R]esearchers estimate that about 4% of those sentenced to death are actually innocent. See Gross, O'Brien, Hu, & Kennedy, [Rate of False Conviction of Criminal Defendants Who Are Sentenced to Death](#), 111 *Proceeding of the National Academy of Sciences* 7230 (2014) (full-scale study of all death sentences from 1973 through 2004 estimating that 4.1% of those sentenced to death are actually innocent); Risinger, [Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate](#), 97 J. Crim. L. & C. 761 (2007) (examination of inherently indisputable DNA exonerations in death penalty cases for capital murder-rapes between 1982 and 1989, estimating a false conviction rate of between 3.3% and 5%).*

The Gross paper provides the following synopsis:

The rate of erroneous conviction of innocent criminal defendants is often described as not merely unknown but unknowable. We use survival analysis to model this effect, and estimate that if all death-sentenced defendants remained under sentence of death indefinitely at least 4.1% would be exonerated. We conclude that this is a conservative estimate of the proportion of false conviction among death sentences in the United States.

By contrast, Scalia ludicrously stated that U.S. criminal convictions have a "a success rate of 99.973 percent." [Kansas v. Marsh](#), 548 U.S. 163, 182 (2006). Scalia defined as a success every conviction for every crime, large and small, except for the few known exonerations (almost of which are for murder/rape). Scalia is also infamous for emphatically disparaging the repeated appeals of a particular death-sentenced petitioner who years later turned out to be innocent. See [DNA Sets Man Free After Scalia Mocked His Death Penalty Appeal](#), Findlaw, Sep. 3, 2014. Note that in [United States v. Quinones](#), 313 F.3d 49 (2nd Cir., 2002), the court held that the new certitude of DNA exonerations had not rendered the federal death penalty unconstitutional, reasoning that courts have long recognized and tolerated the inevitable execution of innocents, wherefore

current death row population of 748⁶⁹ includes about 27 innocent inmates (4%=30, minus the already exonerated 3). Moreover, *a Californian innocent has only about a 15% (0.61/4) chance of exoneration*—if and after living on death row long enough for his first appeal to be heard. *Elsewhere, such an innocent has about a 61% (2.44/4) chance of exoneration.*⁷⁰

I contend that *People v. Masters* is one of California's badly mistaken capital convictions, which elsewhere would have resulted not only in a sooner decision on appeal, but ultimately in an exoneration—if there had been a trial and conviction in the first place, which is doubtful.

4. The 2002 San Jose Mercury News Study

These indictments of California's criminal justice system echo those of a 2002 study undertaken by the San Jose Mercury, which analyzed state and federal death penalty *reversal* rates, rather than the all but non-existent state *exoneration* rate. But these rates of course have common cause—all 3 exoneration followed reversals. Accordingly, the core results of the study are worth reproducing at length, as follows (from [Death sentence reversals cast doubt on system](#), with underscoring added):

A [San Jose] Mercury News review of hundreds of cases found that a state that touts itself as a national model in resources and legal protections for death-penalty defendants has the same systemic problems that are fueling concerns about capital punishment nationwide. In cases involving the murder of children, police officers, college students and the elderly, appeal courts reviewing death sentences are repeatedly finding incompetent lawyers, prosecutorial misconduct and judicial errors. A key finding of the review is that the [California] Supreme Court, which has become one of the nation's most pro-death penalty high courts, applies a different judicial standard than federal courts. When assessing errors in trials, the state's justices consistently find them to be "harmless," rather than grounds for overturning a death sentence. The result of the differing standards is reversals at the much-later federal level, decades after the crime. . . . [T]he dozens of death sentences reversed since 1987[i.e. after Chief Justice Bird and two other liberal justices were recalled] involved trials marred by the same types of problems found in states known for spending less on capital cases, such as Texas and Alabama. . . . California hasn't taken corrective actions that other states have. . . . California's Supreme Court is in greater conflict with federal courts than any other state's. [It] reverses 10 percent of death sentences, one of the lowest rates in the country. But federal courts have reversed 62 percent of the sentences affirmed by the California court, the highest rate nationally. . . . The largest number of reversals have been for judicial error. . . . Prosecutors and police also have contributed to the problem of death sentence reversals.

A comprehensive Mercury News review of death-penalty appeals found 36 cases in which the California Supreme Court noted problems in a trial and decided they were not important enough to reverse a death sentence -- and a federal court later overturned the sentence because of those same problems. The review

there is no fundamental right to a continued opportunity for exoneration throughout the course of one's natural life. . . . Herrera prevents us from finding capital punishment unconstitutional based solely on a statistical or theoretical possibility that a defendant might be innocent.

Id. at 52-53, 69. *Quinones* overcleverly held that the Fifth Amendment due process clause was implicated, rather than the Eighth Amendment cruel and unusual punishment clause; and that due process was not subject to "evolving standards." *Id.* at 62. However, "evolving standards of due process" were dispositive in [Kulko v. Superior Court](#), 436 U.S. 84, 101 (1978).

⁶⁹ The California Department of Corrections maintains [a list of condemned inmates](#), with conviction dates and procedural status.

⁷⁰ If the national innocence rate were 6% instead of the estimated 4%, then innocents in / outside California would respectively have 11% / 47% exoneration chances. Note well that the authors of [Rate of False Conviction](#)—one of the two sources for the nationwide 4% estimate—could hardly be more conservative. They adopt the baseline assumption that so much attention is given to death penalty convicts that an innocent's exoneration is ultimately guaranteed, if only he survives for a long enough time. See n. 57. California's grossly sub-par exoneration rate renders that assumption impossibly conservative.

found that federal courts, by reversing six out of 10 California death sentences, are overturning a higher percentage of capital cases than any other state. But it is the California Supreme Court that has moved further from the national norm in ruling on these life-and-death cases, affirming nine of every 10 it reviews. . . Even some federal judges who review the California Supreme Court's work wonder whether the ghosts of the 1986 election still haunt the state's justices. Federal judges are appointed for life. "It may well be they are saying, 'What the hell, the 9th Circuit or the district courts will take care of it if there is a problem,'" said one 9th Circuit judge, insisting on anonymity. "We're free from political pressure." . . Chief Justice George [] acknowledged the conflict with his federal counterparts: "It may just be we have different standards on prejudicial error than the federal courts," he said. "The bulk of the cases in which they granted relief, we recognize some error," he said. "But in the context of evaluating all the evidence and the law, we found" the errors not prejudicial. . . [S]ince 1997 [the California Supreme Court] has reversed seven of the 67 death sentences for which it has produced full rulings, or 10 percent. By comparison, [] other state high courts reversed about 40 percent. Even in Texas, which leads the country in executions, state courts reversed 31 percent, triple California's rate. "The fact there are federal court reversals in California doesn't mean jack because there are no state court reversals," said Maria Stratton, the chief federal public defender in Los Angeles who has supervised dozens of death-penalty appeals. In fact, there is evidence that the 9th Circuit is more willing to uphold death sentences when state courts are more aggressive in weeding out flaws. Consider the case of Arizona, where the high court reverses two out of every five sentences it reviews, four times California's rate. When Arizona affirms a death sentence, the 9th Circuit tends to agree, reversing 42 percent of them, in line with the national average. A second fact that stands at odds with the critics' portrayal of liberal bias in the 9th Circuit is this: The court has many conservatives among its current and former judges, and the Mercury News review shows that those conservatives have voted dozens of times to overturn death sentences.

Since 2002, matters have worsened.⁷¹ In 2003, [In re Roberts](#)⁷² upheld a death sentence despite a finding that three key witnesses had lied. The only dissenters, Chief Justice George and Justice Kennard, have retired. The San Jose Mercury study specifically faults California's "harmless error" standard, as carelessly applied after 1986, rather than California's integrity in finding constitutional error in the first place. To the chagrin of Masters' counsel,⁷³ *Masters* exemplifies both frivolous harmless findings, and degenerate no-error findings. Most egregiously, it avoids ever addressing the trial court's obviously erroneous final ruling on the admissibility of Richardson's confession.

⁷¹ There just might have been a sea change this summer, due to the appointments of Justices Cuéllar and Kruger. See [Tossed death penalty may signal shift on California Supreme Court](#), San Francisco Chronicle, Aug. 24, 2016:

[The CSC] has continued to uphold a large majority of the death sentences it has considered until six weeks ago. Since then, the court has overturned four out of seven death verdicts. . . Matt Cherry, executive director of Death Penalty Focus [] said the ruling and other recent decisions may reflect "a newfound courage" on the court. Kent Scheidegger, legal director of the pro-capital punishment Criminal Justice Legal Foundation, responded, "It's a little premature to be calling it a trend for one case."

As yet I sense no change. The new justices signed off on *Masters*, none of the reversals affirmed innocence-based claims, and Cuéllar was the author of the decision that unanimously approved *Seumanu*'s careful examination excuse for delay. [People v. Clark](#), S066940 (Cal. 6-27-2016), at 161. The first three cases were unanimous, based on mismanagement of the jury. In the fourth case, a 4-3 majority in January upheld the exclusion of hearsay stating that the defendant, who had participated in a robbery, had played no part in an incidental killing, and had been shocked by it. The arrival of the new justices before that decision became final resulted in reconsideration. Ultimately, *the conviction was upheld*. Only the death sentence was vacated, on the ground that even such weak mitigating evidence must be allowed a capital sentencing hearing.

⁷² [In re Roberts](#), 29 Cal. 4th 726 (2003).

⁷³ See [State Supreme Court affirms death sentence of San Quentin guard's killer](#), Marin Independent Journal, Feb. 23, 2016: *Masters' lead lawyer, Joseph Baxter, said the ruling was "poorly written and poorly reasoned," with mistakes of fact and case law. "It's really a shabby product," said Baxter.*

5. Ayala Did Nothing But Invite Unreasonableness

Under [Chapman v. California](#), to avoid reversal after a *state* review court finds constitutional trial court error, the prosecution must prove that the error was harmless (i.e. did not prejudice the jury or judge) *beyond a reasonable doubt*.⁷⁴ Under [Brecht v. Abrahamson](#), in a *federal* habeas review proceeding, the prosecution need only show to the court's satisfaction that the error did not result in "actual prejudice."⁷⁵ *Brecht* adopted the standard of *Kotteakos*, *supra*, at 776, holding that a conviction can be set aside only if the constitutional error "had substantial and injurious effect or influence in determining the jury's verdict."

However, some errors are structural, and invalidate a verdict *per se*. For example, a defective "beyond reasonable doubt" jury instruction, or an unconstitutionally chosen jury, or a failure to provide counsel throughout trial renders the verdict void *ab initio*. In such cases, there is no constitutionally cognizable verdict to be reviewed.⁷⁶

In light of last year's U.S. Supreme Court decision in [Davis v. Ayala](#),⁷⁷ California's harmful harmless-error errors are likely to become even more harmful, but not because *Ayala* changed the law. In *Ayala*, the five conservative justices approved a typical instance of California's notoriously lax harmless error standard by announcing that AEDPA deference applies to state findings of harmless error under *Chapman*—i.e. to findings of harmlessness *beyond a reasonable doubt*. This was beside the point, because the applicable *Brecht* standard was unaffected. The justices then ludicrously misapplied the *Brecht* standard.

As aforesaid, *Brecht* (at 637) held that on federal habeas review the apposite harmlessness test was whether the trial court error "resulted in 'actual prejudice'." A *Brecht* finding of "actual prejudice" necessarily renders a state court finding of harmlessness *beyond a reasonable doubt* (the state standard, under *Chapman*) unreasonable, and so not entitled to AEDPA deference. Thus *Ayala*'s supposedly new rule, that AEDPA deference applies to state harmless error findings, in no way alters the federal standard for reviewing a state court's harmless error findings.⁷⁸

But *Ayala* is a cause for grave concern *as a matter of political fact*. Its particular factual finding—that state court's finding of harmlessness *beyond a reasonable doubt* was reasonable—is absurd. The trial court's conceded error in *Ayala* was not to allow *Ayala* to object to any of the prosecution's reasons for peremptorily striking seven minority jurors. Had *Ayala* been allowed to object, the court obviously *might* not have stricken all of those jurors, and this per

⁷⁴ [Chapman v. California](#), 386 U.S. 18, 24 (1967) "requir[es] the beneficiary of a constitutional error [the victorious prosecution] to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained."

⁷⁵ [Brecht v. Abrahamson](#), 507 U.S. 619 (1993).

⁷⁶ A constitutional error is deemed harmful if it might have (i.e. not only if in fact it did) result in actual prejudice in the fact-finder or in its fact-weighting. See [Sullivan v. Louisiana](#), 508 U.S. 275, 279, 281 (1993) (citations omitted):

Some [constitutional errors] will always invalidate the conviction [e.g.] total deprivation of the right to counsel; trial by a biased judge [or jury]; right to self-representation. . . . [G]iven a constitutionally deficient "reasonable doubt" jury instruction, [t]here being no jury verdict of guilty-beyond-a-reasonable-doubt, the question whether the same verdict of guilty-beyond-a-reasonable-doubt would have been rendered absent the constitutional error is utterly meaningless. There is no object, so to speak, upon which harmless-error scrutiny can operate. . . . [T]he essential connection to a "beyond a reasonable doubt" factual finding cannot be made where the instructional error consists of a misdescription of the burden of proof, which vitiates all the jury's findings. A reviewing court can only engage in pure speculation—its view of what a reasonable jury would have done. And when it does that, the wrong entity judges the defendant guilty. . . . [W]e distinguish[] between, on the one hand, "structural defects in the constitution of the trial mechanism, which defy analysis by 'harmless-error' standards," and, on the other hand, trial errors which occur "during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented." Denial of the right to a jury verdict of guilt beyond a reasonable doubt is certainly an error of the former sort, the jury guarantee being a "basic protection" whose precise effects are unmeasurable, but without which a criminal trial cannot reliably serve its function.

Regarding the right to counsel in all important parts of a trial, see [People v. Ramos](#) (No. B248512, Cal.App. 11-21-2016).

⁷⁷ [Davis v. Ayala](#), 13-1428 (U.S. 6-18-2015).

⁷⁸ The dissent in *Ayala* (which all four liberal justices joined) at the outset recognized the opinion's legal vapidty (at 2-3): *My disagreement with the Court does not stem from its discussion of the applicable standard of review, which simply restates. . . . Brecht v. Abrahamson*, 507 U.S. 619 (1993), when assessing the harmlessness of a constitutional error on [federal] habeas review. . . . If a trial error is prejudicial under *Brecht's* standard, a state court's determination that the error was harmless beyond a reasonable doubt is necessarily unreasonable [and so reviewable under AEDPA].

se establishes an adverse *prejudice* in the jury's selection, sufficient to void the jury's decision. Showing actual prejudice in a jury's composition is not the same as showing that, but for the error, a more favorable verdict would have resulted. Just consider the extreme case of an all-white jury in a 90%-black county, where the voidness *ab initio* would seem self-evident.

In any case (as follows), the error was certainly not harmless *beyond a reasonable doubt*—yet this was the CSC's ruling, which was therefore certainly unreasonable. In lieu of logic, the *Ayala* majority argued only that a fair-minded judge *might* not have stricken any of the seven jurors, particularly conceding the opposite reasonable possibility, that a juror *might* have been stricken, with respect to three of the seven jurors. The foreclosed possibility of any of those jurors being stricken by definition *prejudiced* the selection of the jury, and this rendered the error per se harmful, regardless of the fact that the prejudice just might not have changed the jury selection.

Ayala thus invites federal district courts to pay no more than lip service to either the “beyond a reasonable doubt” qualification in *Chapman*'s “harmless beyond a reasonable doubt” state review court requirement, or to the void *ab initio* subset of *Brecht*'s “actually prejudiced” set of outcomes. I read *Ayala* as nothing but a stupid message from a Supreme Court packed with ex-prosecutors, without even one ex-public-defender. As detailed in part II below, the numerous conclusory CSC findings of harmlessness in *Masters*—which even include such a finding regarding all of the errors collectively—exemplify the frivolous and fraudulent lip service to *Chapman* that *Ayala* invites.

The invitation to unreasonably deny habeas relief was most recently taken up by dissenting Judge Callahan in [Hardy v. Chappell](#) (9th Cir., 8-11-2016), who at length berated the majority for failing to heed *Ayala*. In *Hardy*, the majority recognized that *nine* evidentiary items (*Hardy*, at 11-12) so substantially pointed to the guilt of a third party as to satisfy the well-established *Strickland* standard,⁷⁹ requiring retrial where the evidence *not* presented to the jury (owing to ineffective counsel) undermines confidence in the verdict. In *Masters*, ineffective counsel was not the cause of unrepresented evidence—the habeas evidence not presented to the jury had been in part excluded by the trial court, and in part not available at trial. However, the same undermined-confidence-in-the-verdict standard applies. The significant similarity is that in both *Hardy* and *Masters*, the fact that evidence was not presented to the jury was deemed harmless by the state court in light of the presented evidence being deemed sufficient to sustain a related conspiracy count. However, *the jury did not weigh the per se sufficient evidence of a conspiracy together with the intertwined new evidence*. In both *Hardy* and *Kotteakos*, the federal courts accordingly rejected findings of harmlessness based on a fallback conspiracy theory based only on the evidence presented.

In *Hardy* the Ninth Circuit majority found that there plainly was a reasonable probability that the evidence would have raised a reasonable doubt as to the defendant's guilt in the minds of jurors. Indeed, the CSC itself found that the unconsidered evidence “may well have created in the minds of the jurors a reasonable doubt as to petitioner's guilt.” However, the CSC went on to find that the non-presentation-of-evidence error was not prejudicial because

*there was ‘substantial evidence’ to convict him under an aid-and-abet or conspiracy theory . . . [T]he state court correctly recited the Strickland standard but then, in its application, abandoned it—replacing it with a substantial evidence standard. As the Supreme Court has made clear [except as implied by Ayala's perverse counter-example], it is the application, not the recitation of a standard that matters for [habeas review] purposes.*⁸⁰

As we shall see, just such a cursory and conclusory affirmance of guilt beyond reasonable doubt based on a vague fallback conspiracy count is the ultimate substance of the referee's report in *Masters*' state habeas evidentiary proceeding—notwithstanding *Kotteakos*' recognition that, in the event of error ordinarily requiring retrial, *even where substantial evidence exists in support of complementary conspiracy theories*, it is generally “impossible to conclude that substantial rights were not affected” by the error.⁸¹

⁷⁹ [Strickland v. Washington](#), 466 U.S. 688 (1984).

⁸⁰ *Hardy*, at 11, 16. In *Ayala*, the U.S. Supreme Court likewise cited a harmfulness standard (*Brecht*) that it then manifestly failed to reasonably apply. In *Hardy*, quoting *Ayala*, the dissent urged that the CSC's harmlessness determination was *not* “so lacking in justification that there was an error . . . *beyond any possibility* for fairminded disagreement.” *Hardy*, at 32. But the CSC's own finding that a reasonable doubt might well have been raised in jurors' minds put the affirmative application of the *Strickman* standard for prejudice (i.e. harmfulness) beyond fairminded dispute.

⁸¹ *Kotteakos*, *infra*, at 765. See n. 55.

In Masters' case, the glossed-over substantial rights include the right to life itself. Yet, in deciding Masters' habeas petition, the CSC seems set to perfunctorily adopt the referee's fallback conspiracy excuse for inaction, à la *Hardy*. I trust it will instead heed the Ninth Circuit's most recent admonishment (*Hardy*, at 29; citations omitted):

Applying an objective fairminded jurist standard does not mean that because any state judge found otherwise, the federal court is obliged to turn away a petitioner. Indeed, to do so would . . . function as a suspension of the writ of habeas corpus for state prisoners.

6. The Fleeting Opportunity To Learn From DNA Exonerations

In 2002, [Learning From Our Mistakes: A Criminal Justice Commission to Study Wrongful Convictions](#) concluded:

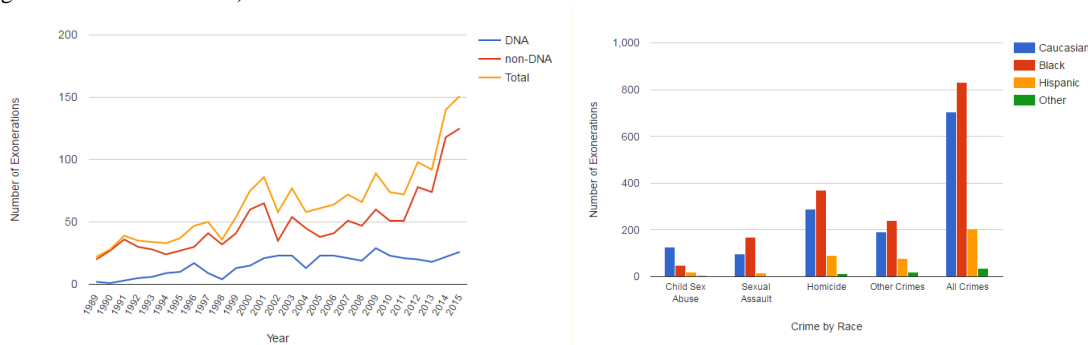
*The scientific certainty of the DNA exonerations presents an opportunity for meaningful reform of the criminal justice system beyond anything known before. The opportunity is important one—for the wrongly convicted or accused, for the victims who have a right to know the truth about their perpetrators, and for the safety of the community. But it is an opportunity that will not be fully present for long. It is an opportunity to learn that we must not waste.*⁸²

The opportunity for reform is limited by the fact that DNA testing has become routine in *pretrial* investigations. Accordingly, annual DNA exoneration counts have already stopped rising. But note well that there always has been a greater number of non-DNA exonerations.⁸³ Non-DNA exonerations have of course given rise to earlier reports of shortfalls in evidentiary practices and standards,⁸⁴ but these have lacked the force of systemic, scientifically certain proofs of innocence, and so have been politically insufficient for change. The most important and permanent lesson learned from indisputable DNA exonerations is that they roundly confirm the prior non-DNA based findings.

⁸² [Learning From Our Mistakes: A Criminal Justice Commission to Study Wrongful Convictions](#), California Western L. Rev., Vol. 38 No. 2, by Keith Findley. It began as follows:

For hundreds of years the criminal justice system has developed, relied upon, and incrementally refined a body of rules and procedures ostensibly designed to ensure that at the end of the day, the guilty are convicted and the innocent are acquitted. The rules have developed through custom and common law, and then through legislation and formal rule-making, through a process of trial and error and logical argument about what might be effective in ascertaining the truth. The criminal justice system has developed largely through faith in the adversarial process, faith in the rules of evidence, faith in the standard of proof beyond a reasonable doubt, and faith in the common sense of police, lawyers, judges, and politicians to create an effective truthfinding process. Recent empirical evidence, however, especially DNA evidence, has opened a window through which we can examine this faith in the system. That window both reveals the errors in the system and suggests means to remedy them.

⁸³ See [Exonerations By Year: DNA and Non-DNA](#) and [Exonerations By Race and Crime](#), National Registry of Exonerations (the website gives other break-downs):



The full register (of 1,777 exonerations as of April, 2016) is listed [here](#), and is available as a spreadsheet. To each exoneration is assigned the state and county, the conviction and exoneration dates, and the contributing evidentiary mistakes.

⁸⁴ See [Miscarriages of Justice in Potentially Capital Cases](#), Stanford L. Rev. Vol. 40 No. 1 (Nov. 1987) at 21-179. The causes of miscarriages of justice (exonerations) were identified in a database of 350 wrongful convictions. See also [A Broken System, Part II--Why There is So Much Error in Capital Cases, and What Can Be Done About It](#) (2002), J. Liebman et al.

The lessons now compelled by DNA exonerations are comprehensively set forth in the aptly entitled 2015 paper [Criminal Law 2.0](#),⁸⁵ by Ninth Circuit Judge Alex Kozinski, and in [Convicting The Innocent](#), a 2011 book by Brandon Garrett.⁸⁶ Garrett's book painstakingly analyses the first 250 DNA exonerations.⁸⁷ The total now stands at 341.⁸⁸ Kozinski's paper updates and expands on Garrett's analysis. DNA exonerations have starkly discredited several longstanding investigative practices and legal mantras requiring and expressing overfull faith in the discretion, impartiality, and integrity of juries, prosecutors, and police.

Not many wrongful convictions in capital cases are discovered through DNA evidence. According to the DPIC's aforesaid [Innocence List](#), the total number of death row exonerations since 1973 is 156, of which only 20 were due to DNA testing. Nevertheless, the scientific certitude of DNA evidence has quieted controversy as to the leading causes of miscarriages of justice, which even China arguably appreciates more than California.⁸⁹

Both Garrett and Kozinski propose simple changes to criminal law, and express concern that few jurisdictions have as yet made any meaningful changes, other than to provide for a right to DNA testing, where biological evidence exists. Otherwise, the rules of evidence and related criminal law have all but stood still. In California, four modest, bipartisan, and generally applauded (even by prosecutors) measures were vetoed by Governors Schwarzenegger and Brown, due to police opposition rather than reason.⁹⁰ Brown's official rationale is absurd on its face.⁹¹

California did enact one new evidential requirement, effective January 1, 2012, which purportedly guards against the notorious unreliability of jailhouse snitches (aka "in custody informants").⁹² As will be shown, this exception proves the general rule of inaction, for it accomplishes next to nothing. In particular, although Masters' conviction rests entirely on the testimony of two obviously unreliable jailhouse snitches, even were the new rule retroactive (which it is not), that testimony would in no way be affected. (All this is detailed in part II below.)

7. California Caricatures Carelessness

California has had its share of highly questionable death sentences and executions. For example, based on the testimony of two career snitches, in 1983 Thomas Thompson was sentenced to death for a 1981 murder and rape. Thereafter, the same prosecutor used four different snitches to convict someone else for the same murder,⁹³ telling

⁸⁵ [44 Geo. L.J. Ann. Rev. Crim. Proc \(2015\)](#).

⁸⁶ See [The Wrongful Conviction As A Way Of Life](#), New York Times Sunday Book Review, May 26, 2011.

⁸⁷ The total number of U.S. DNA exonerations (for all crimes) is now 337, the average time served being 14 years, with 140 real perpetrators found. See the [Innocence Project](#) page.

⁸⁸ See [Keith Harward becomes 341st person in U.S. to be exonerated by DNA](#), Innocence Project, Apr. 8, 2016.

⁸⁹ Driven by (non-DNA) revelations of executed innocents, the world's most prolific execution regime, China (which keeps its execution counts secret), in 2005 instituted "kill fewer, kill carefully" criminal justice reforms; in 2007 reinstated the power of its supreme court to review capital cases; and in 2014 reduced the number of capital offenses. See [We might abolish the death penalty in 20 years: He Jiahong on justice in China](#), The Guardian, Oct. 22, 2016.

⁹⁰ See n. 44, 45. A present bipartisan "criminal justice reform" initiative is limited to *sentencing* reform (lower mandatory terms and fostering rehabilitation), the proposed law being the [Sentencing Reform and Corrections Act of 2015](#). See also [Grassley: Senate 'very close' to deal on criminal justice reform](#), and [A Mockery Of Justice For The Poor](#), New York Times, Apr. 29, 2016.

⁹¹ See [Jerry Brown Fails his Test](#), California Open Blog File, Sep. 30, 2014, regarding his veto of a bill that would have granted judges the discretionary power to inform juries of prosecutorial misconduct, in appropriate instances:

Brown based his veto on two claims: first, that "Under current law, judges have an array of remedies at their disposal if a discovery violation comes to light at trial", and, second, that the bill "would be a sharp departure from current practice that looks to the judiciary to decide how juries should be instructed." The first claim ignores the very problem that the bill was designed to remedy by suggesting that the present regime of prosecutorial accountability is perfectly sufficient, when the evidence, not only in [California](#), but [across the country](#) continues to mount that too many prosecutors have for too long violated their constitutional and ethical duties as public officials. The second claim is, if possible, even stranger. In fact, one could be forgiven for thinking Brown's office hadn't read the bill. To say that an amendment to the penal code which vests discretion in judges is a "sharp departure" from the practice of allowing "the judiciary to decide how juries should be instructed," is, frankly, bizarre.

⁹² California Penal Code § 1111.5

⁹³ This exemplifies the availability of snitch-on-snitch corroboration, as allowed by Cal. Penal Code § 1111.5 (discussed below).

the new jury that the first convict didn't do it. California's courts upheld both convictions. A federal habeas corpus petition was granted by a long and meticulous opinion, only to be reversed by a Ninth Circuit panel. A court communication glitch (in which Thompson played no part) then resulted in a Ninth Circuit denial of en banc review. The U.S. Supreme Court held that the state's interest in finality and the Ninth Circuit's interest in regular procedure outweighed Thompson's interest in life. Thompson was executed in 1997, protesting his innocence.⁹⁴

*Williams*⁹⁵ most recently manifests California's systemic carelessness. After summary CSC denials, on federal review *Williams* upheld both *Napue*⁹⁶ and *Brady*⁹⁷ claims of prosecutorial misconduct, plus a *Massiah*⁹⁸ claim of judicial error. *Williams* found reversible errors, and a "devastating impact of collective error." It indicted the CSC as follows (at 49, 56; footnotes referencing Carney's Order omitted):

Petitioner is not responsible for . . . the California Supreme Court's error in failing to grant record expansion and/or an evidentiary hearing as to this claim on habeas review more than a decade ago. . . [T]he California Supreme Court's summary denial of Petitioner's allegations given the evidence that was presented to it in state habeas proceedings was inexplicable. As it did in this case, the California Supreme Court routinely summarily denies state habeas petitions in capital cases. Yet, the federal courts grant habeas relief in California capital cases in well over half the cases they review. Nevertheless, by the time a California capital case reaches the federal courts in habeas proceedings, often decades have passed and critical evidence is no longer available. . .

Petitioner also presented the Grand Jury findings in the wake of the [1990s] jailhouse informant scandal . . . Because this report documented abuses from 1976 to 1990, it covered the time period [at bar]. The California Supreme Court summarily denied both Petitioner's 1995 and 2001 habeas petitions.

Small wonder jailhouse informant scandals persist to this day. See [The jaw-dropping police/prosecutor scandal in Orange County, Calif.](#), Washington Post, Jul. 13, 2015; [CA's Orange County Jailhouse Snitching Program Continues](#), Findlaw, May 2, 2016; and [Anatomy Of A Snitch Scandal](#), The Intercept, May 14, 2016, which reports recent physical aggression by the unindicted and unrepentant perjurers:

[A] local defense attorney, who recently succeeded in overturning a client's conviction based on misconduct, was beaten up in the courthouse by an investigator . . . The refusal to hold anyone accountable for the corruption is not just a matter of DA Rackauckas's nonchalance. Other officials implicated in the scandal have displayed a similar attitude.

Because this national scandal led to no disciplinary actions (one prosecutor resigned), it resulted in an amendment to [Cal. Penal Code § 141](#) (effective January 1, 2017), making it a felony, rather than a mere misdemeanor, for

⁹⁴ Judge Reinhardt described the case as follows in *The Demise Of Habeas Corpus*, *supra* n. 43, at 1221:

Justice Kennedy is a firm member . . . of the five-member conservative bloc of the Court that, in the name of comity, consistently upholds erroneous state court decisions on matters of federal constitutional rights [citations], and allows an affinity for procedure and finality to outweigh the duty to do justice, see, e.g., [Calderon v. Thompson](#), 523 U.S. 538, 557 (1998) (Kennedy, J.) (authorizing the execution of a person who was likely innocent of the special circumstance that justified the death penalty, based on a newly adopted procedural rule that precluded the circuit court from reaching the merits of a decision in which it had held that the person to be executed received ineffective assistance of counsel in violation of the Sixth Amendment and that his due process rights were violated due to prosecutorial misconduct at his trial; notwithstanding these constitutional violations, Thompson was executed as a result of the procedural ruling).

For an insightful synopsis, see [The Big Kozinski](#), Legal Affairs, Jan.-Feb. 2004.

⁹⁵ *Williams v. Davis* (C.D. Cal., 2016-03-29). See [Ex-L.A. City Atty. Trutanich failed to disclose witness ID while prosecuting a murder case, judge rules](#), Los Angeles Times, Apr. 25, 2016.

⁹⁶ *Napue v. Illinois*, 360 U.S. 264, 269 (1959) ("knowing use of false testimony to obtain a conviction").

⁹⁷ *Brady v. Maryland*, 373 U.S. 83, 87 (1963) ("suppression by the prosecution of evidence favorable to an accused").

⁹⁸ *Massiah v. United States*, 377 U.S. 201, 206 (1964) (undisclosed agent used to "deliberately elicit" incriminating information after indictment and right to counsel has attached).

prosecutors to *willfully* alter or withhold evidence, punishable by 16 months to 3 years in jail. Ironically, this drastic threat could prove even less of a deterrent than the supplanted misdemeanor sanction, which is all but never invoked, despite its mildness. An even less used criminal sanction would seem de facto doomed to impotence.⁹⁹

A federal Department of Justice investigation was recently announced, to focus on the systematic placement of informants in cells next to targets, in violation of the Sixth Amendment right to counsel during interrogation, and on routine failures to inform juries of promises of leniency made to jailhouse informants.¹⁰⁰ On top of all this, see [Orange County's Crime Lab Accused of Doctoring DNA Analysis In Murder Cases](#), OC Weekly, Sep. 27, 2016—a circumstance to bear in mind in the below discussion of DNA evidence against Kevin Cooper.

8. Next Up [Kevin Cooper](#), *Cf. Masters*

After a new one-drug lethal injection protocol is approved,¹⁰¹ and assuming that the death penalty is not repealed in November's ballot, next up on California's ready-to-kill list (now comprising 20 inmates) is [Kevin Cooper](#). In 2009, by a vote of 16-11 an en banc Ninth Circuit panel affirmed Cooper's death sentence. However, in a voluminous [opinion](#),¹⁰² beginning with the statement that "[t]he State of California may be about to execute an innocent man," five of the dissenting judges passionately protested that the district court had not complied with the circuit's prior injunction to have a conclusive blood test performed.¹⁰³

To prove whole-family-murder-by-hatchet charges, the state introduced a T-shirt stained with Cooper's blood (plus other suspect evidence, such as mysteriously materialized cigarette butts). Cooper protested that the stain must have been added by the prosecution, using a blood sample kept in a test tube. When checked, the test tube was full, but had apparently been tampered with. Cooper claimed that the tube must have been topped up with someone else's blood. Sure enough, the blood of two people was found in the tube. The Ninth Circuit enjoined the federal district court to have the T-shirt stain tested for preservative, so as to categorically determine whether it had come from the sample. The laboratory duly reported that the T-shirt stain contained preservative. But the district court allowed the laboratory to reattribute its finding to likely laboratory contamination, *without requiring a retest*.¹⁰⁴

Besides such evidential fabrications, there were grave suppressions. Investigators paid no heed to witnesses who had seen three white people, at least one blood-stained, having fled the murder scene in the primary victim's car. One of them lost a T-shirt and a hatchet—his blood-stained pants were incinerated by the police. See [From FBI Boss to Death Penalty Foe, Tom Parker's Quest to Free a Convicted Murderer](#), Santa Barbara Independent, Jul. 6, 2016:

99 See [Prosecutors Who Withhold Evidence Could Soon Face Felony Charges](#), Findlaw, Oct. 13, 2016; [California At Forefront On Prosecutorial Accountability](#), Fair Punishment Project, Oct. 19, 2016. The law, [AB 1909](#), adds Cal. Penal Code § 141(b):

A peace officer who knowingly, willfully, intentionally, and wrongfully alters, modifies, plants, places, manufactures, conceals, or moves any physical matter, digital image, or video recording, with specific intent that the action will result in a person being charged with a crime or with the specific intent that the physical matter, digital image, or video recording will be concealed or destroyed, or fraudulently represented as the original evidence upon a trial, proceeding, or inquiry, is guilty of a felony punishable by two, three, or five years in the state prison.

¹⁰⁰ [DOJ Announces Investigation Into Orange County DA And Sheriff's Department Over Informant Scandal](#), Huffington Post, Dec. 15, 2016.

¹⁰¹ The proposed protocol provides for a selection from four lethal barbiturates. See [California considers making its own lethal drugs for the death penalty](#), KPCC, May 17, 2016. Approval is expected, although the ACLU has discovered that, re the abandoned three-drug protocol, the

California Department of Correction and Rehabilitation (CDCR) significantly understated drug costs, advocated violating federal law in attempting to acquire execution drugs, considered obtaining execution drugs from questionable sources, and downplayed the seriousness of botched executions in other states and the prospects that botches could occur in California.

[Newly Disclosed California Corrections Documents Reveal Questionable Practices, Huge Price Tag for Execution Drugs](#), DPIC, May 4, 2016.

¹⁰² [Cooper v. Brown](#), 565 F.3d 581 (9th Cir. 2009).

¹⁰³ [Cooper v. Brown](#), 565 F.3d 581 (9th Cir. 2009).

¹⁰⁴ See [End to California Execution Moratorium Raises Controversial Death Penalty Case](#), NBC News, Jan. 31, 2016; and [Kevin Cooper: Justice Denied](#), Campaign to End the Death Penalty.

[H]aving put the Mafia behind bars, investigated dozens of homicides and sent two murderers to their deaths . . . during 45 years in law enforcement, Parker said he's seen too many corrupt homicide investigations to believe in the death penalty anymore. The worst of them, he said, is the Chino Hills murder case of 1983. . . "Kevin was a car thief and a burglar, but he doesn't deserve to be where he is," Parker said. "I'm convinced he was framed." . . .

The courts have called the evidence against Cooper "overwhelming" – spots of Cooper's blood in the Ryens' hallway and on a tan T-shirt by the road; bloody prints of prison-issue Keds inside and outside the Ryens' house; Cooper's cigarette butts in the Ryens' station wagon; and a hatchet sheath and prison uniform button at Cooper's hideout next door. But Cooper claims this was false evidence, planted and manipulated by the San Bernardino County Sheriff's Department to convict him. He alleges that sheriff's deputies destroyed evidence and ignored leads pointing to three white men as the murderers – including the initial statements of the Ryens' eight-year-old son, Josh, the sole survivor.

Cooper's and Masters' cases raise grave questions as to prosecutorial prejudice and culpable CSC carelessness. Both are politically and racially charged—in Cooper's case owing to the blind eye plainly turned to plain evidence of three white culprits, and in Masters' case owing to the killing of a white guard by members of the Black Guerilla Family. In both cases, victim relatives and friends, police forces, and prosecutors insist that there is not even any lingering doubt as to guilt,¹⁰⁵ and they protest inordinate appellate delay. Otherwise, the cases sharply contrast.

The incriminating evidence in *Cooper* is almost wholly physical, depending entirely on local police testimony for its foundation. Also black, Cooper is a far more sympathetic defendant, being a mere car-thief minimum security prison walk-out, homeward bound for the holidays. *Cooper* raises grave questions as to the police fabricating DNA and other physical evidence, while destroying, ignoring, or perverting unfavorable DNA, other physical evidence, and witnesses. *Cooper* has raised the very highest level of international concern (continuing the above quote):

Last fall, the influential Inter-American Commission on Human Rights, an autonomous organ of the Organization of American States, recommended that Cooper be granted a reprieve, pending a new investigation. Citing in part Parker's allegations of "endemic tunnel vision," the commission concluded that the U.S. had violated Cooper's rights to a fair trial, due process and equality before the law. The U.S. is a signatory to the American Declaration, a treaty that guarantees those rights.

Cooper's last hope lies in an unorthodox petition to Governor Brown, *not* for clemency, but seeking an independent non-judicial investigation of the evidence, and a stay of execution pending the outcome. Simply commuting Cooper's sentence to life without parole does not seem a viable option, given that Cooper has been tried twice, and [Cal. Constitution, Art. 5, sec. 8](#) provides that "[t]he Governor may not grant a pardon or commutation to a person twice convicted of a felony except on recommendation of the Supreme Court, 4 judges concurring." Because Cooper's actual innocence is the underlying petition issue, rather than the death sentence, a repeal of the state death penalty in November's election would not moot the petition. Cooper's incarceration for life would every bit as credibly cry out for a conclusive finding as to whether the T-shirt blood stain was fabricated.

Although supported by such bodies as the American Bar Association,¹⁰⁶ it seems a toss-up whether Brown will grant the petition, given that he previously gave absurd reasons for vetoing a simple bipartisan measure to mitigate a

¹⁰⁵ "Lingering" or "residual" doubt, which is a degree below "reasonable doubt" and a degree above "mathematical (one-in-millions) doubt," warrants special consideration re actual innocence claims. Lingering doubt is a legitimate but not conclusive mitigating factor in the death sentencing phase. [Gonzalez v. Wong](#), 667 F.3d 965, 993 (9th Cir. 2011). Its polar opposite—very grave doubt—is a pardoning consideration, and of course also a consideration for commutation from death to life without parole. In my opinion, a unanimous jury finding of "no lingering doubt" should be a prerequisite for all death (and life without parole) sentences. Then again, in my opinion California's death penalty is now unconstitutional *per se*, à la *Carney's Order*, while the perversely perpetuated pipeline to distant death employs many whose bodies, minds, and souls surely could and should be far better occupied. See [Bank Of Moratorium: The Death Penalty Cash Cow](#), *Forbes*, Nov. 16, 2016.

¹⁰⁶ See [California Death Row inmate Kevin Cooper's clemency petition stirs emotions 30 years after family's slaying](#), *San Jose Mercury*, Apr. 17, 2016:

surfeit of prosecutorial misconduct (see n. 45, 91). To grant it would implicitly require that the T-shirt blood stain be conclusively retested for preservatives, which would risk scientifically confirming premeditated, murderous, and racial police misconduct, quite possibly implicating the crime laboratory and prosecutor's office.

Cooper was sentenced to death in San Bernardino County, and his clemency petition is vigorously opposed by its District Attorney, Mike Ramos. Under the auspices of Californians for Death Penalty Reform and Savings, Ramos co-chairs the drive for Proposition 66, and is already campaigning to be California's Attorney General in 2018.¹⁰⁷

Here is [Ramos' response to the ABA's clemency-supporting letter](#):

Kevin Cooper is the perfect example of how dysfunctional the appellate process is and how it is being abused by those on Death Row in California. He has appealed multiple times to each the California Supreme Court and the U.S. Supreme Court, and each time our case gets stronger. I am disgusted by the comments made by the President of the American Bar Association and the fact that they show no concern or respect for the victims and their families in this case. Kevin Cooper committed the most horrendous crimes imaginable against the victims while they were in the sanctity of their home. He killed a family and two little children, and left their family members to suffer a lifetime of pain. The American Bar Association has no business commenting on a case in San Bernardino County and calling into question the integrity of this office. Let me be clear that this office will continue fighting for the families who lost their loved ones at the hands of California's most violent criminals. For them, the pain never ends.

Ramos paints the proponents of Proposition 62 as deceptive, as in [Improve death penalty process, don't abolish it](#), San Bernardino County Sun, Oct. 22, 2016. In fact, Ramos himself is categorically deceptive when he states that:

Proposition 66 will move the first appeal to the California Court of Appeal, then to be heard by the California Supreme Court if necessary. The California Supreme Court is overloaded with death penalty appeals, causing lengthy and unnecessary delays. . . . If you want to save money, let's start carrying out the will of the voters and put prisoners on death row to death.

Proposition 66 does *not* change the statutes that require that first death penalty appeals be filed in the CSC,¹⁰⁸ and Ramos nowhere mentions the cost (let alone impracticality) of working through the Supreme Court backlog of 350 appeals, estimated at ten million dollars per year, for many years. Nor does he address the additional cost having trial courts decide death penalty habeas petitions. Nor does he admit the plain possibility of executing an innocent, which acceleration can only exacerbate.

As Texas law professor San Millsap puts it, the ultimate resolution of Cooper's case

is "a test of sorts. . . . [W]hether the state ... passes this test will say more about its real values than it does about Kevin Cooper or the miserable creatures who commit horrible crimes."¹⁰⁹

Masters' pending state habeas petition also presents an acid test of the integrity of California's death penalty administration. It puts at issue the most common cause of error in death penalty cases, false snitch testimony. With respect to crimes committed in maximum-security prisons, *Masters* is a poster-child case, raising fundamental

In a letter sent to Gov. Brown on March 14, the American Bar Association alleged Cooper's "arrest, prosecution and conviction are marred by evidence of racial bias, police misconduct, evidence tampering, suppression of exculpatory information, lack of quality defense counsel and a hamstrung court system." . . . [FBI veteran Thomas Parker] said. "Shortly after reviewing some of the preliminary materials in this case, I was absolutely convinced that Kevin Cooper was innocent, and I decided I'd work pro bono (for free) on this. I was totally overwhelmed by the degree and volume of evidence of police malfeasance I found in this case."

¹⁰⁷ See [joinmikeramos.com](#). Fitness for office questions are raised by more than such cases as Cooper's. See [Ramos's Breakup With Mistress Sends DA's Office Into Crisis Mode](#), San Bernardino County Sentinel, Sep. 19, 2015.

¹⁰⁸ See, e.g., [Cal. Penal Code § 190.6\(b\)](#), which Proposition 66 does not amend, requiring that the first appeal be filed in the CSC.

¹⁰⁹ [Gov. Jerry Brown to consider clemency for death row inmate Kevin Cooper](#), Inland Valley Daily Bulletin, Apr. 16, 2016.

questions regarding the de facto untrammelled power of prosecutors to limit the evidence to the testimony of a couple of choice snitches, by failing to secure physical evidence and by refusing to immunize, protect, or credit contrary witnesses. In a state and nation plagued by an epidemic of absolutely immunized and professionally undisciplined prosecutorial misconduct, such power must be judicially trammelled.

In *Masters*, the CSC affirmed the blanket suppression of exculpatory evidence, finding the incriminating evidence “overwhelming,” despite a plain shortage if not total lack of required corroboration, and despite plainly reliable-enough-to-admit contrary documentary evidence. Particularly egregious are failures of the CSC *even to mention*:

- (1) regarding a note in Masters’ handwriting cited as “admitting guilt,” (i) its dependence for veracity on the accomplice testimony that it supposedly corroborates, and (ii) its coercive context; and
- (2) regarding the exclusion of a third-party confession as unreliable, (i) the mortal threat motivating honesty, and (ii) the California Department of Correction’s own official finding of accuracy and completeness.

In Masters’ habeas proceeding, after an evidentiary hearing in which Masters introduced an astonishingly full suite of recantations and exculpatory new testimony, a state referee has nevertheless recommended that the CSC dismiss the petition, frivolously finding that even had *all* of the previously excluded and new evidence been before the jury, there was no reasonable probability of a different verdict.

Part II of this article culminated in a list of 17 carelessnesses in the CSC's decision in *People v. Masters*. It has been redacted at request of defendant, at least pending the CSC's decision in the state habeas corpus proceeding.