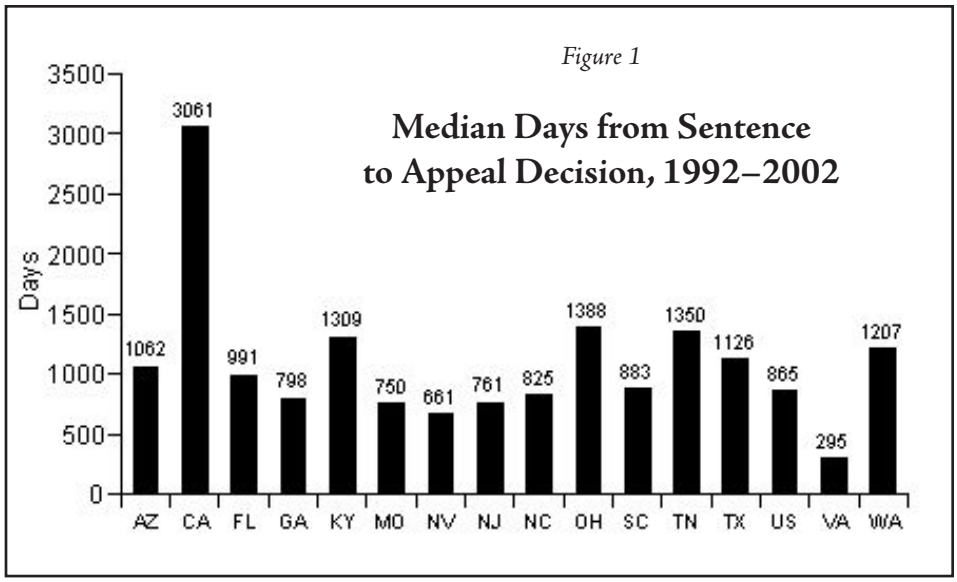
Death Penalty Review in California: Enlightening Comparisons to Other States

by Kent Scheidegger

California's death penalty law has been attacked as overly broad. The state sentences too many people to death, we are told, and this overload of the system is responsible for its malfunction. We are also told that the briefing of capital cases on appeal is necessarily a huge undertaking, and that is why it takes so long and costs so much and one of the reasons why it is so difficult to find lawyers to do it.

To evaluate these contentions, it is useful to compare California capital cases with capital cases from other jurisdictions. Some informative comparisons have already been done by Judge Arthur Alarcon in a recent law review article.[1] This article expands on his analysis using his data as well as data from a recent National Institute of Justice-funded study by Barry Latzer and James Cauthen of the John Jay College of Criminal Justice.[2] These comparisons strongly suggest that California capital appeals do not need to take as long as they do or cost as much as they do.

Figure 1



Time to Appeal

For some time, it has been obvious that California has longer delays in carrying out capital punishment than many other states. Despite 781 death sentences having been imposed through 2004, only 13 have been executed as of April 2008, and the last five executions occurred more than 20 years after the imposition of sentence.[3] For the direct appeal portion of the process, we can now quantify how much worse California's process is.

Figure 1 shows the median time in days from the imposition of sentence in the trial court to the decision on direct appeal in the court of last resort for 15 states and the court of appeals for federal capital cases. The state data except California are from Latzer and Cauthen.[4] The California and federal data are from the Alarcon database.[5] The cases included are those decided by the court in the calendar years 1992 through 2002, inclusive.

The 14 states in the Latzer and Cauthen study were chosen to be representative of the states with active death penalties.[6] Most states have total appeal times averaging in the range of about two to four years. The federal courts fall in this range as well. California is an extreme outlier, with a median time over eight years. Virginia shows what is possible when the court puts a priority on expeditious handling, with a median total time of less than a year.

Number of Death Sentences

The claim has been made that California sentences an excessive number of people to death overall and that the cause of the problem is the system choking on this overload.[7] Here a comparison to other jurisdictions is useful. When comparing numbers, it is important to bear in mind that California is the largest state by a wide margin

1. Alarcon, *Remedies for California's Death Row Deadlock*, 2007 80 So.Cal. L.Rev. 697.
2. Latzer & Cauthen, Justice Delayed? Time Consumption in Capital Appeals: A Multistate Study, U.S. Department of Justice, National Institute of Justice, available at <*http://www.ncjrs.gov/pdffiles1/nij/grants/217555.pdf*> (last visited Apr. 22, 2008).
3. California Department of Corrections and Rehabilitation, Inmates Executed, 1978 to Present, available at <*http://www.cdcr.ca.gov/Reports_Research/Inmates_Executed.html*> (last visited Apr. 22, 2008).
4. See Latzer, *supra*, note 2.
5. See Alarcon, *supra*, note 1.
6. Latzer, *supra*, note 2 at p. 19.
7. Statement of Lawrence C. Marshall to the California Commission on the Fair Administration of Justice (Jan. 10, 2008), transcript available at <*http://www.ccfaj.org/rr-dp-expert.html*> (last visited Mar. 22, 2008).

Figure 2

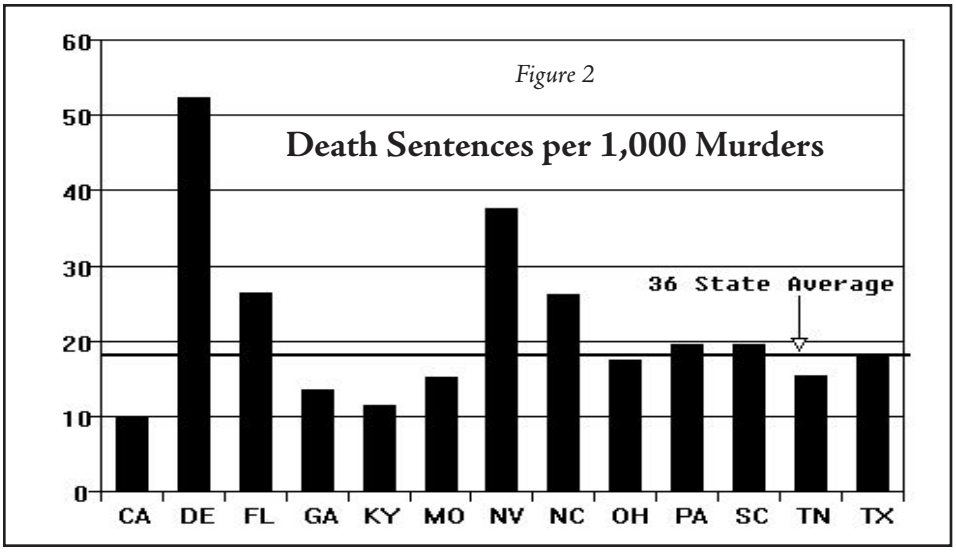
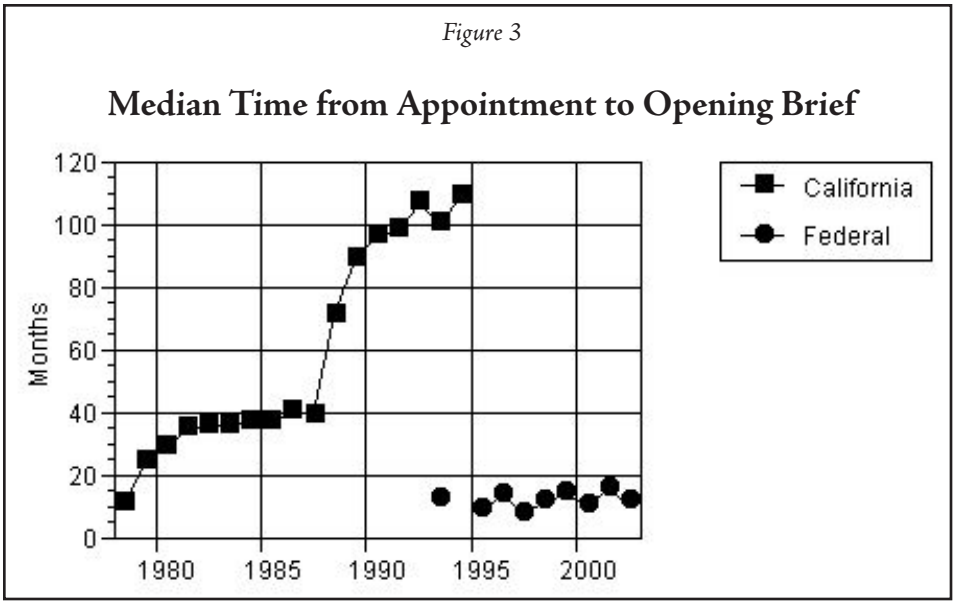


Figure 3



and has by far the greatest number of homicides. For 2006, California alone had over 1/7 of the nation's homicides and nearly double the number of Texas, the second-largest state.[8]

The most meaningful figure for comparing state capital sentencing is the number of death sentences rendered per 1000 homicides.[9] Figure 2 illustrates this ratio for 13 selected states for the period 1978–2004. The horizontal line in the figure shows the average for the 36 states that had capital punishment during most or all of this period. (New York and Kansas are excluded because they only had active capital punishment laws during a small portion of the period.) Contrary to myth, Texas is very close to the average of 18. Most importantly for this purpose, California's death sentencing rate is far below the average, at only 10 death sentences per 1,000 homicides.

Far from being excessive in its imposition of the death penalty, then, California actually uses it much less than most death penalty states. Given the size and resources of the state, this number of cases should not be an excessive burden if the caseload is properly managed. There is one point in the system where absolute numbers rather than rates do matter, however. If all death penalty appeals must go to a single court, as is presently the law in California and most states, then the number of cases to be handled by that one court must be considered. Even here, though, California's caseload is not unique. Both Florida and Texas have had more capital cases than California, and a single court reviews all capital cases in those states. If the single-court bottleneck were an overwhelming problem, it could be dealt with by diverting a portion of the load, as the California Supreme Court has proposed. The fact that the Florida Supreme Court has been able to hear and decide a larger number of cases on direct appeal without the excessive delay that characterizes California direct appeals indicates that such a diversion is not essential.

The premise that California's death penalty appeal backlog is due to an excessive number of death sentences is false. To find the source of the backlog, we must look elsewhere. Again, comparisons with other jurisdictions are useful.

Time to File Brief

The time from sentence to decision on direct appeal is made up of a series of steps, including appointment of counsel, certifying the record, briefing, oral argument, and decision by the court. During the period of the Latzer and Cauthen study, California capital cases had a median time of 11 months for appointment of counsel, 62.5 months from appointment to the opening brief (which includes the time for certifying the record), 14 months for the other briefs,

8. U. S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, <*http://bjsdata.ojp.usdoj.gov/dataonline/Search/Crime/State/TrendsInOneVar.cfm*> (query run Apr. 3, 2008).
9. The denominator is the FBI's category of "murder and non-negligent manslaughter," which includes first- and second-degree murder and voluntary manslaughter but not involuntary or vehicular manslaughter. Except for a few "depraved heart" second-degree murders and the rare unintentional felony murders, these are all intentional killings.

and 16 months from the last brief to the opinion. This section will focus on the longest of these intervals, appointment to the filing of the appellant's opening brief.

This interval is not separately broken out in the Latzer and Cauthen study, but it can be computed for the federal courts from the data in the Alarcon database. Figure 3 shows the time in months from appointment of appellate counsel to the filing of the appellant's opening brief in capital cases in the California Supreme Court and the United States Courts of Appeals by year of judgment in the trial court. The California data stop at year 1994, because after that year a substantial fraction of the cases have not yet been briefed. Including years with a large number of unbriefed cases would introduce a sampling bias, as the cases in the sample are necessarily those briefed more quickly than those excluded.[10] In some federal cases there is no order appointing counsel in the appellate docket, probably because trial counsel continued representing the defendant on appeal without a new appointment. For these cases, the briefing time was calculated from the notice of appeal.

Two facts are apparent from the figure. First, except for a small number of cases in the very early years, California cases have always taken much longer to brief than federal cases. Second, and most curiously, there is a quantum leap in the time taken in just three years in the late 1980s.

No revolutionary change in the law of capital punishment occurred in the late 1980s to explain such a jump. It was 10 years earlier that the Supreme Court had mandated "that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."[11] The major legal issues regarding the constitutionality of the death penalty law were largely hammered out before, not after, this period.

What did happen in 1987, of course, was a change in the California Supreme Court. Prior to the election of 1986, the state high court had been extremely hostile to capital punishment. In one case, for example, the court declared a provision of the state's death penalty law unconstitutional despite the fact that it had been copied verbatim from language expressly approved by the United States Supreme Court.[12]After the voters had had enough of such result-oriented jurisprudence, they removed three of the justices, and they were replaced by others who upheld the law as written. The number of capital cases reversed dropped sharply.

The coincidence between the increase in affirmance and a tripling of the time to write briefs raises a strong suspicion that the increased briefing time results not from any requirement of effective assistance but from a collective intent to bog down the system. Whether this is the intent or not, this is the effect, and it is difficult to see any legitimate reason for the sudden increase or for taking so much longer in California than in other jurisdictions.

California's death penalty law is no more complicated than the federal law or the law of the typical state. The major legal issues turn on the United States Supreme Court's Eighth Amendment jurisprudence, which is the same nationwide.

For the federal capital cases in the Alarcon database for which information on the length of the brief is available, the median brief was a little over 100 pages.[13] In California, it is not unusual for briefs to reach 400 pages in capital cases. Briefs of this length are not necessary. They are not good advocacy.[14] Their effect—possibly intentional—is simply to cause delay through the time required to write them, to answer them, and to decide the plethora of issues presented in them.

The overall problem of delay in review of capital cases is complex, and some of the solutions may involve difficult choices. As to one component of the delay, though, the solution is simple. If a 100-page brief written in one year is effective appellate advocacy in federal courts, there is no reason it would be ineffective in California courts. We should impose some reasonable limits on the length of briefs and the time to write them, and enforce those limits. We have tolerated this excess on appeal for too long.

Kent Scheidegger has been the Legal Director of the Criminal Justice Legal Foundation since December 1986. He has written more than 100 briefs for cases before the United States Supreme Court. Mr. Scheidegger is the Immediate Past Chairman of the Criminal Law and Procedure Practice Group of the Federalist Society and has served on the group's executive committee since 1996.

10. For example, for sentences imposed in 2000, the median time from appointment to opening brief is 35 months, but only three of 23 have been briefed and included in that calculation. When the other 20 have been briefed, the median time will certainly be much longer.
11. *Lockett v. Ohio* (1978) 438 U.S. 586, 604 (plur. opn.).
12. *People v. Superior Court (Engert)* (1982) 31 Cal. 3d 797, 806; *Proffitt v. Florida* (1976) 428 U.S. 242, 255–256 (lead opn.).
13. This information was obtained from the PACER system for 31 cases. Briefs measured in pages had a median length of 104.5 pages. Those measured in words had a median length of 26,430 words, which is 105.7 pages at 250 words per page. The conversion factor was deduced by counting words in Criminal Justice Legal Foundation briefs prepared in accordance with the Federal Rules of Appellate Procedure.
14. Statement of Honorable Gerald Kogan, retired Chief Justice of Florida, to the California Commission on the Fair Administration of Justice (Jan. 10, 2008), transcript available at <*http://www.ccfaj.org/rr-dp-expert.html*> (last visited Apr. 22, 2008). See also *Jones v. Barnes* (1983) 463 U.S. 745, 753 (briefing every conceivable issue is neither necessary nor desirable; selectively briefing strongest points is better advocacy).