Topic Covered: **Would You Bet Your Life On It? The Death Penalty Revisited.**

Author: Sandra D. Delgado

Would You Bet Your Life On It? The Death Penalty Revisited.

STATUTE: The California Death Penalty Statute, California Penal Code §190 quoted:

"Every person guilty of murder in the first degree shall be punished by death, imprisonment in the state prison for life without the possibility of parole, or imprisonment in the state prison for a term of 25 years to life. The penalty to be applied shall be determined as provided … After having heard and received all of the evidence, and after having heard and considered the arguments of counsel, the trier of fact shall consider, take into account, and be guided by the aggravating and mitigating circumstances referred to in this section, and shall impose a sentence of life without the possibility of parole if the trier of fact concludes that the aggravating circumstances outweigh the mitigating circumstances."

QUESTIONS:

I. Are state laws without any standard on how one shall assign the death penalty unconstitutional and deprive effective due process on the defendant?

II. Are laws defining behavior and mental dysfunction failing under Death Penalty Laws?

III. Has public policy shifted on the Death Penalty Issue?

HYPOTHETICAL STATEMENT FACTS

If we take a hypothetical situation that is happening in the United States more often than we think; we will see a gap currently not being addressed in law today. A hardworking family man, John Defendant, with no prior felony convictions killed three people in his hometown. He first kills a Sheriff who comes to his door to serve an arrest warrant in a misdemeanor case, on which a bond set for $100. He then kills Joe and Jenny Smith, neighbors of his who had recently sued him for a dog bite. On this simultaneous rampage, he took the slained Sheriff's car and proceeds to ram his neighbor's car, a police vehicle and his own car. This irrational and violent outburst ends up in a shootout with the police for which John Defendant ends up with a gunshot head wound and blind in one eye. John's history of violence is limited. During John's adolescence he got into the occasional fight in school, but has not ever reached the level of aggression like he did the day of the murders. Past behavior described by neighbors, friends and ex-wife was that John was helpful in the community, sometimes assisting the elderly when needed, and a good friend and neighbor.

In a circumstance like this, the defendant most likely will be evaluated by mental health experts. Mental health experts' evaluations of such type of conduct have suggested this type of event occurs due to some major mental or behavioral disorder. If the Defendant claims Insanity and the jury finds him guilty of First Degree Murder and other crimes, a Judge may then apply the Death Penalty in the State of California.

John has seen several doctors. John has been interviewed by a State psychiatrist and psychologist who conducted forensic examinations of John, who cooperated throughout the investigation. After discussing John's history with the decedents and listening to stories about John's neighbors' always having it out for him, both doctors conclude John is not delusional, but suffers from paranoid personality disorder and anti-social personality disorder. These two findings are based on the defendant's pattern of inner beliefs and behaviors that markedly deviate from the expectations of society. One example is John never kept his money in the bank because he believed the bank was deceiving him.

A. PRELIMINARY ANALYSIS

Do we have adequate information to legally decide the death of another? According to prior case appeals, there have been an alarming number of overturned capital punishment cases for improper conduct and inadequate due process. Qualified counsel and an informed jury are of the greatest importance especially when dealing with capital punishment cases. In order to alleviate wrongful convictions and executions, this issue should be addressed by every state authority. Implementing minimum trial counsel standards in capital cases is a start. Most states have designated some trial counsel standard in accordance with the American Bar Association, but is that enough? A committee review could ensure only those with the proper ethical conduct (including discrimination), forensic knowledge and trial experience will take on these prominent cases providing a modern checks and balances system. The United States as a whole needs to get better and work smarter when it comes to Death Penalty laws. In *Kansas v. Marsh*, 548 U.S.____ (2005). The judge said "stricter scrutiny must occur in death penalty cases because of the repeated exonerations like never before." Death Penalty Law continues to fail and the time is now to re-examine our reasoning. During his inauguration speech President Barak Obama said "the earth has shifted beneath us. Yesterday's arguments no longer apply today." Barak Obama, United States President, Address, Inauguration Speech, (Jan. 20 2009).

I am not convinced one who takes the life of another, takes their life without some aberrant thinking pattern, behavioral or mental. One who has a disorder, especially one which he cannot control, as such should be taken from society; however, I do not believe death is the answer. We currently treat psychological disorders of anxiety, stress, depression, pain; why can we not treat a disorder like violence, of which one may or may not be able to control? Unfortunately, in many cases of circumstance, we do not know to what extent a person can control their paranoid delusions and violent tendencies causes by mental and behavioral disorders. Sometimes too, we do not find out the extent of a person's sickness until something tragic has happened, i.e. suicide, homicide, or other grave incidents that can likely occur. When someone snaps into Schizophrenia, some incidents give us a notion that that person needs psychiatric help. There needs to be more

analysis when a person succumbs under severe mental and behavioral disorders rather than putting one to death.

If a doctor concludes the defendant is suffering from behavioral disorders, but is not legally insane, John cannot use the insanity defense. These particular behavior disorders are considered serious diagnosis, which cannot be made simply by establishing a person got into the usual fight at school. Without the insanity defense, a jury can find John guilty of first degree murder.

Even if defense presents a number of family and friends, employers and co-workers to testify to his moral character and positive accomplishments as mitigating factors, a judge could still find the mitigation insufficient and apply the Death Penalty.

B. Historical Facts, Timeline and Procedure on the Death Penalty in California

By 1872 the state of California codified Capital Punishment (Cal. Penal Code.) Executions were made legal in state prisons only by 1891. The earliest state execution—a hanging, occurred in 1893. Not until 1937 was hanging replaced by the gas chamber. Between years 1967 and 1992, no executions occurred. (California Department of Corrections and Rehabilitation, *Research Reports Key Events and Fact Sheets*, 2009)[1]. California leaders during those periods in California included a Republican Governor, Ronald Reagan; a Democratic Governor, Jerry Brown; and Republicans George Deukmejian and Pete Wilson. Some interesting decisions during those times comprise the 1972 case *Furman v. Georgia*[2] and the 1976 case *Woodson v. North Carolina*[3]. The Supreme Court decided the death penalty cruel and unusual punishment in breach of the state constitution. Then *Gregg v. Georgia*, 428 U.S. 153 (1976), 1977 brought the death penalty back under a different law incorporating evidence of mitigation, special circumstances, and life imprisonment without parole (see Briggs Initiative, 1978 defining special circumstances)[4]. The Supreme Court has upheld state statutes that mitigating

[1] www.cdcr.ca.gov/reports_research/historycaptial.html

[2] 408 U.S. 238 (1972)
[3] 428 U.S. 280, 304 (1976)
[4] California State Senator George Deukmejian drafted the statute currently in effect defining a special circumstance where the Death Penalty is applied when: "Murder committed intentionally and for financial gain; Murder where the defendant was previously convicted of first- or second-degree murder; Multiple murders; Murder with a hidden destructive device; Murder committed in an attempt to evade arrest or escape from custody; Murder through the mails with a destructive device; Murder of an on-duty peace officer; Murder of an on-duty federal agent; Murder of an on-duty fireman; Murder of a witness to a crime to prevent their testimony in a criminal proceeding; Retaliatory murder of a prosecutor; Retaliatory murder of a judge; Retaliatory murder of an elected official; Murder that is especially heinous, atrocious, or cruel1; Murder committed by someone lying in wait; Murder committed because of race, color, religion, nationality, or country of origin; Murder during or directly after the commission of robbery, rape, burglary, kidnapping, arson, and other designated felonies; Murder involving torture; Murder by poison." http://www.rosebirdprocon.org/pop/DeathPen.htm. See also Uelmen, Gerald, *California Death Penalty Laws and the California Supreme Court: A Ten Year Perspective*, prepared for the Senate Committee on Judiciary of the California Legislature (1996).

factors are to be considered by a jury: (*Gregg v. Georgia*, *Proffitt v. Florida*[5], *Jurek v. Texas*[6]). In 1978 the *Lockett v. Ohio*, 438 U.S. 586, decision further has refined what mitigating factor means by requiring that all aspects of a "defendant's character and record be considered before imposition of the death penalty."

In 1992, another execution occurred and legal injection is added as an acceptable and legitimate method (California's sole form of execution was by "administration of a lethal gas." Cal. Penal Code § 3604). Shortly after the execution, the State amended § 3604, adding "lethal injection as an alternative means of execution." It was not until 1994 that the ruling the gas chamber is cruel and unusual. (United States Supreme Court overturned *Fierro v. Terhune*, 147 F.3d 1158, declaring lethal gas unconstitutional).

Today, it is legal in 16 states to execute via legal injection. Multiple forms of Capital Punishment are available in more states: i.e. Arizona, California, Missouri, and Wyoming use the gas chamber a method of execution (as of Feb, 2009). States such as New Hampshire, Washington and Delaware have authorized hanging as an acceptable execution method (as of Feb, 2009). Idaho, Oklahoma, and Utah authorize death by firing squad as a process to apply capital punishment (as of Feb, 2009). Interestingly, though, ½ of executions to date have taken place in Texas and Virginia.

C. There are Too Many Unanswered Questions Not to Doubt the Application of the Death Penalty.

Attorney Experience and Knowledge

The 2009 California Rules of Court (Rule 4.117) provides a checklist of General Qualifications and Designation of Counsel in Capital Punishment cases; where there is no interpretation or bars that measure the ethical standards. The rule is as follows:

> "**Rule 4.117. Qualifications for appointed trial counsel in capital cases** (a) **Purpose** This rule defines minimum qualifications for attorneys appointed to represent persons charged with capital offenses in the superior courts. These minimum qualifications are designed to promote adequate representation in death penalty cases and to avoid unnecessary delay and expense by assisting the trial court in appointing qualified counsel. Nothing in this rule is intended to be used as a standard by which to measure whether the defendant received effective assistance of counsel. **(b) General qualifications** In cases in which the death penalty is sought, the court must assign qualified trial counsel to represent the defendant. The attorney may be appointed only if the court, after reviewing the attorney's background, experience, and training, determines that the attorney has demonstrated the skill, knowledge, and proficiency to diligently and competently represent the

[5] 428 U.S. 242 (1976)
[6] 428 U.S. 262 (1976)

defendant. An attorney is not entitled to appointment simply because he or she meets the minimum qualifications.

(c) Designation of counsel (1) If the court appoints more than one attorney, one must be designated lead counsel and meet the qualifications stated in (d) or (f), and at least one other must be designated associate counsel and meet the qualifications stated in (e) or (f). (2) If the court appoints only one attorney, that attorney must meet the qualifications stated in (d) or (f). (Subd (c) amended effective January 1, 2007.)

(d) Qualifications of lead counsel To be eligible to serve as lead counsel, an attorney must: (1) Be an active member of the State Bar of California; (2) Be an active trial practitioner with at least 10 years' litigation experience in the field of criminal law; (3) Have prior experience as lead counsel in either: (A) At least 10 serious or violent felony jury trials, including at least 2 murder cases, tried to argument, verdict, or final judgment; or (B) At least 5 serious or violent felony jury trials, including at least 3 murder cases, tried to argument, verdict, or final judgment;(4) Be familiar with the practices and procedures of the California criminal courts; (5) Be familiar with and experienced in the use of expert witnesses and evidence, including psychiatric and forensic evidence; (6) Have completed within two years before appointment at least 15 hours of capital case defense training approved for Minimum Continuing Legal Education credit by the State Bar of California; and (7) Have demonstrated the necessary proficiency, diligence, and quality of representation appropriate to capital cases. (Subd (d) amended effective January 1, 2007.)

(e) Qualifications of associate counsel To be eligible to serve as associate counsel, an attorney must:

(1) Be an active member of the State Bar of California; (2) Be an active trial practitioner with at least three years' litigation experience in the field of criminal law; (3) Have prior experience as: (A) Lead counsel in at least 10 felony jury trials tried to verdict, including 3 serious or violent felony jury trials tried to argument, verdict, or final judgment; or (B) Lead or associate counsel in at least 5 serious or violent felony jury trials, including at least 1 murder case, tried to argument, verdict, or final judgment; (4) Be familiar with the practices and procedures of the California criminal courts; (5) Be familiar with and experienced in the use of expert witnesses and evidence, including psychiatric and forensic evidence; (6) Have completed within two years before appointment at least 15 hours of capital case defense training approved for Minimum Continuing Legal Education credit by the State Bar of California; and (7) Have demonstrated the necessary proficiency, diligence, and quality of representation appropriate to capital cases. (Subd (e) amended effective January 1, 2007.)

(f) Alternative qualifications The court may appoint an attorney even if he or she does not meet all of the qualifications stated in (d) or (e) if the attorney demonstrates the ability to provide competent representation to the defendant. If the court appoints counsel under this subdivision, it

must state on the record the basis for finding counsel qualified. In making this determination, the court must consider whether the attorney meets the following qualifications: (1) The attorney is an active member of the State Bar of California or admitted to practice *pro hac vice* under rule 9.40; (2) The attorney has demonstrated the necessary proficiency, diligence, and quality of representation appropriate to capital cases; (3) The attorney has had extensive criminal or civil trial experience; (4) Although not meeting the qualifications stated in (d) or (e), the attorney has had experience in death penalty trials other than as lead or associate counsel; (5) The attorney is familiar with the practices and procedures of the California criminal courts; (6) The attorney is familiar with and experienced in the use of expert witnesses and evidence, including psychiatric and forensic evidence; (7) The attorney has had specialized training in the defense of persons accused of capital crimes, such as experience in a death penalty resource center; (8) The attorney has ongoing consultation support from experienced death penalty counsel; (9) The attorney has completed within the past two years before appointment at least 15 hours of capital case defense training approved for Minimum Continuing Legal Education credit by the State Bar of California; and (10) The attorney has been certified by the State Bar of California's Board of Legal Specialization as a criminal law specialist. (Subd (f) amended effective January 1, 2007.)

(g) Public defender appointments When the court appoints the Public Defender under Penal Code section 987.2, the Public Defender should assign an attorney from that office or agency as lead counsel who meets the qualifications described in (d) or assign an attorney that he or she determines would qualify under (f). If associate counsel is designated, the Public Defender should assign an attorney from that office or agency who meets the qualifications described in (e) or assign an attorney he or she determines would qualify under (f). (Subd (g) amended effective January 1, 2007.)

(h) Standby or advisory counsel When the court appoints standby or advisory counsel to assist a self-represented defendant, the attorney must qualify under (d) or (f). (Subd (h) amended effective January 1, 2007.)

(i) Order appointing counsel When the court appoints counsel to a capital case, the court must complete *Order Appointing Counsel in Capital Case* (form CR-190), and counsel must complete *Declaration of Counsel for Appointment in Capital Case* (form CR-191). (Subd (i) amended effective January 1, 2007; adopted effective January 1, 2004.) Rule 4.117 amended effective January 1, 2007; adopted effective January 1, 2003; previously amended effective January 1, 2004."

Section 4.117 (d) lists the qualifications required for an attorney to handle capital murder cases which is based on the number of years in practice. Experience based on a quantity of years rather than lessons learned maybe misplaced and skew analysis. If someone practices for 15 years and keeps making the similar mistake over and again; or approach the issue in the like manner, is this a standard someone has reasoned strategies and decisions over someone else's life made powerfully and clearly? What if the

experienced lawyer is simply making judgment calls based on how things have been done before; (i.e.) what it takes to win, the politically correct method, or worse, only ones that bear the minimum standards? A human life deserves much more regardless of the crime. A human's life deserves a counsel who will at whatever means possible avoids rash decisions and pressures society poses on them; to be sure an educated counsel knows all levels of the death penalty grounds. And, the accused should not be granted death penalty until every test (including DNA), without reasonable doubt, has passed. Should errors be made upon trial and appeal, the punishment for counsel should be made more severe, or maybe there should be a penalty of some sort. Not merely does a defendant need a deterrent so gross crimes will be evaded, but our Justice system also needs some deterrent in official proceeding discretions so we can effectively convict as well as provide much deeper and complete analysis when it comes to a death penalty sentence.

A hearing was held[7] with the Senate Judiciary Committee featured a discussion regarding the many indigent defendants who are left to rely on our overworked and underpaid public defenders. The importance of the criminal justice process and its stability hinges on how well representation a defendant may get, of which, lately statistic are showing may or may not be adequate[8]. Yet, the under the U.S. Constitution, Sixth Amendment, it is and implied a promise of effective assistance to those who cannot afford counsel of their choice.

In *Strickland v. Washington*, 466 U.S. 668, *; 104 S. Ct. 2052, **; 80 L. Ed. 2d 674, ***; 1984 U.S. LEXIS 79, the court held "right to counsel is the right to the effective assistance of counsel, and the benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. The same principle applies to a capital sentencing proceeding…" Here the suspect's lawyer had failed to deliver a psychiatric report and had failed to complete and comprehensive investigation. The Sixth Amendment provides an avenue where should a defendant receive inadequate representation, counsel will be in violation and consequently the case being dismissed or in a death penalty case like this the sentence be overturned.

In *Stanley v. Zant*[9], the defendant on death row claimed inadequate representation when his attorney failed to promote character evidence at trial. The analysis lies on "whether counsel conducted a reasonable pretrial investigation and whether counsel's failure to investigate certain lines of defense was part of a strategy based on reasonable assumptions." *Stanley* at 6. The court concluded that without further evidence, counsel

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[7] Patrick Leahy, *The Adequacy of Representation in Capital Cases*, the Subcommittee on the Constitution of the Senate Judiciary Committee, (April 2008). http://judiciary.senate.gov/hearings/hearing.cfm?id=3253.

[8] Howard Minz, *Death sentence reversals cast doubt on system COURTROOM MISTAKES PUT EXECUTIONS ON HOLD*, (2002). http://www.deathpenaltyinfo.org/node/534#1.

[9] 697 F.2d 955, *; 1983 U.S. App. LEXIS 30642.

was not inadequate since counsel was using a tactical method of representation in avoiding character evidence.

Conclusion

When it comes to attorney competency, Rule 1.1 of the American Bar Association Rules of Professional Responsibility, Competence provides "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."[10] Even though competency is a core ethical standard, the issue of lawyers taking on capital cases for which they are not equipped, there are few disciplinary proceedings focus and application in such practices. The people value specialized knowledge while handling capital case trials and the rules of bar associations do not fill the gap of lack of insight.

Deterrence.

Supporters of the Death penalty say in certain cases justice demands a death sentence and further deters crimes as such which in turn ultimately saves lives. Quoting the eye-for-an-eye religious value is often seen, "life for life, eye for eye, tooth for tooth". (see *Sandoval v. Calderon*, 241 F.3d 765, *; 2000 U.S. App. LEXIS 35371, **; 2001 Cal. Daily Op. Service 1494; 2001 Daily Journal DAR 1889; *People v. Wash*, 6 Cal. 4th 215, *; 861 P.2d 1107, **; 24 Cal. Rptr. 2d 421, ***; 1993 Cal. LEXIS 5807).

In addition, to any deterrent effects, supporters further point out those executed will obviously never commit another murder. Those opposed say there is no credible statistical evidence supporting the claim that crimes are deterred by execution and that capital murders can easily be prevented by sentencing one to a life sentence without parole, as then the accused will no longer be among the community.

Numerous studies have been performed over the course of the Death Penalty Debate. All conclude, while arbitrary and subjective, the Death Penalty creates a deterrence that only seemingly saves lives. (See H. Naci Moren, University of Colorado, *Getting off Death Row: Commuted Sentences and the Deterrent Effect of Capital Punishment*, Journal of Law and Economics, October 2003; Dezhbaksh, Hashem, Rubin, Paul H., Shepard, Joanna M., *Does Capital Punishment Have a Deterrent Effect , New Evidence From Post-moratorium Panel Data*, American Law and Economics Review, 2003). A pair of Sociologists wrote and essay and stated: "In the early 1970s, the top argument in favor of the death penalty was general deterrence. This argument …suggests that we must punish offenders to discourage others from committing similar offenses; we punish past offenders to send a message to potential offenders... over the last two decades more and more scholars and citizens have realized that the deterrent effect of a punishment is not a consistent direct effect of its severity, after a while, increases in the

[10] http://www.abanet.org/cpr/mrpc/rule_1_1.html

severity of a punishment no longer add to its deterrent benefits. In fact, increases in a punishment's severity have decreasing incremental deterrent effects" (Borg and Radalet, *The Changing Nature of Death Penalty Debates*, Annual Review of Sociology Essay, Aug. 2000).

Comparisons between states with the Death Penalty and those without do not have a one-to-one ratio in murder rates.[11] In fact, states with a Death Penalty have higher murder rates or sometimes the same. So here, the only persuasive argument I see is why spend taxpayer dollars for a law that implements unneeded administration costs for a process that has little to no effect? If the goal is to decrease murder rates, the argument that the Death Penalty deters crime, fails.

Cost.

The State of New Jersey has abolished the Death Penalty due to the costly jurisprudence. Over the course of the previous thirty years, "California has sentenced 813 to death." Borenstein, Daniel, *Can California Really Afford the Death Penalty?*, (2008) http://www.alamedadeathpenalty.org/news%20articles/2008.11.17%20Daniel%20Borenstein%20Opinion.pdf. *Borenstein* points out costly expenses; "The elapsed time between judgment and execution in California is 20 to 25 years, according to a report this year by the California Commission on the Fair Administration of Justice. That time span exceeds every other death penalty state in the nation…[a]bolishing the death penalty, the commission concluded, would save well over $100 million a year." Borenstein lists an example sketching an incredible picture of unnecessary spenditure: "the commission estimated, the cost of a trial increases by at least $500,000 when the defendant's life is at stake, and confinement on death row adds $90,000 per inmate to the normal annual incarceration bill of $34,150."

So you can see, many try to justify analytically, forensically, but no matter how you spin the data model, the elimination of a human life is not convincing on any grounds. (See also, Donohue, John J., Wolfers, Justin, *Uses and Abuses of Emprical Evidence in the Death Penalty Debate*, Stanford Law Review, December 2005). There are multiple roads leading to the same result. I am not satisfied we have explored every road possible—something I believe our Constitution demands in order to preserve a human life. I am sure expending our time and efforts exploring every possible avenue, including chemically related therapy inducing new behaviors and cognitive states are reasonable.

[11] http://www.deathpenaltyinfo.org/deterrence-states-without-death-penalty-have-had-consistently-lower-murder-rates

I. Are state laws without any standard on how one shall assign the death penalty unconstitutional and deprive effective due process on the defendant?

Any court's authority to reduce a death sentence should be carefully applied. But under the Constitution's Eighth Amendment[12], the desire to give a condemned defendant's life should be exercised whenever that penalty is "found to be inappropriate… in view of any relevant mitigating factors" as suggested in *Ring v. Arizona*, 536 U.S. 584 (2002). I believe this challenges the constitutionality of the Death Penalty statute due to the optional value and due process analysis a jury must provide.

The *Kansas v. Marsh* case offers facts about Michael Lee Marsh II who convicted of murder, including a mother and her daughter. During sentencing the jury found equal mitigating and aggravating factors. The Kansas capital punishment statute provides that if mitigating and aggravating factors weigh equally, the death penalty is authorized method of sentence. Marsh's death sentence revisited by the Supreme Court ruled the tie-breaker rule faulty and unconstitutional on the basis there should be some "fundamental fairness when life or death is at issue." The United States Supreme Court reversed this ruling with Ginsberg, Souter, Stevens and Breyer dissenting.

Ring provides the findings that extenuating factors are not sufficient to override the aggravating factors must be found "beyond a reasonable doubt." This means the decision that a defendant should be put to death is based on a true finding, by the jury. Facts in *Ring* involve a murder during an armed robbery where Ring was found guilty of a Felony Murder for killing the driver of an armored van and stealing $562,000 plus. Ring did not have a history of serious crimes. Ring's death penalty sentence was reversed (by Justice Ginsberg, with Justice O'Conner dissenting) due to the fact a jury should determine sentencing factors rather than the judge.

In support, is California case *People v. Myers*, 43 Cal.3d 250, 233 Cal.Rptr. 264, 729 P.2d 698 (1987). The facts in *Myers* included multiple armed robberies where one of them led to the death of a patron in a convenience store. The defendant here had a long history of violent behavior from childhood through adolescence and adulthood, including snatching purses and rape. *Myers* involves a discussion regarding disparate impact[13] (see *Furman v. Georgia*, 408 U.S. 238, 364-65 (1972) assigning the death penalty based on race is unconstitutional), which I will not go into in this paper. The key factor here is

[12] The Eighth Amendment (Amendment VIII) to the United States Constitution is the part of the United States Bill of Rights which prohibits the federal government from imposing excessive bail, excessive fines or cruel and unusual punishments. The phrases employed are taken from the English Bill of Rights of 1689. In *Robinson v. California*, 370 U.S. 660 (1962), the Supreme Court of the United States ruled the Cruel and Unusual Punishments Clause to be applicable to the states via the Fourteenth Amendment. (http://en.wikipedia.org/wiki/Eighth_Amendment_to_the_United_States_Constitution)

[13] Ronald J. Tabak, *Racial Discrimination in Implementing the Death Penalty*, American Bar Association (1999), http://www.abanet.org/irr/hr/summer99/tabak.html; and U.S. Gen. Accounting Office, *Death Penalty Sentencing: Research Indicates Pattern of Racial Disparities* (1990).

jurors are responsible in determining the factors involved. Okay, so a jury consists of a pool of ordinary and rational persons. People who have typically not received training and knowledge to support a deep analysis using cautionary reasoning, a baseline foundation of the broad picture, or knowledge about all areas of impact (i.e. deterrence, cost, etc). And these people are making a judgment call about one individual's life. In *Myers*, it was found "that a juror who believes that the death sentence is not appropriate, may reasonably understand such an instruction to require him to vote for a sentence of death." The word standing out here is '**may**.' Whether a jury may understand is not solid enough for me when a life is at stake. If stricter scrutiny is commanded, then ensuring a jury does in fact understand or **shall** understand should be commanded.

Another case supporting this kind of factual finding is found in *Johnson v. State*, 59 P.3d 450 (Nev. 2002). There, the Nevada Supreme Court held that a finding comparable to our facts was a factual in nature that it had to be found by a jury and proved by the State beyond a reasonable doubt.

In *Johnson*, the jury deadlocked on the issue of whether the aggravators outweighed mitigators, throwing the issue for consideration by a three-judge panel, which did find that aggravation outweighed mitigation and thus sentenced the accused to death. Johnson, 59 P.3d at 458. The Supreme Court in Nevada held that permitting these findings to be made by the group of judges instead of the jury violated the Sixth Amendment. This Court said: "Nev. Rev, Stat. 175.556(1) provides that when a jury in a capital case cannot reach a unanimous verdict upon the sentence, a panel of three judges shall conduct the required penalty hearing to determine the presence of aggravating and mitigating circumstances, and give sentence accordingly. The court concluded under *Ring* this provision violates the Sixth Amendment right to a jury trial."

In further support, an earlier case, the US Court of Appeals, 9th Circuit decided without a jury, to find an aggravating circumstance necessary for imposing the death sentence violated the right to a jury trial. *Schriro v. Summerlin*, 542 U.S. 348 (U.S. 2004). Facts in *Schriro* involve defendant killing a woman and crushing her skull in and left in the trunk of her car. Defendant here had a prior heinous felony offense unlike our defendant in our fact pattern, but yet was not given the death sentence.

Other cases have declared the same unconstitutional measure like *McKoy v. North Carolina,* 494 U.S. 433 (U.S. 1990) where a death sentence was overturned and the jury was not allowed to consider all mitigating factors. And, in another jurisdiction upholding a death sentence because the statute did not limit the jury's disposition and allowing the jury to assess and provide validity "to all relevant mitigating evidence and to weight the aggravating circumstances against the mitigating ones." *Blystone v. Pennsylvania*, 494 U.S. 299 (U.S. 1990).

In determining a true sentence under the Federal Death Penalty Act, the jury must consider whether any aggravating factors alleged by the Government are proved beyond a reasonable doubt, and whether mitigating factors proved by the defendant under the

traditional civil standard, preponderance of the evidence. "A finding of a mitigating factor may be made by one or more members of the jury, and it may be considered regardless of the number of jurors who concur. If at least one mitigating factor is found, the jury then decides whether all the aggravating factors found to exist sufficiently outweigh the mitigating factors found to exist." *Davis v. Mitchell*, 318 F3d. 682, (6th Cir. Ohio 2003), 18 U.S.C.S. §3593(e). "Special findings must be returned identifying any aggravating and mitigating factors found to exist." *Davis* at id., 18 U.S.C.S. §3593(d). A more recent decision continues to advance the jury finding facts in a death sentence case; "Based upon its consideration of the aggravating and mitigating factors, the jury by unanimous vote recommends whether the defendant should be sentenced to death, to life imprisonment without possibility of release, or some other lesser sentence." See United *States v. Green* , Case Number: 5:06-cr-00019, Memorandum Opinion, Judge Thomas B. Russell (Aug. 2008), http://207.41.14.15/3-06-00230/pdf/entry145.pdf, quoting *United States v. Mitchell*, 502 F.3d 931 (9th Cir. Ariz. 2007).

The Eighth Amendment law to date has accepted the principle that statutory aggravating factors cruel-and-usual application of the death penalty. If you compare *Furman v. Georgia*, with *Gregg v. Georgia* you see the selection process remains by jury in California, and is cannot be a valid determination that a jury will reason and sentence as the Constitution calls for. Within the many future capital cases those selected for death are often insignificantly different than those who are spared the death penalty.

Furthermore, not only can we find discrepancies in the application regarding jury decisions, thus depriving our defendant's due process, but we also need a check and balance when we allow these jural discretionary decisions. With our facts at hand with extenuating circumstances of positive life accomplishments, insignificant crime history and because the accused's acts where driven by paranoia and underlying chronic mental and behavioral disorders, the Death Penalty is an excessive and inappropriate punishment and one that has been applied in a similar scenario in several jurisdictions. Here there is no disputing the seriousness of our defendant's crimes, nor can these devastating crimes be minimized in any way. But, in determining the Death Penalty, our courts must properly "consider both the circumstances of the offense and the history of the individual offender."*Woodson v. North Carolina*, 428 U.S. 280 (1976). Again, the discretions still remain unchecked.

Conclusion

With genuine consideration, I do not accept our Founding Father's intended every defendant should receive this sentence. When proper regard is given to our Defendant's life history, and to the usually-bizarre circumstances that occasionally lead to tragic murders, I think it is clear that death is neither appropriate nor required. The looseness of jury decision making deprives Defendant's Due Process and should be called unconstitutional. Also, a death sentence in any situation is always brutal. In *Gregg*, dissenting on the opinion, Justice Brennan and Justice Marshall both adhere to their view

too that "the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments."

II. Are laws defining mental and behavioral dysfunction failing under Death Penalty Law?

Mental and Behavior dysfunction are defined by the American Disabilities Act. There is similar language when describing a person's incapacity under Model Penal Code Insanity Defense. A report by the Task Force on Mental Disability and the Death Penalty[14], written by a group of doctors and lawyers, explains and recommends "people who have a mood disorder with psychotic features might understand the wrongfulness of their acts and their consequences, but nonetheless feel impervious to punishment because of delusion-inspired gradiousity."[15] Based on these reporter's professional opinions, someone who only has Antisocial Personality Disorder should be excluded from getting only a Life Sentence, and thus can be put to Death.[16]

The Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition™ (DSM IV) is a handbook used by professionals in the medical and psychiatric industries to establish levels of psychiatric cognition. In the DSM IV, disorders are characterized from the most serious (Axis I diagnosis) to the least serious (Axis V diagnosis). The Axis I diagnosis include schizophrenia, bi-polar disorder, borderline personality disorder, suicide, post-traumatic stress disorder; all of which are determinable exclusions in Death Penalty cases. There is much debate regarding Axis II disorders which may or may not involve behaviors in which the defendant has realized the wrongfulness in the moment. While courts have said, they will analyze options on a case-by-case basis, it is evident only when there is an Axis I diagnosis or when it is determined an individual is mentally retarded, the Death Penalty is taken off the table. Those wavering somewhere in the middle thus fall through the cracks. In our hypothetical facts, I could conclude our Defendant suffered from Anti-Social behavior which, in several jurisdictions, including California, our Defendant could be put to death. I detect a pattern after examining cases where death is an inappropriate penalty. In these cases, the circumstances of the killing the accused is under extreme mental or emotional disturbance.

Today, our law provides someone with severe mental illness can avoid the Death Penalty under *Adkins v. Virginia*, 536 U.S. 304 (2002). While the term severe described as one who cannot understand the wrongfulness of his crime thus eliminating an indispensable element of mens rea, this interpretation excludes many other less serious disorders –as many medical professionals have defined.[17]

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[14] *A Report of the Task Force on Mental Disability and the Death Penalty*, http://www.apa.org/releases/mentaldisabilityanddeathpenalty.pdf
[15] *Mental Disability and the Death Penalty*, American Psychological Association Press Release Report, April 17, 2007.
[16] See Model Penal Code §4.01 (2), Mental Disease or Defect excluding Responsibility, 2008.
[17] See Talking Points Mental Disabilities and the Death Penalty, National Disability Rights Network , March 28, 2007, www.ndrn.org/issues/cj/Talking%20Points.pdf.

In *Ford v. Wainwright*, 477 U.S. 399 (1986), the defendant convicted of murder in Florida and whose symptoms were similar to Schizophrenia, death sentence was overturned even though Ford suffered from paranoid delusions and was found to appreciate the nature of his actions. In *Clark v. Arizona*, 548 U.S. 735 (2006), the accused claimed he could not know the essence of his acts at the time he was committing them. The Supreme Court upheld the insanity defense. In *Panetti v. Quarterman*, 551 U.S. ____ (2007), the Supreme Court ruled the accused should not be executed if he does not recognize the reason why he was to be executed. Here Panetti held his spouse and daughter hostage while killing his father and mother-in-law. Experts found Panetti suffered from delusions and hallucinations and was convinced he was the devil.

As severe mental disability coupled with a death sentence is becoming an emerging issue, Professor Bruce Winick of the University of Miami Law School prepared an abstract discussing how mental illness has become another category we have failed to appropriately address when the death penalty is applied. "At least five leading professional associations—the American Bar Association (ABA), the American Psychiatric Association (APsyA), the American Psychological Association (APA), the National Alliance for the Mentally Ill (NAMI), and the National Mental Health Association (NMHA)—have adopted policy statements that recommend prohibiting the execution of those with severe mental illness." Bruce J. Winick, *The Supreme Court's Emerging Death Penalty Jurisprudence: Severe Mental Illness as the Next Frontier*, #2008-31, Social Science Research Network Electronic Paper Collection: http://ssrn.com/abstract=1291781; http://www.deathpenaltyinfo.org/new-resources-supreme-court%E2%80%99s-emerging-death-penalty-jurisprudence-severe-mental-illness-next-fronti).

Conclusion

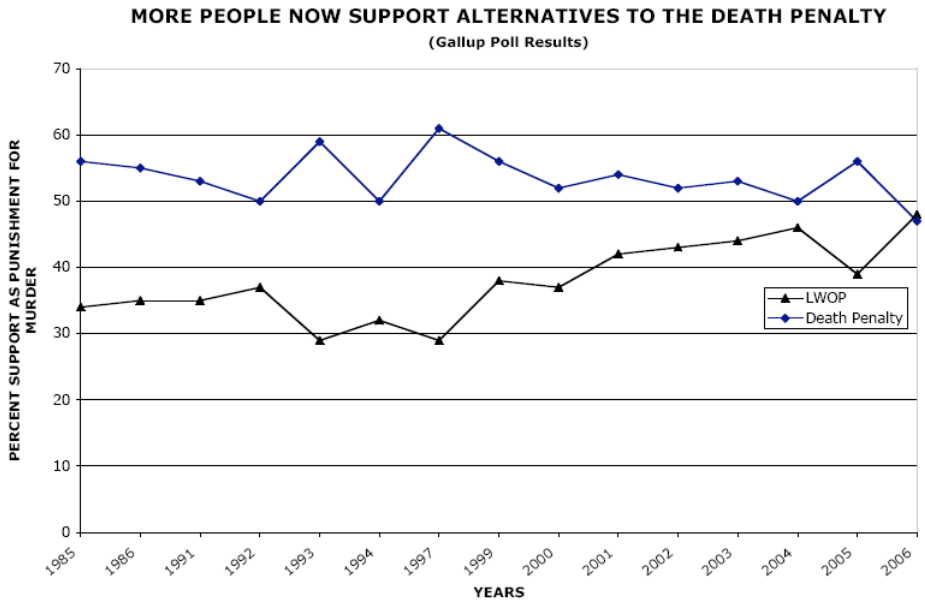
I am Primarily in agreement and alignment with the court's conclusion in *Adkins* and *Wainwright*, since capital punishment for someone who is mentally disabled, in one way or another, I believe is cruel and unusual punishment and hence is prohibited under the Eighth Amendment. How can a person who has no control over his aggression, but may see the essence of what he is doing be deterred from committing that crime again? I believe this outlines another gap in analysis. Due to procedural problems assessing the accused's competency and cognitive health, this exclusion, I believe is unfounded and capricious based on a guess by the medical profession. Therefore, I believe the common definitions of what is considered a psychiatric illness sustaining a death penalty ruling should be re-considered. The emphasis should shift to prevention rather than punishment. I believe where a person is reacting and cannot control his own aggression, this is a problem we should address maybe with medications rather than death.

III. Has public policy shifted on the Death Penalty Issue?

Use of Death Penalty in the United States dates back to colonial times, with the first recorded execution taking place in Jamestown in 1608. Internationally, the United States is a pioneer in using the Death Penalty, side by side China, the Congo and Iran. According to Amnesty International reports, these four nations account for 86% of all executions in one year.

Federal Crime Control is but a central concern, especially at the border states and particularly after September 11th, 2001. There is no doubt crime is a problem to address. However, I do not accept a Death Penalty is an answer. Most are aware of the Timothy McVeigh[18] case, where McVeigh was sentenced to death after bombing a Federal Building in Oklahoma. *McVeigh* portrays a compelling Death sentence case since hundreds died in the bombing. But, I am nevertheless not clear how this helps us.

If you look at the trend in Death Penalty sentencing (see graph below)[19], you can predict the cost in alternate measures are beginning to grow; according to the latest Gallop Poll results in the graph below. The Gallop Poll is an organization that studies global human behavior and reports changes in human character and behavior using the society's best scientists in sociology, psychology, economics and management.



As times and policy changes, we hear more and more complaints about the need for capital defense lawyers and capital defense lawyers complaining they are not given

[18] *United States v. McVeigh*, 918 F. Supp. 1467, 1471 (W.D. Okla. 1996).
[19] http://www.gallup.com/poll/1606/death-penalty.aspx

enough time and resources to adequately discharge their defendants. In Maricopa County, Arizona, defense lawyer James Haas says they are overwhelmed with capital cases and says "there are not enough lawyers who are qualified to take these cases."[20] Lawyers working capital cases must comply with the American Bar Associations standards and requires sufficient time.

There is a strong movement to rescue innocent people who have been sentenced and are currently on Death Row. The Innocence Project[21] is implemented as a teaching clinic in various Law Schools. This Project purpose is to free wrongfully convicted individuals with DNA testing and points to an oversight in forensic discovery. States like Mississippi are enacting laws to counteract the wrongfully convicted; however there is still a shortfall of additional job training, health care and counseling. In Texas, where I live, we had a prisoner convicted of a rape he did not commit and sentenced to Death. Texas Governor, Rick Perry met with his family after DNA results confirmed it was another individual who committed the rape.[22] At my Law School, Thomas M. Cooley Law School, the Innocence Project there effortlessly worked to exonerate Kenneth Wyniemko who walked out a free man June 17th, 2003; and who had been in prison since 1993.

"The impact of innocence and how the concept of wrongful convictions has changed public opinion about the death penalty and in turn affects public policy." Frank R. Baumgartner, Suzanna L. DeBoef and Amber E. Boydstun. *The Decline of the Death Penalty and the Discovery of Innocence*, New York and Cambridge, Cambridge University Press, 2008. Baumgartner and colleagues discuss the issue of the Death Penalty has reached a tipping point.

Baumgartner and colleagues here point out a revised model of decency. The authors state that "the US Supreme Court ruled in *Atkins v. Virginia* in 2002 that it is unconstitutional to execute the mentally retarded, and in 2005 in *Roper v. Simmons*, [543 U.S. 551 (2005)] that it is unconstitutional for states to execute juveniles. The evolving standard of decency, which permeates death penalty discussion, includes the fallibility argument of wrongful conviction and executions. Just recently a de facto nationwide moratorium was created by the Supreme Court as it considered the legality of lethal injection in *Baze v. Rees*, 553 U.S. ___ (2008). The Court ultimately ruled that lethal injection was not a cruel and unusual method of execution. However in its next breath the Court found that executing convicted rapists violates the Eighth Amendment, leaving homicide as the only crime that is death penalty eligible in *Kennedy v. Louisiana*, 554 U.S. ___ (2008)." *Id.*

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[20] See Policy Shift in the Death Penalty overwhelms Arizona Court, New York Times, Wednesday, April 1, 2009.

[21] The Innocence Project is a national and public policy organization committed to exonerating innocently convicted persons through DNA testing. http://www.innocenceproject.org/

[22] For the complete news story, go to http://www.wwlp.com/dpp/news/politics/state_politics/statepolitics_kxan_family_presses_for_meeting_with_perry2286468, WWLP News, 03/30/09.

Backed by the Mental Health America and also strongly by the Catholic Church group, a push for Death Penalty moratorium keeps on. The shift, while maybe a slow movement, towards another moratorium is predicted. One clue is that longtime death penalty supporters are now backing a moratorium. "[T]he announcement from Lt. Gov. Beverly Perdue, a death penalty supporter, that she backed a moratorium was another signal that views on public executions may be shifting." Rob Christensen, *Support for death penalty shakier. It's no longer a sure thing for politicians*, (2007), www.newsobserver.com, http://www.newsobserver.com/politics/story/540380.html.

Conclusion

Change in the status quo of *Furman v. Georgia* to the moratorium between 1972 to 1976 to the reinstatement of the Death Penalty says be are moving into the modern era and we must revise and frame and revolutionize the way we look at Death and the Prisoner. The evolving standards of the Eighth Amendment clearly shows the "progress of a maturing society and one not tolerable of acts traditionally branded as savage and inhuman" as Justice Thurgood Marshall said in *Ford v. Wainwright*, 477 U.S. 399 (1986). I call that the Death Sentence be stopped until we can gain superior understanding and can prove through psychological and sociological research the need, also have better answers to the questions and defeating any deficiencies mentioned here.