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Justice Carter's Role in the Caryl Chessman Cases: Due Process Matters

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The Great Dissents of the "Lone Dissenter"

Justice Jesse W. Carter's Twenty Tumultuous Years on the California Supreme Court

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Justice Carter's Role in the Caryl Chessman Cases: Due Process Matters

By Susan Rutberg[*]

Introduction

Caryl Chessman was a legendary figure both in California capital punishment history and in the history of the death penalty in our nation. Sentenced to death in Los Angeles in 1948 at the age of 27, for crimes involving sexual assaults, Chessman waged a twelve-year struggle to save his life and to end capital punishment in this state. Hardly a poster boy for innocence, Chessman had spent much of his adult life incarcerated for robberies and car thefts. Yet, before he was executed, this career criminal managed to alert much of the world to the issues surrounding capital punishment. While on San Quentin's death row, despite prison regulations forbidding inmates from writing for publication, Chessman wrote and published four books.[1] The first of those books, a memoir entitled *Cell 2455, Death Row*, sold half a million copies and was published in 18 languages.[2]

In the 1950s, while Caryl Chessman's appeal was pending, California's prison system operated from the enlightened point of view that individual offenders could be successfully rehabilitated through education and psychotherapy. The state's scheme of indeterminate sentencing meant that parole boards, rather

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1. Theodore Hamm, Rebel and a Cause: Caryl Chessman and the Politics of the Death Penalty in Postwar California, 1948–1974 at 5–7, 75, 82 (University of California Press, 2001). Chessman's published works are: *Cell 2455, Death Row* (1954), *Trial by Ordeal* (1955), *The Face of Justice* (1957); and a novel, *The Kid Was a Killer* (1960).

2. Clark Howard, *The True Story of Caryl Chessman*, available at http://web.archive.org/web/20010331051545/www.crimelibrary.com/classics3/chessman/38.htm.

than judges, determined whether an offender had reformed and was suitable for release.[3] To many among Chessman's wide readership, his ability to articulate powerful arguments against state sanctioned killing seemed proof positive of his rehabilitation. It was the belief that Chessman had become a productive human being while incarcerated, rather than a belief in his innocence, that convinced many to oppose his execution. When Caryl Chessman was gassed to death in 1960, protestors gathered outside the gates of San Quentin and at U.S. embassies around the world.[4] The fight to spare Chessman's life was described by one historian in 1971 as "the most important attack on capital punishment in American history."[5]

Chessman's legal claims came before California Supreme Court Justice Jesse W. Carter five times. On two occasions, Carter dissented from the majority opinions which denied Chessman's due process claims regarding the accuracy of the trial transcript and the fairness of his trial (Chessman I and II). In 1952, and again in 1954 (Chessman III), Carter granted stays of Chessman's execution.[6] The last time Chessman's case came before Justice Carter, in 1955, he again dissented and excoriated the majority for denying Chessman the right of access to legal materials and counsel while incarcerated (Chessman IV).

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3. John Pomfret, *California's Crisis in Prison Systems A Threat to Public: Longer Sentences and Less Emphasis on Rehabilitation Create Problems,* Washington Post, June 11, 2006, at p. A03. This philosophy held sway until the mid-1970s, when the legislature formally removed "rehabilitation and treatment" from the prison system's mandate.

4. Hamm, *supra* note 1, at 2.

5. William L. O'Neill, Coming Apart: An Informal History of America in the 1960s at 276–277 (Chicago, Quadrangle Books 1971). To students of this history, the worldwide protests surrounding the December 2005 execution of Stanley (Tookie) Williams must have seemed familiar. Mr. Williams, on death row for the murders of four people in Los Angeles in 1981, sought clemency on the grounds of redemption. Admittedly the cofounder of the violent Los Angeles street gang, the Crips, Williams renounced violence and apologized for his role in gang life while on death row. His published writings include a series of anti-gang children's books, a memoir intended to warn kids away from crime, and an autobiography, Blue Rage, Black Redemption. Williams was nominated for the Nobel Peace Prize a total of six times. California Governor Arnold Schwarzenegger denied his bid for clemency on December 12, 2005. Williams was executed by lethal injection the following day. NPR Legal Affairs, Timeline: Tookie's Path to Death Row, *available at* http://www.npr.org/templates/story/story.php?storyId=5047269 (last viewed on June 22, 2006).

6. Although there is no written decision accompanying the grant of the first stay of execution Justice Carter extended to Chessman, the fact that Carter granted Chessman's first stay is documented in two books: Edmund G. (Pat) Brown, & Dick Adler, Public Justice, Private Mercy: A Governor's Education on Death Row 24 (New York: Weidenfeld & Nicolson, 1989); and Hamm, *supra* note 1, at 5.

Chessman's Crimes

Over a three-week period in January 1948, a rash of unsolved street crimes—several robberies and a car theft—occurred in the greater Los Angeles area. During this same time frame, two sexual assaults were committed against women who had been parked in "lover's lanes." In both of the lover's lanes cases, the assailant approached the victims' cars flashing a red spotlight, ordered the women out of their cars at gunpoint and coerced them to perform oral copulation. In one case, the assailant also attempted rape. On January 23, 1948, 26-year-old parolee, Caryl Chessman, and another man, David Knowles, led police on a five-mile chase before being taken to the Hollywood police station, where they were interrogated on suspicion of committing the robberies and the sexual assaults. After 72 hours of interrogation, Chessman allegedly admitted the crimes, saying he alone had committed the sexual assaults. Chessman later recanted, claiming that police had beaten him into confessing. Both women identified him as their assailant.[7]

Trial and Appellate Issues

Chessman was charged with 18 crimes, including robbery, sexual assaults, and two counts of kidnapping with bodily harm. The kidnapping charges, violations of Penal Code Section 209, also known as the "Little Lindbergh Law," were capital offenses in 1948. Dubbing Chessman the "Red Light Bandit," reporters (and the prosecutor) portrayed him as a violent "sex fiend." After a jury trial in which he declined counsel and represented himself, Chessman was convicted of 17 of the felony charges. Two days before the sentence was to be pronounced, the original court reporter, Ernest Perry, died. Chessman moved for a new trial, arguing that no one other than Perry could accurately transcribe his notes. Judge Charles W. Fricke denied the motion.[8] The judge appointed a new court reporter, Stanley Fraser, a reputed alcoholic who was related by marriage to J. Miller Leavy, the prosecutor who tried the case.[9] The judge also approved payment to Fraser in the amount of $10,000, approximately three times

7. *Id.* at 3–4.

8. After Judge Fricke's appointment of a new reporter, the Executive Committee of the Los Angeles Superior Court Reporters' Association reviewed the original reporter's notes and deemed his court shorthand completely undecipherable. *Id.* at 4.

9. *Id.*

the normal fee for a court reporter.[10] Judge Fricke sentenced Chessman to death.[11]

Later, at a hearing at which Chessman was neither present nor represented by counsel, the trial judge approved the transcript Fraser produced. The issue of whether or not this transcript was an accurate record of the proceedings was disputed in state and federal courts for the next twelve years, until Chessman's execution in 1960.[12]

Chessman I

In Chessman I (1950), Chessman, acting as his own lawyer, filed a document in the Supreme Court protesting the manner in which the trial judge had certified the record. He asked the Supreme Court to order the Superior Court to hold a hearing on the matter. Chessman also asked the Supreme Court to decide "certain undecided questions of law relative to the preparation of a reporter's transcript for use on appeal in a capital offense …."[13] The majority opinion concluded that the transcript filed by the substitute court reporter, Fraser, with certain minor augmentations, was a sufficient record on which to base appellate review. The Court dismissed Chessman's attempted appeal from the trial judge's order certifying Fraser's transcript, ruling that the trial court's orders and determinations on this issue were simply not appealable.[14]

Justice Carter joined fellow Supreme Court Justice Edmonds in dissenting from the majority's conclusions. Edmonds took the position that because the substitute reporter was not able to certify that the transcript was an accurate

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10. Brown & Adler, *supra* note 6, at 24.

11. Since Chessman was not convicted of taking a life, the death sentence imposed by Judge Fricke would not withstand constitutional scrutiny today. In 1977, the U.S. Supreme Court found it unconstitutional to impose a death sentence in a rape case, holding that capital punishment was disproportionate to the crime committed. *Coker v. GA.*, 433 U.S. 584; 53 L.Ed. 2d 982.

12. *People v. Chessman*, 35 Cal. 2d 455 (1950) [Chessman I]; *People v. Chessman,* 38 Cal. 2d 166 (1951) [Chessman II]; *Ex Parte Chessman*, 43 Cal. 2d 296 (1954) [Chessman III]; *Chessman v. Teets*, 354 U.S. 156 (1957).

13. *People v. Chessman*, 35 Cal. 2d 455, 458 (1950). The full title of the document Chessman filed was: "Motion for order of Supreme Court to order Superior Court to augment, correct and properly certify record, to order a hearing in the Superior Court relative to this matter, and for the Supreme Court to agree to decide on appeal (or otherwise) certain undecided questions of law relative to the preparation of a reporter's transcript for use on appeal in a capital offense and the applicability of section 953e C.C.P. to criminal cases."

14. *Id.* at 468.

record of the proceedings, the record lacked the proof of authenticity required by law and therefore Chessman was entitled to a new trial. In light of the fact that this was a death penalty case subject to automatic review by the Supreme Court, Justice Edmonds believed that judicial review of the evidence, in the absence of a complete and correct record, violated the Constitution.[15] Carter filed a separate dissent.

DISSENT

Carter, J. I dissent.

In the main I agree with the basic concept expressed in the dissenting opinion of Mr. Justice Edmonds, but I would not go so far as to hold that in every case where the death penalty is imposed, the death or disability of the court reporter before the completion and certification of the record would justify the granting of a new trial. Should a case be presented where the reporter had transcribed all of his notes with the exception of routine testimony of character witnesses, or other evidence more or less collateral to the main issue, and no serious objection is made to the accuracy of the portion transcribed, I would be disposed to hold that there had been a substantial compliance with the statutes and rules applicable to the preparation of records in cases of this character. Experience of those who have participated in the trial of cases dictates that absolute perfection in the preparation of phonographic records is not to be expected. Some errors may exist in records prepared by the most capable and efficient reporters. In fact, any reproduction of the human voice dependent upon the skill and accuracy of a shorthand reporter may contain some errors. That is why a provision is made for the settlement and certification of a record by the trial judge in the event objection is made to the accuracy of the record certified to by the reporter. But in a case of this character, where some 1,200 pages of the reporter's notes had not been transcribed by him or dictated into a dictaphone, and the transcription of such notes is dependent upon the ability of another reporter to read the same, I cannot agree that a record prepared in such a manner can be said to constitute a substantial compliance with the provisions of the statutes and rules applicable to the preparation of records in cases of this character.

I would, therefore, reverse the judgment and grant defendant a new trial in this case.

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15. *Id.* at 474.

Chessman II

Chessman appealed both his conviction and the order denying his motion for a new trial, raising several legal issues. Again, Chessman represented himself. The central issue in Chessman II remained Chessman's claim that the transcript was inadequate.[16] Chessman asserted additional legal errors as well, including prosecutorial misconduct, and claims that the limitations imposed by the trial judge on Chessman's conduct as his own counsel violated his right to a fair trial. Once again, Justices Carter and Edmonds wrote separate dissents.

DISSENT

Carter, J. I dissent.

Because, as was pointed out in the dissenting opinions of Mr. Justice Edmonds and myself in [Chessman I], there is no adequate record upon which this court may review the judgments of conviction against the defendant, I would reverse said judgments and order denying defendant a new trial on that ground alone. A reading of the majority opinion, however, convinces me that many flagrant errors were committed during the trial which would ordinarily be held to be prejudicial and require the reversal of a judgment of conviction. In fact, the only way I can rationalize the majority opinion is that those concurring therein feel that a person charged with 17 felonies of the character of those charged against the defendant, and who represents himself, is not entitled to a trial in accordance with the rules applicable to the ordinary criminal case. I cannot subscribe to this doctrine.

Chessman III

Chessman's execution was scheduled for March 1952, but in late February of that year, Justice Carter granted (without a surviving written opinion) the first of what eventually became eight stays of execution.[17] The publication of

16. *People v. Chessman*, 38 Cal. 2d 166 (1951).

17. Carter first stayed Chessman's execution in 1952. On May 13, 1954, Marin County Superior Court Judge Thomas Keating granted the second stay. Justice Carter again stayed the execution in July 1954. U.S. Supreme Court Justice Tom Clark granted a stay in 1955. Two more judicial stays were granted between 1955 and 1959. U.S. Supreme Court Justice William Douglas granted another in late 1959. In February 1960, Governor Brown stayed the execution for 60 days. *See* Hamm, *supra* note 1, at 5–7; *see also* Brown & Adler, *supra* note 6, at 24–28, 36–41.

Cell 2455, Death Row, in early May 1954, drew heightened attention to the case. One day before the date on which Chessman was next scheduled to die, a Marin County Superior Court Judge granted a stay in order to permit Chessman's petition for a writ of habeas corpus to be considered by the state's high court. The California Supreme Court denied the writ a month later and Chessman's execution was re-scheduled once again. This time he was scheduled to die on the same date as two other men, with the triple execution set for July 30, 1954.

On July 29, 1954, one day before Chessman's scheduled execution date, Ben Rice, Chessman's chief lawyer, hiked through the Northern California mountains in search of Justice Carter. Rice found the judge at a campsite in the Sierras, where, writing in longhand and using a tree stump for a desk, Carter granted another stay.[18] Chessman's application for the stay contained new allegations: he had just learned that the trial prosecutor had actual knowledge of the transcript's inaccuracy at the time it was approved by the trial court and presented to the California Supreme Court. The reason Justice Carter granted this stay was to permit the issue of the transcript's reliability and the prosecutor's knowledge thereof to go to the United States Supreme Court.[19]

STAY OF EXECUTION

An application has been presented to me for a stay of execution pending the determination of a petition for a writ of certiorari to the Supreme Court of the United States to review the denial of an application to the Supreme Court of California for a writ of habeas corpus on July 21st, 1954. Said application is based upon the claim that the transcript on appeal from Chessman's conviction in the Superior Court of Los Angeles County was inaccurate due to the inability to correctly transcribe the notes of the official court reporter who died before approximately 1,200 pages of his reporter's notes were transcribed, and that the inaccuracy of this transcription was known to the prosecuting officials at the time the transcript was approved by the trial court and presented to the Supreme Court of California.

It appears from said application that the alleged fraudulent procurement of said transcript was not known to petitioner until June of this year and the facts in connection therewith were never presented to any court until the petition

18. *See* Brown & Adler, *supra* note 6, at 26–27.
19. *In re Caryl Chessman, for Stay of Execution*, 43 Cal. 2d 296 (1954).

for a writ of habeas corpus was filed in the Supreme Court of California on July 16, 1954.

In my opinion the application presents a serious constitutional question under the due process clauses of both the Constitutions of the United States and California, as I can see no distinction between the knowing presentation by the prosecution of perjured testimony in a criminal case and the knowing submission of an inaccurate record on appeal in a death penalty case. (citations omitted).

The statutes of this state make it mandatory that the Supreme Court … review the entire record in every case in which the death penalty is imposed and render a decision based upon such record.

To my mind it is a clear and obvious violation of the due process provisions of both the federal and state Constitutions for the Supreme Court of California to decide a death penalty case upon an incomplete or inaccurate record where such record is procured by the fraudulent connivance of prosecuting officials. This is the legal proposition in Chessman's petition for a writ of certiorari and stay of execution, and in my opinion he should have an opportunity to have the Supreme Court of the United States consider his petition for certiorari which squarely presents this issue.

I have therefore granted Chessman a stay of execution pending the determination by the Supreme Court of the United States of the merits of his petition for a writ of certiorari.

Chessman IV

In his earlier Chessman dissents, Justice Carter made two things clear: his belief that the role of an appellate court was to determine if mistakes had been made below, and that fundamental fairness was violated when an appellate court did not have a complete and accurate trial transcript upon which to base its determination of the legality of the proceedings. Chessman IV concerned a different aspect of the role of an appellate court: the relationship between the Court and the California Department of Corrections.

As part of an earlier Superior Court proceeding, Chessman had obtained an order from the Superior Court, directed to the warden, that he "continue to be allowed the free exercise of asserted rights in connection with his representation of himself." When the warden removed his law books and typewriter, allegedly because he helped another man prepare a legal document, Chessman protested that the warden was in violation of the Court order. On behalf of the Warden, the Attorney General appealed the validity of the Superior Court's

order to the Supreme Court. In *Application of Chessman*, Carter's colleagues on the California Supreme Court accepted the Attorney General's position and vacated the Superior Court's order to the Warden which had guaranteed Chessman's access to law books, a typewriter, and consultation with counsel.[20] The Court deemed the Superior Court's order "unnecessary" and vacated it for that reason. Carter again dissented, writing an eloquent defense of Chessman's right to seek the Court's protection from the prison administration's attempts to limit his rights to legal materials and to the assistance of counsel.

DISSENT

Carter, J. I dissent.

… Aside from the question of appealability, I cannot agree with the majority opinion on the merits.… T[he] reversal [of the Superior Court's order] seems to be predicated upon the ground that because petitioner was given the facilities to which the order said he was entitled the question has become moot. In reaching that conclusion the majority ignores the fact that the evidence supports the order of the superior court in that the conduct of the prison authorities was such that it could at least be inferred that they would continue to withhold the facilities from petitioner unless a court ordered otherwise. It is similar to a case in which an injunction is sought, and there is a showing of threatened injury by defendant, but after the injunction is ordered he says he will be a "good boy." His belated repentance furnishes no basis for reversing the judgment granting the injunction. The majority opinion purports to decide the question anew in spite of its being bound on appeal by the conclusion of the trial court on conflicting evidence.

The evidence shows that the prison authorities delayed for 14 days in permitting petitioner to have access to the courts; that despite the advice of the attorney general petitioner was deprived of such access; that petitioner was deprived of his personal books and papers and prevented from working on his case; indeed, this is admitted by the warden and he insisted on his right to do so; that the warden refused to permit petitioner to consult with an attorney … and the warden testified that if petitioner asked to see that attorney *again*, "I am not prepared to say whether or not we would approve it." All of these things justified the superior court in concluding that there existed a real danger that the prison authorities would continue to deny the rights to which petitioner was entitled. It is of little significance that at the time of the hearing petitioner was

20. *Application of Chessman*, 44 Cal. 2d 1 (1955).

not being deprived of his rights.... Judicial protection of the rights of a prisoner would indeed be a mockery if the courts would always accept the pious protestations of the prison authorities that the rights would be accorded and then blithely disregard them the next day, leaving the prisoner to commence his weary journey through the court process toward a chimerical goal. Such conditions are intolerable in a civilized society, yet this court now espouses them....

The rights assured to petitioner by the order of the superior court are important and any impairment thereof must be carefully scrutinized. It is said in *Ex parte Hull* (citation omitted) "[T]he state and its officers may not abridge or impair petitioner's right to apply to a federal court for a writ of habeas corpus...." The court said in *In re Rider* [citation omitted]: "The right of an accused, confined in jail ... to have an opportunity to consult freely with his counsel without any third person ... being present ... is one of the fundamental rights guaranteed by the American criminal law...." There is no basis whatsoever for the statement in the majority opinion that petitioner is seeking or sought or was granted "special privileges." The rights sought by petitioner and granted by the trial court are the rights which must be accorded to all prisoners if the concept of "equal justice under law" is to have any significance whatever.

The majority states that prisoners have a right to prompt and timely access to the mails "for the purpose of transmitting to the courts" facts which show ground for relief but they "have no legally enforceable rights to engage in legal research." For that conclusion it cites the code sections to the effect that petitioner is civilly dead. What bearing that has on a prisoner's right to defend himself does not appear. If he may transmit "facts" to the courts in an attempt to obtain relief he should also be entitled to transmit legal propositions. To do either requires reasonable opportunity to prepare the facts and the law.... The order of the trial court here did not go beyond the bounds of reason. Certainly it cannot be said its order is so unreasonable that it abused its discretion.

The majority decision is another, in a long line of decisions by this court, in which this petitioner has been denied his constitutional rights. (citations omitted).

I would affirm the order here under review.

Comment

Running throughout Justice Carter's jurisprudence on the Chessman case are twin themes: the importance of procedural due process and the importance of judicial objectivity. In dissent he spoke as the conscience of the Court, chastising his majority colleagues for what he perceived as their inability to rise

above politics and defend principles of fundamental fairness for an unpopular criminal defendant. Justice Carter's oft-stated position that Chessman had not received a fair hearing on the issue of the accuracy of the transcript was eventually vindicated by the United States Supreme Court in 1957.[21] Writing for the Court, Justice John Harlan held that ex-parte settlement of the state court record violated Chessman's constitutional right to procedural due process. Because Chessman had been neither present nor represented by counsel at the hearing at which the trial judge approved settlement of this controversial transcript, he had not had "his day in court" regarding the accuracy of the record. The opinion concluded: "California's affirmance of the convictions upon a seriously disputed record, whose accuracy petitioner has had no voice in determining, cannot be allowed to stand.… The proponent before the Court is not the petitioner, but the Constitution of the United States."[22]

After the high court's decision in *Chessman v. Teets*, *supra*, Carter delivered a speech to the Alameda County Bar Association in which he quoted from Justice Harlan's opinion approvingly and reminded his audience that since courts are administered by human beings, errors are bound to occur. Justice Carter told the members of the Bar that the creation of higher (appellate) courts to correct the errors of the lower was an expression of the wisdom of the Constitution's framers. He ended his remarks this way:

> Those of you who believe in a government of law, as I do, must feel, as I do, that it is a horrifying thought that even a guilty person could be executed on a conviction obtained in violation of the due process clauses of the Constitution of the United States. But it is even more horrifying to realize that if this happen[s] to a guilty person it may also happen to an innocent person because you cannot protect the innocent without at the same time protecting the guilty. Let one man be deprived of his property, or his liberty, or his life without due process of law, and the property, liberty and lives of all of us are in danger. These are not mere words, they are the armor which shields our liberties from destruction.[23]

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21. *Chessman v. Teets*, 354 U.S. 156 (1957).

22. *Id.* at 164–65.

23. *The Chessman Case*, an address given by Justice Jesse W. Carter, Associate Justice of the Supreme Court of California to the Bar Association of Alameda County, Oakland, California, February 11, 1958, *available at* http://ggu.edu/lawlibrary/jessecarter/speeches/attachment/021158.pdf, at p. 21.

Although Chessman's case had been sent back to the trial court by the U.S. Supreme Court in 1957, just two years later, in 1959, after more hearings and more than 2,000 corrections, the transcript's legitimacy was affirmed, and the case was back before the U.S. Supreme Court.

Ultimately, the Court rejected all of Chessman's claims and his last hope became a second appeal for clemency from then-Governor Edmund (Pat) Brown. Personally opposed to the death penalty, but convinced both of Chessman's guilt and his lack of remorse, Governor Brown was prepared to deny clemency. Rising public sentiment against Chessman's execution and a phone call from Governor Brown's son, Jerry Brown,[24] suggested a way out of this dilemma. On Februrary 19, 1960, Governor Brown put Chessman's execution on hold for sixty days and asked the state legislature to declare a moratorium against the death penalty.[25] The moratorium bill never left committee and the tide of public opinion turned in favor of the death penalty, and heavily against Brown.[26] When the stay ended and a new execution date was set, Brown let it stand. Caryl Chessman was executed on May 2, 1960. He outlived Justice Carter by one year.

In the nearly fifty years since Caryl Chessman's execution, the debate over capital punishment and over just how much "due process" criminal defendants are entitled to, has continued to drive much of the political discourse in our state and the nation. People on both sides of an increasingly polarized political spectrum argue that the high courts have become overly politicized. This view is consistent with Justice Carter's prescient observations in Chessman II that the justice administered by his colleagues on the Supreme Court was blinded by Chessman's notoriety and the heinous nature of his alleged crimes.

Writing in dissent from the majority opinion denying Chessman's claims, Carter said:

> [M]any flagrant errors were committed during the trial which would ordinarily be held to be prejudicial and require the reversal of a judgment of conviction.... [T]he only way I can rationalize the majority opinion is that those concurring therein feel that a person charged with 17 felonies of the character of those charged against the defen-

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24. Jerry Brown served as Governor of California from 1974–1983. He ran for President in 1992. From 1998 to 2006 Brown served as Mayor of Oakland, CA. In 2008 he was elected Attorney General of California. http://www.oaklandnet.com/government/mayor/biography.html.

25. *See* Hamm, *supra* note 1, at 6; *see also* Brown & Adler, *supra* note 6, at 39–41.

26. *See* Brown & Adler, *supra* note 6, at 41–50.

> dant, and who represents himself, is not entitled to a trial in accordance with the rules applicable to the ordinary criminal case.[27]

Carter's reminder to his colleagues that all defendants, regardless of public opinion, are entitled to due process of law seems even more relevant today, when many court watchers believe that result-oriented judges are all too frequently the norm. When due process is given short shrift, as Justice Carter warned, "the armor which shields our liberties from destruction" is in grave danger.[28]

Since 1989, 237 wrongly convicted people have been exonerated in the United States as a result of post-conviction analysis of DNA evidence.[29] In California, over roughly the same period of time, 200 people have been released from prison after courts found that they were unjustly convicted.[30] These exonerations occurred after the convictions had been affirmed by appellate courts, in other words, *after* findings that each defendant had received minimal due process. These cases, the ongoing concerns about the administration of criminal justice in general, and the death penalty in particular, prompted the State Legislature to create a Commission on the Fair Administration of Justice in 2004. The Commission's charge was:

1. To study and review the administration of justice in California to determine the extent to which that process has failed in the past, resulting in wrongful executions or the wrongful conviction of innocent persons.
2. To examine ways of providing safeguards and making improvements in the way the criminal justice system functions.
3. To make any recommendations and proposals designed to further ensure that the application and administration of criminal justice in California is just, fair and accurate.[31]

The 22-member Commission, chaired by former California Attorney General and former Los Angeles District Attorney John Van De Kamp, included representatives of law enforcement and victims' rights organizations, as well as prosecutors, defense attorneys, judges, law professors, and members of the public. The Commission gathered information, conducted public hearings,

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27. *See Chessman II*, 38 Cal. 2d at 193–94.
28. *The Chessman Case, supra* note 23.
29. *See* www.innocenceproject.org (last visited on May 4, 2009).
30. Nina Martin, *Innocence Lost*, San Francisco Magazine, November 2004, available at http://www.sanfran.com/archives/view_story/200/ (viewed June 22, 2006).
31. *See* http://www.ccfaj.org/.

issued reports, and proposed legislation to address issues affecting the integrity of the California criminal justice system.

The Commission's study of the death penalty included testimony from 72 witnesses, including Ronald M. George, Chief Justice of the California Supreme Court. In his testimony, the Chief Justice described the state's death penalty system as "dysfunctional." In June 2008, the Commission issued its final report, agreeing with the Chief Justice's assessment and painting a portrait of a system close to collapse.[32]

With 680 prisoners awaiting execution, California has the largest death row population in the nation. The state's "death row deadlock," a 17-year average wait between judgment and execution, is longer than any of the other death penalty states. The Commission estimates that if changes are not made in the way the death penalty is administered, a person sentenced to death will wait 25 years for judicial review. Nearly everyone who considers the problem agrees with the Commission's conclusion that the death penalty system in California is terribly broken.[33]

In fact, George Kennedy, retired District Attorney of Santa Clara County and a member of the Commission, concluded that "the cumulative evidence proved to me beyond a reasonable doubt that it is time to replace the death penalty with permanent imprisonment." Citing the high costs of the death penalty system, the long delays, and the prolonged pain caused to victims' family members, Kennedy told a public forum convened to discuss the Commission's findings: "it is time to throw in the towel," and went on to say that the hundreds of millions California spends on the implementation of the death penalty could better be spent on other law enforcement needs.[34]

It is difficult not to speculate that if Justice Jesse W. Carter were alive today he would support the reforms suggested by the Commission and applaud its understanding that only an expansive view of due process provides "the armor which shields our liberties from destruction."

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32. *See* http://www.ccfaj.org/documents/CCFAJFinalReport.pdf at p. 114.

33. *See* Natasha Minsker, *California's Dysfunctional Death Penalty: Bay Area Bar Associations Ask What's to be Done?* (April 3, 2009) *available at* http://www.sfbar.org/newsroom/20090403.aspx (last visited May 5, 2009).

34. *Id.* at p. 2.