Mosk and Capital Punishment in California:
A Liberal Approach to the Death Penalty

by Amber A. Trumbull ©
J.D. Program, New York University School of Law

INTRODUCTION

The death penalty persists in America into the twenty-first century, retained in thirty-eight states, including California. From the very inception of the state into the present day, capital punishment in California has been the source of endless debate. Looking at the influence of the courts, it is difficult to deny that common law has made a great impact on how the death penalty is used in California. Using an automatic appeals process, the Supreme Court of California plays a particularly weighty role in the operation of capital punishment, and each individual justice is given his or her due opportunity to make legal history. In the history of the California Supreme Court, one justice of particular interest is Justice Stanley Mosk. Indeed, it is nearly impossible to discuss the evolution of the Court through the second half of the twentieth century without turning to Mosk, being "…the only justice with roots extending from the pre-Bird court through to the Lucas court,"[1] and eventually extending even further into the George Court. Apart from his outstandingly long tenure on the Court, totaling just over thirty-seven years, Mosk has been portrayed as the epitome of the liberal judge.[2] He worked tirelessly to enforce business regulation, to encourage environmental protection, and to promote overall liberty and equality. Focusing entirely on his capital punishment opinions and decisions, this paper seeks to confirm this liberal reputation.

On a personal level, Mosk was no supporter of the death penalty. From a very early point in his life, Mosk was opposed to state-sanctioned executions.[3] However, "[e]ven though [he] consider[ed] the death penalty, 'socially' invalid and 'anachronistic,' as a judge and prosecutor, he carried out what he viewed as his legal duties in connection with its enforcement."[4] Indeed, Mosk's philosophy was that whatever his personal convictions, he had an obligation to uphold the law as it was written: "As a judge, I am bound to the law as I find it to be and not as I might fervently wish it to be."[5] Thus, although he was "a staunch foe of capital punishment,"[6] Mosk upheld its implementation as a matter of law, and prosecuted capital cases while acting as the attorney general prior to his appointment to the California Supreme Court.[7] Still, he advocated for a continued debate on the death penalty, believing "[l]iberty under law can be achieved and preserved if we have the courage to advocate our principles openly, freely, vigorously, circumscribed only by respect for those whose conflicting principles are advanced with equal determination."[8] On occasion, his personal beliefs would appear in his written opinions for the Court. In *People v. Frierson*,[9] Mosk's concurring opinion was a declaration of his abhorrence to the death penalty. He described his inner struggle in the case, stating, "[t]hat as one individual I prefer values more lofty than those implicit in the macabre process of deliberately exterminating a human being [but these beliefs do] not permit me to interpret in my image the common values of the people of our state."[10] Regardless of his personal opposition to capital punishment, the California death penalty law was constitutional, and thus he was compelled to uphold it. Mosk went even further in elaborating this divide between himself and the general public, bemoaning the popular sentiment in support of such a punishment—

> The day will come when all mankind will deem killing to be immoral, whether committed by one individual or many individuals organized into a state. Unfortunately, morality appears to be a waning rule of conduct today, almost an endangered species, in this uneasy and tortured society of ours: a society in which sadism and violence are

> highly visible and often accepted commodities, a society in which guns are freely available and energy is scarce, a society in which reason is suspect and emotion is king. Thus with a feeling of futility I recognize the melancholy truth that the anticipated dawn of enlightenment does not seem destined to appear soon.[11]

This tension between Mosk's private beliefs and the public values treasured by the Court was typically not expressed so directly in his opinions, but it remains hidden in the background of every one of his capital punishment decisions.[12]

Over his remarkably long tenure on the Court, Mosk wrote around one thousand five hundred opinions.[13] Of these, approximately four hundred thirty-three dealt directly with capital murder cases. In looking at Mosk's writings in death penalty cases, the question arises of whether he was truly the epitome of the liberal justice. Was he always in line with the liberal ideology? Can one perceive in his later opinions during the conservative Lucas and George Courts remnants of the extremely liberal Bird Court? Was he in perpetual disagreement with the more conservative courts?

After looking at over four hundred capital cases from the very beginnings of his career on the California Supreme Court to his final year of service in 2001, I conclude that yes, Justice Mosk repeatedly approached capital cases with an eye toward protecting defendants from the abuses of justice, toward narrowing the death-eligible categories of defendants, and toward the strongest possible protection of individual rights, both those guaranteed in the United States Constitution and the California Constitution—in other words, Mosk upheld the liberal ideology.[14] However, by no means was Mosk a blind adherent to the liberal creed. Generally, he upheld liberal principles but oftentimes wrote in opposition to liberal majorities, particularly during the Bird Court.

Whether he was looking at Eighth Amendment jurisprudence, inadequate representation, juror selection, special circumstances, or any other legal issue likely to appear in capital cases,

Mosk would adhere to a liberal approach, but in his own, "Moskian" way. This paper will focus on the particularly intriguing topic of California's response to the *Furman* and *Gregg* decisions by the United States Supreme Court.[15] Through this examination, this paper will compare the approach of the California Supreme Court to that offered by the United States Supreme Court, and more specifically compare Mosk's approach to that of the California Supreme Court more generally.

INDEPENDENT STATE GROUNDS

Before examining the actual capital cases, a brief overview of independent state grounds is necessary. The federal Constitution and the United States Supreme Court lay down certain minimal protections and rights which must be upheld in every state, yet states are free to go above and beyond these constitutional floors to increase protections and grant more rights than are required by the federal standards. This has allowed California to create its own distinctive system of capital punishment, complete with its own unique set of criminal rights and protections.[16] Much of the discussion throughout the capital punishment cases revolve around California law, California rights, and the California Constitution rather than being simply a discussion of the federal requirements or United States Supreme Court decisions. Even when voters attempted to reduce the California protections to the "bare-bones federal standards" mandated by the federal Constitution by passing Proposition 8,[17] independent state grounds allowed the California Supreme Court to continue to construct uniquely Californian rights based upon the California Constitution.[18]

Independent state grounds was a pet project of Mosk's since his start on the California Supreme Court. Mosk found this doctrine to support the goals of both liberals and conservatives, allowing liberals to increase the scope of rights and even create new protections,[19] and allowing conservatives to maintain federalist boundaries and freedom within the state away from federal oversight.[20] Mosk believed that rather than being viewed as an instrument of liberal activism, independent state grounds should be embraced by both liberals and conservatives to create state regulation that was appropriate for the individual state—"[t]he future of state constitutionalism depends on whether liberals and conservatives can put aside their traditional differences and join in supporting a concept that provides mutual benefits."[21] The principle of independent state grounds is the foundation of nearly every capital punishment opinion Mosk writes.

CRUEL AND UNUSUAL PUNISHMENT: EIGHTH AMENDMENT CONCERNS

Bird Court Activism

Any discussion about modern capital punishment must begin with a discussion of the Eighth Amendment protections against cruel and unusual punishments. The California Supreme Court operates under the dual standards of the federal and California constitutional protections. The Court can base its decision on either the federal Eighth Amendment protections against "cruel *and* unusual" punishment or California's Art. I, § 17 protections against "cruel *or* unusual" punishment. In the pre-1970s death penalty decisions by the California Supreme Court, challenges to capital punishment claiming that it was unconstitutionally cruel and unusual under either constitution were brushed aside as irrelevant. In *People v. Thomas*,[22] the Court found that

the death penalty did not constitute cruel and unusual punishment in the abstract or as applied to the specific case. *Thomas* shows the overall lack of interest with such challenges early in Mosk's career.

As the more liberal Bird Court entered the 1970s, cruel and unusual concerns came to the forefront of the Court's decisions, with first *People v. Anderson*,[23]and then the United States Supreme Court's *Furman v. Georgia*,[24] striking down the death penalty as unconstitutional.

The California Supreme Court's rather radical *Anderson* decision has been discussed far more expansively and far more skillfully elsewhere than here, so only a brief summary will be necessary for the purposes of this paper. The Court began by asserting judicial superiority over determinations of constitutionality by the legislature, and thereby laid the foundation for their subsequent reversal of statutory law—

> It is the function of the court to examine legislative acts in light of such constitutional mandates to ensure that the promise of the Declaration of Rights is a reality to the individual. Were it otherwise, the Legislature would ever be the sole judge of the permissible means and extent of punishment and article I, section 6, of the Constitution would be superfluous.[25]

The Court then moved into the heart of its argument, finding the death penalty to be both cruel *and* unusual, doubly ensuring that there was a violation of California's cruel *or* unusual provision requirement. In coming to such a conclusion, the Court looked at the time spent waiting for execution, the pain of the actual execution, and the increasing infrequency with which executions were performed, and found from such facts that the death sentence was cruel. The Court found that it

> …cannot today assume, as it was assumed in early opinions of this court [such as in *Thomas*], that capital punishment is not so cruel as to offend contemporary standards of decency….Judgments of the nineteenth century as to what constitutes cruelty cannot bind [the court] in considering this question any more than eighteenth century concepts limit application of the Eighth Amendment.[26]

The Court also looked at the worldwide abolition of the death penalty and the infrequency of executions imposed and even more rarely enforced in California to find capital punishment to be unusual— "[i]t is now, literally, an unusual punishment among civilized nations."[27] The Court continued further to find that the death penalty was not necessary for any state purpose. Retribution and deterrence were discussed, the Court finding that retribution was not a legitimate state purpose, and also finding no significant deterrent effect in continuing the death penalty in California.

In conclusion, the Court found the death penalty to be a cruel and unusual punishment. By grounding its decision on California constitutional grounds rather than federal Eighth Amendment grounds, "…the California Supreme Court struck boldly, creating virtually unreviewable state constitutional law."[28] This decision was an almost complete contradiction of the earlier standard voiced in *Thomas*, and led to widespread reductions of sentences to life imprisonment without the possibility of parole. Mosk was exceedingly supportive of this decision, calling the opinion "a masterpiece of judicial writing; I considered it a privilege to sign it."[29]

The same year in *Furman v. Georgia*,[30] the United State Supreme Court similarly concluded that the death penalty was unconstitutional under the federal constitution. No majority opinion was produced, only a plurality with nine separate opinions with some justices focusing on discrimination, some justices focusing on execution rates, and some justices focusing on the unreasonableness of retribution. The dissenting justices made a clear statement of how state legislators could overcome *Furman* and create constitutionally sound sentencing procedures to overcome the arbitrary sentencing that doomed Furman's conviction, a lesson the California legislature and voters took to heart.[31]

Mosk was perpetually in agreement with the majority in reversing death sentences, similarly striking down capital punishment under both *Anderson* and *Furman*.[32] A group of condemned prisoners were moved off of death row,[33] including the infamous Sirhan Sirhan and Charles Manson. Later, in *Rockwell v. Superior Court*,[34] Mosk joined the majority and upheld the elimination of the mandatory sentencing scheme in place in California, finding that mandatory death sentencing left no room for the evaluation of mitigating circumstances, and thus violated the mandates of *Gregg v. Georgia*[35] as well as the Eighth Amendment protections against arbitrary sentencing.

However, Mosk refused to blindly follow the majority. In *People v. Frierson*,[36] Mosk actually attacked the United States Supreme Court for not providing a workable guideline for determining the meaning of "cruel and unusual" as used in the Eighth Amendment. The plurality decision was simply too vague to be properly used by the state courts, and throughout the country, "[t]he contrariety of interpretations and misinterpretations of the *Furman* principle…testified to the lack of direction from the Supreme Court…."[37] In *Frierson*, Mosk vented his frustration, stating,

> I need not document at length the manifest inadequacy for that purpose of the high court's first decision in this sequence, *Furman* v. *Georgia*….In effect the court ruled that the statute before it was unconstitutional without saying what would make it constitutional.[38]

While Mosk felt bound by *stare decisis* and continued to enforce *Anderson*, he was also calling upon the higher court to create a more user-friendly standard, or at least to create a clear majority opinion which could be enforced at the state level.

Post-Bird Turnabout

After the 1986 election, which led to the removal of three California Supreme Court justices including Chief Justice Bird herself, the Court entered a conservative era led by new

Chief Justice Lucas, heading a much more "cautious court…[which] embraced a decidedly pro-victim, pro-prosecution, and pro-capital punishment stance in criminal law."[39] In this post-Bird Court, there was a clear return to the pre-*Anderson* rationale where, as in *Thomas*, the death penalty was not unconstitutional simply because of protections against cruel or unusual punishments. Mosk remained in agreement with the new majority, now in affirming death sentences rather than reducing the sentences. Indeed, in *People v. Bonin*,[40] Mosk's majority opinion explicitly stated that the imposition of the death penalty did not violate the Eighth Amendment of the federal Constitution, and in *People v. Gordon*,[41] Mosk's majority opinion found that the specific 1978 death penalty statute employed in California also did not violate the Eighth Amendment. Mosk's continued allegiance to the majority suggests that while he remained a liberal justice, he was not as unrelentingly liberal as Bird and her adherents were. Mosk upheld reversals when the law required him to reverse, and Mosk upheld death sentences when the law required death sentences. Mosk might have been a liberal justice, but not to the point of neglecting his duties to uphold the laws of California.

In a particularly interesting concurring opinion in *People v. Ghent*,[42] Mosk laid out a justification for the retention of the death penalty. Mosk pointed out that the United States was a signatory of several international treaties, and in these treaties, the death penalty was acknowledged and upheld. By signing such treaties, the United States accepted the constitutionality of capital punishment under the federal Constitution, and thus a constitutional challenge could not be based on the Eighth Amendment—nowhere in the international treaties could an argument be made to "compel elimination of capital punishment."[43] While this argument still left room for a challenge under the California Constitution, Mosk was essentially ruling out challenges to capital punishment based upon the federal Constitution.

Methods of Execution

Cruel and unusual considerations also encompass the actual execution. Mosk dealt with the two modern forms of execution in California: the gas chamber and lethal injection. The gas chamber had been in use in California since 1937,[44] seen as a less painful, more predictable alternative to the previous method of execution by hanging. When early Eighth Amendment challenges to the gas chamber reached the United States Supreme Court, they were brushed aside "…on the ground that the state was simply adopting a kinder means toward a traditional end."[45] Gas was seen as a far more humane method of execution than any other existing technology. Gas still had something of a "creepy factor" in that the agent of death was invisible, and the condemned was locked in a tiny chamber with no other people present.[46] By 1992, the gas chambers had been operational for fifty-five years in California, and yet questions remained of how humane execution by gas truly was. In *In re Harris*,[47] Mosk dissented from the majority and called for an evidentiary hearing as to whether death by lethal gas violated the Eighth Amendment protections against cruel or unusual punishment under the California Constitution. Regardless of the findings of the United States Supreme Court, Mosk still believed an investigation was warranted to ensure that California executions passed California constitutional review, for

> [o]nly after such a hearing can the court ascertain whether or not [California's] means of execution conforms to what the United States Supreme Court has referred to as the 'evolving standards of decency that mark the progress of a maturing society.'[48]

California made the transition from the gas chamber to lethal injection by the end of the twentieth century, and here Mosk made no similar call for an investigation into the method of execution. In *People v. Samayoa*,[49] Mosk joined the majority opinion which refused to look at whether execution by lethal injection was cruel or unusual because such an inquiry dealt with the

execution of the sentence, not the legality of the sentence itself. Here, Mosk was seemingly contradicting himself and his earlier opinion in *Harris* where he was willing to investigate the execution of the sentence. When trying to explain why Mosk would make such a distinction between the two forms of execution, perhaps the clearest reason might come from the more sanitary conditions involved in lethal injection as opposed to the gas chamber, lethal injection being seen as "…ordinarily painless and clean."[50] As was mentioned, the gas chamber was still somewhat sinister even in its later incarnations, and lethal injection had all the appearances of being a medical procedure rather than an actual execution. Mosk might have simply been deciding based on his different perceptions of each form of execution.[51] Another explanation might be that Mosk simply disagreed with the question regarding the constitutionality of lethal injection as it was presented to the Court, and that his contradictory opinions were not in fact based on any underlying squeamishness about death by gas.[52]

Delay, Delay, Delay

One further element of cruel and unusual punishment addresses the time spent before the execution itself. Here, the California Supreme Court was unwilling to consider the psychological pain inherent in such a long wait prior to the actual execution, deeming it to be a post-conviction issue out of the hands of the Court. Following the *Gregg* decision, the period of time stretching from the pronouncement of the death sentence to the execution itself grew enormously, a side effect of the "constitutionalization of capital punishment."[53] No longer were executions taking place within a few months of sentencing. Rather, the delays grew to an average of ten to twenty years, keeping the condemned in constant suspense awaiting his trip to the afterlife. In *People v. Frye*,[54] the Court rejected the argument that the defendant could even raise questions about the effect of his death sentence on his psyche while he awaited execution,

arguing that "'[a]ppellate jurisdiction…is limited to the four corners of the record on appeal,' and to 'matters' that are 'properly subject to judicial notice'….[This concern] is not trivial. But it may not be presented here."[55] In *People v. Massie*,[56] the Court found that the inherent delay in the automatic appeals process did not constitute a violation of Eighth Amendment protections against cruel *and* unusual punishments, and the fact that the defendant had spent over sixteen years awaiting execution also did not constitute cruel *or* unusual punishment. Rather, the Court found "…that substantial delay in the execution of a sentence of death is inherent in this state's automatic appeals process, but that this delay is a 'constitutional safeguard,' not a 'constitutional defect.'"[57] Overall, the Court's opinions suggested that such delays are not a legal concern, but a psychological matter that should be presented in a different forum.

It is actually these growing delays which have led to recent proposals to reform the automatic appeals process in California. Many have recommended introducing the local court of appeals as an intermediary to hopefully remand some of the cases back to the trial courts and therefore reduce the burden on the California Supreme Court.[58] As Justice Joseph Grodin has observed, "[d]eath penalty cases require an enormous amount of judicial attention,"[59] thereby causing even greater delays and creating a huge burden on the California Supreme Court every time an appeal is sent automatically for review. Mosk found that "[t]he highest courts of our nation and state are being inundated by an ever-increasing caseload of appeals,…[and] the time has arrived for consideration of major appellate reform—not merely on the federal level,…but right here in California."[60] He proposed "…a constitutional amendment to create two separate divisions of [the California] Supreme Court—one devoted exclusively to criminal matters, the other to hear only civil cases."[61] However, "his views…gained little support."[62] Perhaps the primary problem with dividing the capital cases with another court would be the loss of

uniformity. Thus, while many suggestions have been discussed and debated about resolving this issue of almost crippling delays, none are likely to be adopted, and such delays will continue to pervade capital murder cases.

SPECIAL CIRCUMSTANCES

In the post-*Gregg* era of capital punishment, the death penalty was reintroduced on the condition that the states would create a new trial scheme that would allow for the weighing of aggravating and mitigating circumstances. In California, this condition was fulfilled through the use of special circumstances.[63] Under the 1978 death penalty statute, special circumstances included murder committed to facilitate an escape from lawful custody, murder of a police officer or similar state official, murder of an "especially heinous, atrocious, or cruel" nature, murder committed while lying in wait, murder connected to a hate crime, or murder committed by poison.[64] The purpose of such aggravating elements was to narrow the class of death-eligible murderers. After guilt was established, the prosecutor would then have to show that a special circumstance was present in order to pursue the death penalty during the sentencing phase of the trial. In *People v. Earp*,[65] the Court upheld the California reliance on special circumstances as fulfilling the constitutionally mandated narrowing function "…because they do '"not apply to every defendant convicted of a murder, [but only] to a subclass of defendants convicted of murder."'"[66]

In examining Mosk's opinions on special circumstances, he appears to have been consistently trying to further narrow the death-eligible group of murderers, thereby reducing the

number of death sentences affirmed by the California Supreme Court. In trying to shrink the scope of the special circumstances, Mosk was showing his liberal leanings—not only was he trying to better fulfill the purpose behind *Gregg*'s requirement of aggravating and mitigating circumstances (to narrow the group eligible for the death penalty and thus reduce arbitrary imposition of death sentences), but he was also trying to reduce the total number of people sentenced to death.

Multiple-Murder

One of the more frequent special circumstances found in capital cases is the multiple-murder special circumstance. When prosecutors pushed for more than one multiple-murder circumstance, typically a multiple-murder charge for each victim, defendants were oftentimes found guilty of up to ten counts of multiple-murder.[67] Linking so many multiple-murder charges together could be used by the prosecution to sway the jury in favor of death and against the expression of any sympathy for the ten-plus murderer. However, when these cases were brought before the California Supreme Court, such duplicate multiple-murder special circumstances were not tolerated by either Mosk or the Court as a whole, and were struck down to leave only a single multiple-murder special circumstance. In *People v. Anderson*,[68] Mosk's majority opinion succinctly stated that "…no matter how many murder charges are tried together, they constitute a single multiple-murder special circumstance."[69] Although eliminating these surplus special circumstances did not really affect the conviction, merely reducing the charges from up to ten multiple-murders to one multiple-murder, this was an effort by the Court to narrow the death-eligible class and possibly to eliminate the shock value on the jury of so many multiple-murder charges. Still, the multiple-murder reductions were rather empty narrowing attempts.

Kidnapping-Felony-Murder

Mosk took a more deliberate step toward narrowing the death-eligible category in his interpretation of the kidnapping-felony-murder special circumstance. In the three cases where Mosk specifically spoke of kidnapping, he was in agreement with the majority's decision to reverse the sentences. However, he presented a much narrower view of what constituted a true kidnapping. In his majority opinion in *People v. Daniels*,[70] he redefined kidnapping as needing more movement than was necessary to commit any other element of another crime, such as movement to facilitate a rape or a robbery, finding "…that the intent of the Legislature…was to exclude from its reach...movements of the victim [which] are merely incidental to the commission of [other crimes]."[71] Later, in *People v. Thornton*[72] and in *People v. Lara*,[73] Mosk reaffirmed his view that the majority oftentimes was using an overly broad definition of kidnapping, and stated that force was required in all kidnappings. Indeed, in *Thornton*, Mosk actually attacked the majority's interpretation of the kidnapping-felony-murder special circumstance:

> …we must not lose sight of the salutary purpose of our landmark decisions in *Daniels* and its progeny: surely the fate of this single defendant is not more important than our continuing effort—in which the Legislature has now joined—to bring reason, proportion, and consistency to the development of the law of kidnapping in California. It is my sincere hope that the future will prove the majority's ruling on the aggravated kidnapping counts in this case to be no more than a passing aberration unfortunately confirming the old adage that hard cases make bad law.[74]

Mosk's understanding of the kidnapping-felony-murder special circumstance substantially reduced the scope of the definition of kidnapping, thereby making it more difficult to establish the kidnapping special circumstance and thus reducing the number of death sentences based on this felony-murder charge. Mosk was showing his liberal colors by both

opposing the majority's definition of kidnapping, and protecting defendants from overly broad special circumstance categories.

Lying-in-Wait

Another set of special circumstances where Mosk took an even firmer stance against the majority came in his understanding of what constituted lying-in-wait. In cases addressing this special circumstance, Mosk dissented from the majority and reversed sentences during the conservative Lucas Court. Mosk opposed the majority's view that lying-in-wait meant simply hiding one's intentions, or only a concealment of purpose. In *People v. Webster*,[75] Mosk found that "'[c]oncealment' meant actual physical concealment of the killer's person, and not…mere concealment of his true intent and purpose."[76] In *People v. Morales*,[77] Mosk more forcefully asserted that this particular special circumstance should be completely eliminated as it was unconstitutionally broad. He saw lying-in-wait as interpreted by the Court to encompass nearly all intentional murders, and he believed that no real distinction could be made between the guilt of a murderer who hid from his victim and the guilt of the murderer who openly attacked.[78] In *People v. Edwards*,[79] Mosk reaffirmed his belief that the existing lying-in-wait special circumstance was unconstitutionally broad, finding lying-in-wait in its current state to actually violate Eighth Amendment protections. Mosk's interpretation of the lying-in-wait special circumstance showed a significant narrowing of the death-eligible group. Otherwise, nearly every murder could potentially be taken under the umbrella of "concealment of purpose", and death sentences would in no true way be narrowed to a specific category of murderers.

"Lawfully Engaged in Duty"

One final special circumstance that drew particular attention from Mosk regarded the murder of a peace officer "lawfully engaged in duty". In *People v. Gonzales*,[80] Mosk disagreed

with the majority which severely limited this condition of the peace officer special circumstance, making virtually all police activities lawful. Mosk argued that "[t]he majority severely limit the lawfully-engaged-in-duty element and as a consequence greatly expand criminal liability and punishment."[81] Instead of this broad reading, Mosk would have enforced a stricter interpretation of what constituted lawful duty, creating a narrower definition and thus a smaller category of eligible murderers. Mosk's concurring and dissenting opinion in *Gonzales*, perhaps more so than any other case where Mosk addressed special circumstances, showed his dedication to fulfilling the *Gregg* mandate to narrow death-eligibility and to protect against arbitrary death sentences.

Throughout Mosk's opinions on special circumstances, there was constant attention to whether a certain interpretation of a particular circumstance would truly narrow death-eligibility, or simply reopen California law to the arbitrary sentencing at issue in *Furman*. While Mosk was not always arguing against the Court, he was much more consistent than the California Supreme Court in trying to enforce *Gregg* mandates against overly broad special circumstance categories. In dealing with special circumstances, Mosk remained an ardent liberal, hoping to narrow the special circumstances to the point where they actually served their intended function in guiding the jury, rather than taking in all murderers and putting them up for a potential execution.

"INTENT TO KILL"

Felony-murder special circumstances came to the forefront of the California Supreme Court's radar in 1983 with *Carlos v. Superior Court*.[82] Mosk joined the majority in voicing this opinion in which the "intent to kill" became mandatory in all felony-murder special

circumstances. This was justified on two grounds, looking first at the intent of the 1978 death penalty law and also finding that any ambiguities in the wording of the law must be resolved in favor of the defendant.[83] *Carlos* was, in essence, the child of the extremely liberal Bird Court. While Mosk joined in this original decision, and participated in the Court's subsequent flood of reversals, he soon became disenchanted with the results, choosing to switch sides and to affirm sentences in opposition to the majority. He also penned the death sentence for the *Carlos* precedent in *People v. Anderson*,[84] eliminating the intent to kill requirement—"[a]fter the decision in *Anderson*, the affirmance of special circumstance findings became quite routine."[85]

The "intent to kill" era of California death penalty jurisprudence encompassed a four-year period in the mid-1980s, stretching from *Carlos* to *Anderson*, and was seen by many to have been used as a tool by the liberal Bird Court to overturn death penalties. Mosk, himself a liberal justice, originally joined in these reversals.[86] However, he was not in complete agreement with all the intent to kill decisions of the Court. In *People v. Garcia*,[87] Mosk disagreed with the majority and joined Bird in a concurring and dissenting opinion speaking against the retroactive application of the intent to kill requirement. Mosk saw this decision as the Court choosing to substitute its own judgment for that of the jury through a modification to the exceptions for a "per se reversal", essentially replacing the jury determination of whether the required intent to kill element existed with a decision made by the appellate court.[88] Mosk went so far as to agree with Bird that such a decision was basically eliminating the defendant's right to a jury trial. Still, Mosk continued to join the Court in upholding the *Carlos* precedent, even writing several majority opinions.

Starting with *People v. Fuentes*,[89] however, Mosk began to voice his concerns over the seemingly unending reversals, actually affirming some death sentences reversed by the Court.

Mosk saw the Court as "…setting aside special-circumstance findings in some gruesome cases in which the defendant's intent to kill seemed quite apparent…."[90] This rather pronounced change of heart shows an underlying division between Mosk and the incredibly liberal Bird majority—Mosk may have been a liberal justice, but he was no blind adherent to the Bird dogma which demanded the maximization of reversals at all times.

Still, Mosk continued to uphold *Carlos* as the law of California, regardless of how much he disliked its present application by the Court:

> Even if one be disillusioned by the number of penalty reversals required by that decision and by *Garcia*, *stare decisis* and respect for the judicial process require adherence to decisions rendered so recently by a substantial majority of this court….[R]eview in the high court was denied. Thus *Carlos-Garcia* remains the law in California.[91]

In *People v. Silbertson*,[92] Mosk showed that he was not completely opposed to the intent to kill requirement, and argued instead to create a more expanded series of exceptions to the *Carlos* intent to kill requirement.[93] Rather than attempting to completely eliminate the intent to kill requirement, Mosk hoped to at least narrow the parameters of it.

Mosk, perhaps symbolically, wrote the majority opinion in 1987—post-1986 election and post-Bird Court—eliminating the intent to kill requirement. In *People v. Anderson*,[94] Mosk put an end to the *Carlos* legacy with the statement "…we overrule *Carlos* and hold…intent to kill is not an element of the felony-murder special circumstance…."[95] Mosk based this reversal not his private grievances with the intent to kill requirement, but on the decision by the United States Supreme Court "…that the Eighth Amendment did not require intent to kill for the execution of the judgment of death—less still for the determination of death-eligibility."[96] Mosk further justified his disposal of the *Carlos* rule by pointing out that

> …it appears to be generally accepted that by making the felony murderer but not the simple murderer death-eligible, a death penalty law furnishes the 'meaningful basis

> [required by the Eighth Amendment] for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not.'[97]

The intent to kill jurisprudence is a poignant example of Mosk upholding liberal values, but not to the point of compromising his duties to uphold justice as conceived by the legislature and voters. He was unwilling to sacrifice the rule of law to his personal liberal principles, and his retention by the voters in 1986 was his reward for doing so.

CONCLUSION

It is impossible to deny that Mosk is an indispensable figure in California's capital punishment jurisprudence. With opinions spanning over a third of the twentieth century and just barely entering the twenty-first century, Mosk and his incredible collection of opinions have most certainly left their indelible mark. Mosk's tenure on the bench stretched across five chief justices, leading both overtly liberal and overtly conservative courts. He took part in the *Anderson* and *Furman* controversy of the 1970s, survived the 1986 electoral ousting, continued to dispense numerous opinions through the 1990s as delays grew larger and more looming, and celebrated the start of a new millennium while still serving on the Court.

Throughout this rather impressive tenure, Mosk retained a strong grasp on his liberal values, refusing to easily topple under the pressures of the majority, and oftentimes continuing to fight even when he was left standing on his own. It is with fair certainty that I say that regardless of the political partisanship of the Court, regardless of the era, and even regardless of his ever-increasing age, Mosk was the embodiment of a truly liberal approach to capital punishment.

[1] John H. Culver, "The California Supreme Court Turnabout on Capital Punishment," 59 Alb. L. Rev. 1693, 1693 (1995-1996).

[2] To define what exactly constitutes a "liberal" judge is no simple feat. Such a broad word can have numerous connotations and indeed changes and adapts as the social mores evolve over time. For the purposes of this paper, "liberal" will not be used to describe a particular political party or related party views, but rather a personal commitment to upholding individual rights or, in the case of capital cases, to upholding prisoners' rights. Such a definition should not be construed as a criticism on opinions or justices labeled as "conservative", and certainly should not be interpreted as an underhanded insult, describing opposition to human rights, or even agreement with the "law and order" dogma. Rather, when some opinion or judge is called "conservative", the term is simply describing a strong commitment to state interests.

[3] "I confess that I have been convinced that the death penalty must go since I was in high school in a small town in Illinois and a murder took place in our community….[A] childhood experience of learning about an innocent man being convicted of murder had an indelible effect on me which will last for the rest of my life, and frankly, no arguments to the contrary will convince me." (Stanley Mosk, speech made to the Assembly Judiciary Committee on Assembly Bill No. 221, March 16, 1959, 9. Accessed at the California Judicial Center Library from Justice Mosk's personal files on July 17, 2006).

[4] "Honoring the Record Service of Justice Stanley Mosk, California Supreme Court," 65 Alb. L. Rev. 863, 867 (2001-2002).

[5] *In re Anderson*, 69 Cal.2d 613, 635 (1968).

[6] Gerald Uelman, "Tribute to Justice Stanley Mosk," 65 Alb. L. Rev. 863, 858 (2001-2002).

[7] Stanley Mosk, Oath-Taking Ceremonies at Sacramento, January 5, 1959. Accessed at the California Judicial Center Library from Justice Mosk's personal files on July 17, 2006.

[8] *Id.* at 5.

[9] *People v. Frierson*, 25 Cal.3d 142, 188-96 (1979) (Mosk, J., concurring).

[10] *Id.* at 189.

[11] *Id.*

[12] *See* Mosk's comments on Assembly Bill No. 221 generally for a strong statement of Mosk's personal convictions, including his appeal to the people of California calling for abolition: "I urge our state to discontinue the degrading, demoralizing, stultifying spectacle of destroying lives and to devote our financial and human resources toward achieving a constantly more effective system of justice." (Stanley Mosk, speech made to the Assembly Judiciary Committee on Assembly Bill No. 221, March 16, 1959, pg. 11. Accessed at the California Judicial Center Library from Justice Mosk's personal files on July 17, 2006).

[13] "Honoring the Record Service," *supra* note 4, at 872.

[14] Indeed, in Mosk's personal collections, there were volumes of newspaper and magazine articles documenting the development of the death penalty, from the United States' position as the outlier of Western democracies in maintaining the death penalty in the 1960s through articles about D.N.A. evidence exonerating death row inmates.

[15] *Furman v. Georgia*, 408 U.S. 238 (1972); *Gregg v. Georgia*, 428 U.S. 153 (1976).

[16] "If I may be permitted a certain collegial immodesty, I must observe that California has a long record of reliance upon its own constitution." (Stanley Mosk, Speech to the National College of the State Judiciary, October 1, 1976, pg. 16. Accessed at the California Judicial Center Library from Justice Mosk's personal files on July 17, 2006).

[17] Candace McCoy, "Crime as a Boogeyman: Why Californians Changed Their Constitution to Include a 'Victims' Bill of Rights' (and What It Really Did)" 132, in G. Alan Tarr (ed.), *Constitutional Politics in the States* (Westport: Greenwood Press, 1996).

[18] "…the Supreme Court has consistently held that states may impose higher standards than those required by the United States Constitution." (Stanley Mosk, Speech to the National College of the State Judiciary, October 1, 1976, pg. 18. Accessed at the California Judicial Center Library from Justice Mosk's personal files on July 17, 2006.)

[19] "…states' rights are associated with increased, not lessened, individual guarantees." (Stanley Mosk, "The Emerging Agenda in State Constitutional Rights Law," The Annals of the American Academy, March 1988, pg. 63. Accessed at the California Judicial Center Library from Justice Mosk's personal files on July 17, 2006.)

[20] Stanley Mosk, "State Constitutionalism: Both Liberal and Conservative," 63 Tex. L. Rev. 1081, 1081 (1984-1985).

[21] *Id.* at 1081; *see also* Mosk, "Emerging Agenda," *supra* note 19.

[22] *People v. Thomas*, 65 Cal.2d 698 (1967).

[23] *People v. Anderson*, 6 Cal.3d 628 (1972).

[24] *Furman v. Georgia*, 408 U.S. 238 (1972).

[25] *Anderson*, 6 Cal.3d at 640.

[26] *Id.* at 645.

[27] *Id.* at 656; *see also*, Trevor Thomas, *This Life We Take: A Case Against the Death Penalty* (Friends Committee on Legislation, December 1965, accessed at the California Judicial Center Library from Justice Mosk's personal files on July 17, 2006) (contemporary abolitionist pamphlet discussing world and domestic trends in the death penalty).

[28] Barry Latzer, "California's Constitutional Counterrevolution" 156, in G. Alan Tarr (ed.), *Constitutional Politics in the States* (Westport: Greenwood Press, 1996).

[29] Stanley Mosk, Speech made to the International Conference on Justice in Punishment, March 30, 1988, pg. 19. Accessed at the California Judicial Center Library from Justice Mosk's personal files on July 17, 2006.

[30] *Furman*, 408 U.S. 238.

[31] Stuart Banner, *The Death Penalty: An American History* 257-66 (Cambridge: Harvard University Press, 2002).

[32] Mosk rationalized his support for the *Anderson* decision by pointing out that there was no "major crime wave" immediately following the abolition of the death penalty. (Stanley Mosk, "Impact Decisions, U.S. Supreme Court," National Conference of State Trial Judges and Appellate Judges' Conference, August 12, 1972, pg. 7-8. Accessed at the California Judicial Center Library from Justice Mosk's personal files on July 17, 2006.)

[33] *People v. Sirhan*, 7 Cal.3d 710 (1972); *People v. Eli*, 7 Cal.3d 420 (1972); *People v. Miller*, 7 Cal.3d 562 (1972); *People v. Salas*, 7 Cal.3d 812 (1972); *People v. Welch*, 8 Cal.3d 106 (1972); *People v. Carr*, 8 Cal.3d 287 (1972); *People v. Murphy*, 8 Cal.3d 349 (1972); *People v. Cannady*, 8 Cal.3d 379 (1972); *People v. Hathcock*, 8 Cal.3d 599 (1973); *People v. Mathis*, 8 Cal.3d 813 (1973); *People v. Morse*, 8 Cal.3d 811 (1973); *People v. Robles*, 8 Cal.3d 908 (1973); *People v. Rhinehart*, 9 Cal.3d 139 (1973); *People v. Milan*, 9 Cal.3d 185 (1973); *People v. Duren*, 9

Cal.3d 218 (1973); *People v. Preston*, 9 Cal.3d 308 (1973); *People v. Sommerhalder*, 9 Cal.3d 290 (1973); *People v. Vaughn*, 9 Cal.3d 321 (1973); *People v. Hill*, 9 Cal.3d 784 (1973); *People v. Kemp*, 10 Cal.3d 611 (1974); *People v. Stanworth*, 11 Cal.3d 588 (1974); *People v. Thornton*, 11 Cal.3d 738 (1974); *People v. Lara*, 12 Cal.3d 903 (1974).

[34] *Rockwell v. Superior Court*, 18 Cal.3d 420 (1976).

[35] *Gregg v. Georgia*, 428 U.S. 153 (1976).

[36] *Frierson*, 25 Cal.3d at 190-96.

[37] Steven F. Shatz and Nina Rivkind, "The California Death Penalty Scheme: Requiem for *Furman*?" 72 N.Y.U. L. Rev. 1283, 1305 (1997).

[38] *Frierson*, 25 Cal.3d at 190.

[39] John H. Culver, "The Transformation of the California Supreme Court: 1977-1997," 61 Alb. L. Rev. 1461, 1476-77 (1997-1998).

[40] *People v. Bonin*, 46 Cal.3d 659, 709-10 (1988).

[41] *People v. Gordon*, 50 Cal.3d 1223, 1278 (1990).

[42] *People v. Ghent*, 43 Cal.3d 739, 780-81 (1987) (Mosk, J., concurring).

[43] *Id.* at 781.

[44] Banner, *supra* note 31, at 199.

[45] *Id.*

[46] *Id.*, at 198-199.

[47] *In re Harris*, 1992 Cal. LEXIS 1788 (1992) (Mosk, J., dissenting).

[48] *Id.*

[49] *People v. Samoyoa*, 15 Cal.4th 795 (1997).

[50] Banner, *supra* note 31, at 297.

[51] Indeed, Mosk describes his wariness of the gas chamber by finding that "[l]ethal gas was introduced in response to the cruelties of hanging, shooting, and electrocution. Although the gas chamber has certain advantages over these other methods because it is less violent and does not mutilate or disfigure the body, it is questionable whether death by lethal gas is painless." (Stanley Mosk, "The Death Penalty Today," given at the Third Session of Congress, December 28, 1978, pg. 19. Accessed at the California Judicial Center Library from Justice Mosk's personal files on July 17, 2006.)

[52] "The incremental humanitarian gains achieved by rejection of more cruel methods of execution in favor of less cruel methods may be insignificant in the progression from a barbarous society to one that espouses principles of dignity and humanity" (*id.*, at 20).

[53] Banner, *supra* note 31, at 293.

[54] *People v. Frye*, 18 Cal.4th 894 (1998).

[55] *Id.*, at 1032.

[56] *People v. Massie*, 19 Cal.4th 550 (1998).

[57] *Id.*, at 574.

[58] Robert Weisberg, "Redistributing the Wealth of Capital Cases: Changing Death Penalty Appeals in California," 28 Santa Clara L. Rev. 243, 244, 248 (1988).

[59] Joseph R. Grodin, *In Pursuit of Justice: Reflections of a State Supreme Court Justice*" 100 (Berkeley: UC Press, 1989).

[60] Stanley Mosk, "A Two-Part State Supreme Court," L.A. Times, June 29, 1983. Accessed at the California Judicial Center Library from Justice Mosk's personal files on July 17, 2006.

[61] *Id.*

[62] Grodin, *supra* note 59, at 69.

[63] Gerald F. Uelman, "Review of Death Penalty Judgments by the Supreme Courts of California: A Tale of Two Courts," 23 Loy. of L.A. L. Rev. 237, 259 (1989-1990).

[64] *Id.*, at 264.

[65] *People v. Earp*, 20 Cal.4th 826 (1999).

[66] *Id.*, at 904.

[67] *See, e.g.*, *Bonin*, 47 Cal.3d at 808.

[68] *People v. Anderson*, 43 Cal.3d 1104 (1987).

[69] *Id.*, at 1150.

[70] *People v. Daniels*, 71 Cal.2d 1119 (1969).

[71] *Id.*, at 1139.

[72] *People v. Thornton*, 11 Cal.3d 738 (1974) (Mosk, J., concurring and dissenting).

[73] *People v. Lara*, 12 Cal.3d 903 (1974) (Mosk, J., concurring and dissenting).

[74] *Thornton*, 11 Cal.3d at 782-83.

[75] *People v. Webster*, 54 Cal.3d 411 (1991) (Mosk, J., concurring and dissenting).

[76] *Id.*, at 461.

[77] *People v. Morales*, 48 Cal.3d 527 (1989) (Mosk, J., concurring and dissenting).

[78] "…this special circumstance does not distinguish the few cases in which the death penalty is imposed from the many in which it is not. Indeed, it is so broad in scope as to embrace virtually all intentional killings. Almost always the perpetrator waits, watches, and conceals his true purpose and intent before attacking his victim; almost never does he happen on his victim and immediately mount his attack with a declaration of his bloody aim. Second, the lying-in-wait special circumstance does not provide a meaningful basis for distinguishing between murderers

who may be subjected to the death penalty and those who may not. To my mind, the killer who waits, watches, and conceals is no more worthy of blame or sensitive to deterrence than the killer who attacks immediately and openly" (*Id.*, at 575).

[79] *People v. Edwards,* 54 Cal.3d 787 (1991) (Mosk, J., concurring and dissenting).

[80] *People v. Gonzales*, 51 Cal.3d 1179 (1990) (Mosk, J., concurring and dissenting).

[81] *Id.*, at 1264.

[82] *Carlos v. Superior Court*, 35 Cal.3d 131 (1983).

[83] "The wording of the [1978] initiative, its purpose as explained to the voters, the principle that penal statutes should be construed to give the defendant the benefit of reasonable doubt, and the companion principle that statutes should be construed to avoid substantial questions of their constitutional validity—all unite to support the conclusion that the felony murder special circumstance…requires proof that the defendant intended to kill" (*id.*, at 153).

[84] *Anderson*, 43 Cal.3d. 1104 (1987).

[85] Uelman, *supra* note 63, at 270.

[86] *People v. Garcia*, 36 Cal.3d 539 (1984); *People v. Whitt*, 36 Cal.3d 724 (1984); *People v. Ramos*, 37 Cal.3d 136 (1984); *People v. Armendariz*, 37 Cal.3d 573 (1984); *People v. Anderson*, 38 Cal.3d 58 (1985); *People v. Hayes*, 38 Cal.3d 780 (1985); *People v. Boyd*, 38 Cal.3d 762 (1985); *People v. Chavez*, 39 Cal.3d 823 (1985); *People v. Guerra*, 40 Cal.3d 377 (1985).

[87] *People v. Garcia*, 36 Cal.3d 539 (1984) (Bird, C.J., concurring and dissenting).

[88] "Under our system of justice, juries *alone* have been entrusted with the responsibility of determining guilt or innocence…[however,] it is an appellate court that will determine whether the accused entertained the intent to kill required when a felony-murder special circumstance is charged….I cannot endorse a holding which substitutes the belief of appellate judges for a jury's finding as to the truth of a special circumstance allegation" (*id.*, at 558-60).

[89] *People v. Fuentes*, 40 Cal.3d 629 (1985) (Mosk, J., concurring and dissenting).

[90] Grodin, *supra* note 59, at 95.

[91] *People v. Hamilton*, 41 Cal.3d 408, 439 (1985) (Mosk, J., concurring and dissenting).

[92] *People v. Silbertson*, 41 Cal.3d 296 (1985) (Mosk, J., concurring and dissenting).

[93] "The majority [has gone] astray at the outset of their analysis by assuming that 'The only possible exception' to the *Carlos* rule of reversal 'which might possibly apply' is the so-called *Cantrell-Thornton* exception" (*id.*, at 308).

[94] *People v. Anderson*, 43 Cal.3d 1104 (1987).

[95] *Id.*, at 1147.

[96] *Id.*, at 1140.

[97] *Id.*, at 1147.