

INTERVIEW 8 (JUNE 18, 2015)

MCCREERY: We thought we might start off talking today about the fact that your court is asked oftentimes to review ballot initiatives that are going to appear before the voters of California and specifically that, by law, these initiatives are intended to be limited to a single subject per initiative. How did this matter first come up in your own work on the court when you were serving at any level, do you recall?

WERDEGAR: Could I step back a bit? Because, as it happened, in 2012 I was invited to give the Jefferson Memorial Lecture at UC, the annual lecture, which is a series that's devoted to democratic government and matters of politics and government. 2012 was the hundredth anniversary of the initiative and referendum in the State of California.

I chose as my topic, and here comes the title: "Living with Direct Democracy: The California Supreme Court and the Initiative Power — 100 Years of Accommodation."²⁷ It gave me the opportunity to explore the history of the initiative and how the court has had to deal with it when challenges have come before us.

As you know, the initiative was enacted as part of a populist movement that swept the country. California was not the first. Its purpose was to circumvent the railroad interests that had a stranglehold on the Legislature. It's direct democracy. It enables the citizens to directly propose legislation and put it before the electoral body.

Let me say, parenthetically, the irony is that in the ensuing 100 years the initiative has become an implement of the very kind of special interests that it was intended to circumvent, one reason being the enormous expense in our very, very populous state of circulating and qualifying an initiative petition. Most citizen groups don't have that kind of funding.

There are, as you suggest, certain limitations on the initiative process. To back up, one is that you cannot use an initiative to revise our state Constitution. You can amend the Constitution, one particular piece of it. I don't have the date, but the limitation of the single subject, I believe, *was* an amendment to the Constitution after there had been on the ballot something called the Ham and Eggs Initiative, which replaced everything from

²⁷ 7 CAL. LEGAL HIST. 143 (2012); March 20, 2012.

post office to fishing rights to everything under the Constitution. That just wouldn't do.

So we have a provision that an initiative can address only a single subject. The question is, why? The answer is you want to avoid what's called logrolling. Proponents could put on the ballot — and they have done so, and I'll give you an example — an initiative that might have two parts. To the proponents, there's one part that they really are interested in. But as bait to the electorate, they'll put in another part that they think will capture the attention and the approval of the body politic.

One example was in — let me see, I don't find the date here, but the two provisions were, one, limits on the salary of state legislators, and the other provision had to do with taking reapportionment from the Legislature and putting it in the domain of the California Supreme Court.

MCCREERY: Yes, both good recent examples.

WERDEGAR: The idea, I'm told, was that limiting legislators' salaries would be of great interest to the public, which seems chronically to be somewhat disdainful of legislators, but that reapportionment was what the proponents really wanted. I don't know what party was in power at the time, but whatever party wasn't didn't want the Legislature doing reapportionment.

This court, in a case called *Senate v. Jones*,²⁸ held that that violated the single-subject rule. When you have two different parts in an initiative, you don't know — the public can be confused. They might like one and not the other, and they don't know what to do. So the idea is to avoid logrolling and to avoid confusion for the electorate.

MCCREERY: But it seems the Constitution doesn't actually define what makes a single subject. It refers to the idea of it but doesn't actually tell you how to interpret that.

WERDEGAR: The test as to whether an initiative passes the single-subject rule is whether, quoting, "all its parts are reasonably germane to a common subject or purpose." Our court has rather broadly applied that. The initiative that we did declare in violation was called, "Let the Voters Decide."

²⁸ 21 Cal.4th 1142 (1999).

The proponents tried to put an umbrella title on it and put together two different parts.

It's up to the court to apply this rule of whether all parts are reasonably germane. And we have, on occasion, found that a number of separate parts — safe schools and crime victims' rights for example — were germane to the single subject of public safety.

There was another initiative — I can't give you the name — where we found that the common purpose was overruling various opinions of our court that the public didn't like. [Laughter]

MCCREERY: Do you happen to recall when this first came up in your own work, perhaps as far back as when you were assisting other judges?

WERDEGAR: No. The only time I had anything to do with it as a jurist was in 1999, the Proposition 24, "Let the Voters Decide." I was a member of the court, and I can't remember if the court was divided on this but the majority — perhaps all of the members — held that that violated the single-subject rule. That was my only introduction to that issue.

MCCREERY: Is it useful to think about the leadership of the court at that particular time, in this case Chief Justice George, and what difference that may have made in how the members talked about and decided upon such a matter?

WERDEGAR: Not in my memory. We are each independent, and the leadership that any given chief justice gives in the decision of cases is — there are exceptions, but it's no greater than another justice who might have a strong power of persuasion. Chief Justice George certainly had strong leadership talents, but I have no recollection that in this particular regard he played a role different from any other justice.

In the *Marriage Cases*, which he assigned to himself — and Chief Justice George's view, as he articulated it, was always to assign something that might be very controversial to himself. He felt that he should have the "broad shoulders." And as we'll get to, later, this impacted his retention election.

So in that case, he did in a way have leadership because he left it to the members of the court. Instead of circulating a calendar memo with a conclusion, as we usually do and then other justices weigh in, he circulated two opposing points of view to give the other members of the court every

side of the issue. Of course, the briefs did that as well, but to lay it out as a proposed draft opinion, both ways, and then see where the court landed. The court as it turned out was equally divided, and at that point Justice George weighed in on the way it ultimately came out.

MCCREERY: The swing vote, as it were.

WERDEGAR: Yes. He was his own swing vote.

MCCREERY: Thank you. Just to return to the broader picture, when a question of whether something meets the single-subject test of reasonably germane — when such a question comes to your court — is there any difference in the way that it's treated from any other matter that comes before you in terms of how you discuss or consider it? Or is the process of discussing and writing very much similar to other matters?

WERDEGAR: In this monograph that published my speech, I do make reference to the fact that there are two schools of thought about how we should treat initiatives. One is that, since we are the only check on the initiative legislation or constitutional amendment, we should view them more stringently and with more particularity to whatever limits there might be. The other point of view is that we should be more hands off because it's the *vox populi*, the voice of the public.

I maintained in my speech and in this monograph that we do neither. We treat them just the same as we do other legislation. That is, we purport to do that. Others, outside viewers, might question that, but that's where I stand. We try to. We are aware. We're sensitive to the fact that this is direct democracy.

Some have dubbed the initiative process the fourth branch of government. There's the executive, the legislative, the judicial, and the initiative. We're never eager to overturn an initiative because the public then declares that we are thwarting the will of the people, which of course courts do. Indeed, they're supposed to if they have to, if something is in violation of the Constitution.

In California, if we declare that an initiative violates the California Constitution, as we did in the *Marriage Cases* — well, in the *Marriage Cases* it wasn't an initiative, it was a law restricting marriage to a man and a woman, and we said that violated the California Constitution. What did the voters do? They amended the California Constitution to eliminate our holding.

As I referenced, they have done that before, when this court — long before my time — declared the death penalty “cruel and unusual punishment,” the voters passed an initiative saying the death penalty of the State of California shall never be determined to be cruel and unusual punishment.

Before my time, of course, when this court determined that busing would be necessary in the realm of school attendance to address segregation, the voters passed an initiative saying busing shall never be required to address school segregation except as required by the United States Supreme Court. The federal Constitution, of course, always trumps our Constitution. So those are some examples.

MCCREERY: Speaking of the Constitution, that’s a great segue into something else we wanted to bring up today, which is just a bit more about how our state Constitution is distinct from the U.S. Constitution. You’ve mentioned the issues that arose in the *Marriage Cases*, and we also had it come up in our discussion of the *American Academy of Pediatrics v. Lungren* and the emphasis on the state constitution’s specificity on a citizen’s right to privacy. I just wonder what other distinctions between the two constitutions might have been central to the work of this court, as you’ve experienced them?

WERDEGAR: To back up, our Article I of the California Constitution, the declaration of rights, historically was not based on the United States Constitution Bill of Rights. Until the Warren era, the fifties and sixties of Earl Warren’s court, those provisions were not thought to restrict state action against the citizens of a state.

Indeed in 1974, by voter initiative, our Constitution was amended to provide that rights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution. So the two rights that we upheld that you referenced — the right to marry was based on the California Constitution as it then stood, and the parental consent case where we invalidated — as in violation of a minor’s privacy right — the requirement that she obtain the consent of her parent or a judicial order to get an abortion was, again, based on the express privacy provision of our Constitution, thereby giving broader privacy rights to a minor than the United States Constitution offers, because parental consent has been upheld under the federal Constitution.

The California, or any state, Constitution can provide its citizens greater rights. The United States Constitution is a floor. Justice Grodin, when he was here and as a scholar, has been a strong proponent of our looking to our own Constitution. There has been a trend, on occasion, to interpret our unreasonable search-and-seizure provision and our free speech provision in tandem with or identical to how the federal provision is interpreted. But that's really not — certainly not necessary and some would say not appropriate because our declaration of rights has independent origins. It was based largely on the New York Constitution. So we have afforded, under these somewhat differing provisions, we have afforded individuals greater rights.

I could give you an example where I relied on the state Constitution in dissent. This was the *Golden Gateway Center v. Golden Gateway Tenants Association* in 2001.²⁹ In that case the tenants association had been distributing pamphlets to the residents of the Golden Gateway Center on issues relating to the management of the center. The Golden Gateway Center management sued them to enjoin that, stating that it was against their rules and regulations, it created litter, and it was an intrusion on the residents and so forth.

The case came to us, and the majority — not garnering four votes for any particular view, and I forget how they went because I wrote the dissent — but the majority said that there was no free speech right for the tenants in that context because there was no state action involved. I took the position that our state Constitution was broader in its protection of speech rights than the federal Constitution, and I'll tell you why.

The federal Constitution says there shall be — the First Amendment — there shall be no law abridging the right of free speech. The California Constitution prohibits a law restraining or abridging liberty of speech or press, but it goes on to say, "Every person may freely speak, write, and publish his or her sentiments on all subjects, being responsible for the abuse of that right." It doesn't say anything about "no law," and I took it to grant free speech against private entities as well as state law, that our right runs against the world. Now, the majority was divided in their opinion, so maybe the court one day will have an opportunity to revisit that issue.

²⁹ 26 Cal.4th 1013.

MCCREERY: To what extent had that line of reasoning that you employed been used before?

WERDEGAR: I think — now, I could be wrong, but — there was an earlier case called the *Pruneyard* case, *Robins v. Pruneyard Shopping Center*,³⁰ where students were at a large shopping mall — restaurants, parking lots, stores, pathways, parks — endeavoring to distribute literature protesting a United Nations resolution against Zionism. The shopping center ejected them and said this was against their rules and regulations.

This court, long before my time, held that under the California Constitution they had the right of free speech within the shopping center, even though the shopping center was not state action. It was private action. So that preceded my dissent. Why it didn't persuade the majority I can't remember. I would have to research it. If you're interested you could look at it, but under our state Constitution the court held the students had the right to distribute their literature.

MCCREERY: Since you authored the dissent, do you happen to recall whether this has come up again in any fashion?

WERDEGAR: I don't think it has.

MCCREERY: But as you say, there may be an opportunity in the future.

WERDEGAR: Oh, yes. Issues of free speech always emerge.

MCCREERY: Thank you for bringing up the question of independent and adequate state grounds doctrine. I do recall that Justice Grodin showed quite an interest in that, and perhaps Justice Mosk as well at some points along the way.

WERDEGAR: I think Justice Mosk did, and let me say there was a debate. Sometimes this court will decide a case — I can't give you particular examples — under both constitutions. If we decided under the federal Constitution, that lends itself to our being overruled by the United States Constitution. If we decided under our Constitution, the United States Supreme Court has nothing to say about that. We're assuming we're giving greater rights, not restricting rights. But the electorate, of course, can come back and say, "To the contrary," if that's what they feel.

³⁰ 23 Cal.3d 899 (1979).

MCCREERY: What example comes to mind of when that choice has come up, if any?

WERDEGAR: There's a whole body of case law that I'm not aware of at the moment, that I can't cite you at the moment.

MCCREERY: Which other individuals have shown any personal interest in this question of state constitutionalism, perhaps even promoting it or favoring it in some way?

WERDEGAR: You've mentioned Justice Mosk, and you're right, and Justice Grodin — in my experience. Historically, I'm not sure. I think it's an area that is ripe for further exploration as we go forward.

MCCREERY: You also happened to touch a few minutes ago on the possibility of amending the California Constitution. That's another big distinction from our federal Constitution. California's can be amended more easily, and it's done much more often. [Laughter]

WERDEGAR: It's a dramatic difference. Ron George has spoken to this, and I will echo what he said. The United States Constitution has been amended twenty-seven times. The California Constitution has been amended more than 500 times.

I might say, parenthetically, this doesn't seem like a good idea. When you have a fundamental document governing the structure of our government, I don't think it should be so easily amended by, as is the case in California, a majority of the voters by process of initiative. I think to amend your fundamental governmental document should require greater study and reflection and expert opinions and so forth.

Of course, the federal Constitution is almost impossible to amend. Some think it should be a little easier in light of some United States Supreme Court decisions that have disrupted aspects of political experience in the state. Is that obscure enough? [Laughter]

MCCREERY: No, it's lovely. [Laughter]

As a practical matter, how does this ability to amend our state Constitution bear upon your work on this court?

WERDEGAR: I think I've mentioned, historically the voters have not been loath to overturn decisions that they come to believe are contrary to the will of the people. It can be very political, because the issues I mentioned

— school busing — did I mention the death penalty? Yes, I did. The death penalty. These are highly divisive issues. Single-sex marriage. And maybe that's what democracy is about. So we do what we do, and the initiative process does what it does.

MCCREERY: It is an interesting outside force, though, isn't it, on the development of the law in our state over time? It's certainly not a linear development in that sense.

WERDEGAR: That's true. And if I might go to some of the initiatives, I don't know if we spoke about this earlier but one problem — there are several, I would say, problems with the initiative process — but one is that anything passed by initiative can only be modified or amended by initiative. There have been amendments to improve the process, just this last year. But previously, initiatives drafted by some partisan individuals who think they have a good idea and slap it on the ballot — no screening, no hearing, no refinements — and if in practice it turns out to have flaws or impediments or difficulties, you have to put another initiative on the ballot. The term limits and the Three Strikes laws are two examples of that.

Term limits, a very popular idea, swept the country at one point and became the law in our state: two terms for the governor and maybe it was three for the Assembly and two for the Senate. But over time, through experience or change of public perceptions of the impact, that was thought too stringent. So they wanted to tweak it, modify it, change it a little bit. I think there were a couple of unsuccessful efforts until 2014, perhaps, when there was a modification of the term limit law passed by initiative in California so that now legislators can serve a total of twelve years, divided between either house.

The Three Strikes law was another one. It seemed like a very good idea to the public at the time, and it's in the aftermath of just a horrendous crime, the Polly Klaas killing by somebody who had certainly more than Three Strikes. The public was outraged, and so they decided: Two violent or serious felonies? If you do a third felony of any kind, you're behind bars for life.

Over time the press picked up on instances where somebody supposedly stole some golf clubs — that would be a felony — and was put behind bars for life. They focused on the last crime, and I can't cite to you

all the crimes that seemed minor compared to a life sentence. However, parenthetically, often although the third crime might be stealing some golf clubs, these individuals often had far more than two violent and serious felonies in their background. But the cases came out, and it seemed outrageous to the public, and there were efforts to modify the Three Strikes law. Once again, after more than one effort, this last election cycle, 2014, the Three Strikes law was amended to require that, like the first two strikes, the third strike also had to be violent or serious.

But that is one of the limitations of the initiative process. I think we spoke earlier that legislation was passed now where a proposed initiative has to be presented to the Legislature, maybe for some fine tuning — not that the proponents have to accept that. It also has to be posted online for a period of time so that members of the public who are interested can look at it and maybe give their input. And I think one of the most important aspects is people who are financially backing the initiative to some extent have to be disclosed.

MCCREERY: There certainly are a lot of ongoing efforts to “fix the initiative process” in some of the ways you’ve just described.

WERDEGAR: Yes. The initiative process is here to stay. Going back to the court’s response to it, the court, in its opinions, has repeatedly stated that the power of the initiative must be liberally construed to promote the democratic process and has described — this is from some of our cases — the initiative power as being, “one of the most precious rights of our democratic process.”

That’s why my speech, part of its long title, was “one hundred years of accommodation.” It really is a dance. We are the only check on the initiative power, so of course if it’s patently unconstitutional under the federal Constitution we have no choice. We have to strike it down.

MCCREERY: It is likely here to stay, as you say.

WERDEGAR: Absolutely.

MCCREERY: From where you sit on our highest court, what thoughts do you have about a way that it might be implemented and carried out more effectively, just at any step in the process? Has anything occurred to you?

WERDEGAR: Yes. I mean, it's not original, but I think some of the reforms that were just made will be very helpful. I don't know if this is part of the recent reform package. I think proponents being required once they've drafted the initiative to give the Legislature the opportunity to pass the law first, certainly to have some refinement of it by the Legislature, people who might know on the face of it that the court is going to be required to say that there are certain invalid portions.

I think that would be very important. Give the Legislature the opportunity. "Oh, you're interested in this? Let us look at it." And if the Legislature refuses to do so, all right. Let it be an initiative. I certainly think disclosure of who's behind it is extremely important because the titles can be very confusing and very misleading.

MCCREERY: The other thing that has arisen quite recently is the influence of out-of-state persons and money on our state initiative process.

WERDEGAR: Yes. That was evidently — my job is just to rule on these things and not to be engaged in the political aspects of it — but it was publicly disclosed widely that our Proposition 8 that said marriage is only between a man and a woman had a lot of outside money and interests from other states coming into the state of California to enact that.

MCCREERY: As we say, and as has been one of your themes, it's a different world today even than when you started on this court twenty years ago. There's another example of that. Thank you.

We thought we might also talk today a bit more about the matter of retention elections for Supreme Court justices, which we touched on a little bit on another day. But I wanted to give you the chance to talk about that whole part of your role as you've experienced it over these years and over three different elections, starting in 1994 when you had to face the voters immediately after being appointed and sworn in.

WERDEGAR: Yes. As we may have mentioned, when you are appointed to this court and confirmed by the Commission on Judicial Appointments, you must stand for retention at the first general election after your appointment. In my case, I was appointed in June of 1994, and the first general election thereafter was November. So I had been on the court a bare five months when the people of the state of California were called upon to say whether they wanted me retained or not.

Historically in these retention elections the public has voted yes. All of us who were ever on the ballot get really nervous because why would they vote yes? They certainly didn't know who I was, and they don't know who most of the appellate justices are in the state, including the Supreme Court justices. So you hold your breath. Some people, not knowing who a justice is, will leave it blank. Others, being raised, "If you don't know, just vote no." I guess we rely on editorial endorsements and so forth. It has mostly worked out.

When I was on the ballot for the first time, I did receive 61 percent of the vote. I was filling Justice Panelli's term, of which eight years remained, so eight years down the road I had to stand for retention again. That was in 2002.

MCCREERY: How did that one go by comparison?

WERDEGAR: That was different. In the interim, this court had decided the parental consent case *American Academy of Pediatrics v. Lungren*. Ron George and Ming Chin, who had voted in the majority in that case striking down the law requiring parental consent for a minor — that opinion, which was 4–3, aroused a lot of controversy and a lot of resentment by various segments of the population.

It was very clear that there was going to be an effort to see that those two justices, who happened to be on the ballot, would not be retained. This hadn't been the case since 1986, when it was the retention election for Rose Bird, Joe Grodin, Cruz Reynoso, and Stanley Mosk. Of which three out of the four were not retained. Generally, we thought maybe that was an aberration and would never happen again. But it looked like it was going to be the case for Chief Justice George and Justice Ming Chin.

Ron George, true to his style, got out his little black book, engaged campaign consultants and fundraisers, and waged a vigorous and aggressive campaign. Ming Chin, as well, mounted a campaign, and they were both retained. That was 2000.

In 2002, two years later, four years after our opinion in that controversial case, I was on the ballot. Things had seemed to settle down, but I was advised by people in Governor Wilson's administration that I would be well advised to mount some kind of a campaign, the idea being that — and I had also written a very high-profile dissent in the 101 California shootout

case, *Merrill v. Navegar*,³¹ which aroused the ire of gun rights individuals. The idea was that you want to make sure you avoid what's called the snake in the grass, that is, people who are opposed to you but are quietly marshaling their forces to come out against you, to become visible only late in the game, in September, when the poor benighted justice is caught flat-footed and has no opportunity to respond.

This had happened not so long before in Tennessee when Supreme Court Justice Penny White, who was up for retention, had typically — as individuals did in that era — just done nothing, paid her filing fee.

Just before her election there was a strong victims' rights campaign against her. She had voted — not even written the majority opinion — I believe she had just been a member of the court that had reversed a death penalty. She was not retained. That was alarming to those of us who were up for retention.

So I took that advice and had to hire a campaign consultant and a professional fundraiser and a political law firm that sees to it that you don't transgress any ethical provisions, don't get yourself in trouble in any way. We did have a campaign.

MCCREERY: Who could help you select these individuals to bring in?

WERDEGAR: People in the Wilson administration did. I also consulted with Justice George. You can be sure this was so out of the realm of anything I had ever been exposed to or ever intended or anticipated I would ever be exposed to. It was educational because it compelled me to go out and speak to people that would invite me to speak and to have a more public face than I ever sought. But it was extremely painful, I mean, to raise money.

MCCREERY: How did it go, as the campaign went on?

WERDEGAR: The campaign consultant did the work of securing for me what he could in the way of endorsements. And the fundraiser, the professional fundraiser, did what she could to get organizations or individuals to write letters on my behalf or to invite me to speak, and I did have to speak. What can you talk about? At the time, judicial ethics precluded any judge running for election or retention to commit to any position on any issue that might come before them.

³¹ 26 Cal.4th 465 (2001).

Right about that time, 2002, the United States Supreme Court came down with this — talk about a controversial opinion — *Minnesota v. White*,³² which held that if justices are going to be on the ballot to be voted on, yes or no or a contested election, you can't constrain their free speech rights. The United States Supreme Court invalidated the Minnesota law that had precluded judges from announcing their position on issues.

This did come down about the time — I can't be clear about the timing, but I adhered to what had been the California code of ethics, and I used it as a shield. I had questionnaires sent to me by activist groups who wanted to know where I stood on various things. One donor, potentially a large donor, called me personally, and the questions were, "How did I feel about affirmative action, about legalization of certain drugs, about civil liberties for homosexuals, about religion in the schools?"

My refrain was, "It's unethical for me to speak to an issue that might come before the court."

His frustrated response was, "Everything might come before the court!"

He's right, and I understand. I understand exactly how he felt. But I was so grateful for the shield that we had at that time. In case you're wondering, I have no idea at this time if this individual saw fit to contribute to my campaign or not.

MCCREERY: Other than being called upon to give speeches, what was your own role in the campaign?

WERDEGAR: That was it. I mean, I had friends who came forward. Lawyers, of course, are the ones that you hope will because they're the ones that understand. They also have an interest in an independent judiciary. But on the other hand, certain aspects of the bar have an interest in how a particular justice will rule on cases. Justice Grodin, in his book, *In Pursuit of Justice*, spoke to that about his campaign. He used the phrase — certain parts of the bar will have an interest in a judge's opinions, and he said they might even have a stake in it.

So it's all very awkward. Of course, you're recused for a certain amount of time after — assuming you are retained — you're recused from hearing any case that has as a party or an attorney — anybody who gave money to your campaign.

³² Republican Party of Minnesota v. White, 536 U.S. 765 (2002).

Certain women's groups mounted — well, gave me the opportunity to speak at fundraisers or would endorse me, and certain lawyers would. All I did was write thank-you notes.

MCCREERY: Given what you saw go on around you as the election date approached, what was your level of concern that you really wouldn't pass through this time?

WERDEGAR: Even if there's no campaign against you, you really don't know and you're always nervous for the reasons I mentioned earlier. Unless there's a negative campaign against you, people don't know who you are. I had my concerns.

Oh, I want to tell you one thing about money that came my way. This is an article from *The Recorder*, and don't hold me responsible for what it says, the title, all right? But it says, "Lawyers can be both blonde and brilliant." The point was that my campaign received a contribution from the woman who was the author of the book that became the movie *Legally Blonde*. That was really cute. If somebody picked up on that I wouldn't have known, but she gave something to my campaign. [Laughter] So that was kind of a cute article.

Ron George. I don't know how much he raised. In Justice Grodin's book, he mentioned that he raised — or the three of them — Justice Mosk didn't participate in this — but the three of them raised maybe \$4 million. But the opposition raised \$7 million. That is a lot of money, and I've read that as big money starts paying attention to who's on the supreme courts of the states, something like \$45 million has been spent in national judicial elections.

Most of the money goes to television, which of course — I certainly have no money for television. The money that we used was to preemptively buy a place on slate mailers. Slate mailers are these cards or pamphlets that go to households telling them how to vote. They have titles such as Citizens for Responsible Government and Voters for Integrity and so on, and it's for sale.

We bought it preemptively so that people against me, groups against me, wouldn't pay for "Vote no on Werdegar." They wouldn't buy that slot on that slate. Once the slate has taken my money, they can't take it. That's what the money is about. There was a question somewhere. [Laughter]

MCCREERY: Just how worried were you about the outcome?

WERDEGAR: You have to be anxious. But in the end — in the end it turned out — and we might have touched upon this, but — this particular retention I received 74.2 percent of the votes cast, which was the largest number of votes cast for any candidate in the United States of America, which was very gratifying.

But the reason was, apart from the voters' approval of whatever they thought they knew or didn't know, that there was no national election that year. We, being the most populous state in the union, and I, being unopposed, that's how it played out. But given that it was a year that I did have to mount a modest campaign, it was very gratifying.

MCCREERY: Especially since you were singled out among the three who were up for retention at that time. Justices Baxter and Moreno also.

WERDEGAR: Yes, I was vulnerable because Justice Baxter had — I don't enjoy using the word "voted" with respect to what justices do, but that's how we're perceived and that's in the end what we do — we end up landing 4-to-3 on something — Justice Baxter had been on the other side of the parental consent issue, and he didn't have to concern himself in any way. And in the end maybe I didn't have to, but we had to make this decision in February, when all was silent, to avoid this "snake in the grass" or "coming out of the weeds" are the expressions that are used.

MCCREERY: Justice Moreno, whom we'll talk about a bit more later on, was really facing his first retention election and hadn't been there that long.

WERDEGAR: I think that's the answer. He hadn't attracted attention.

MCCREERY: But it's interesting that your yes vote percentage was higher than either of them got by a few points.

WERDEGAR: Yes, and that brings us once again to the subject of why, not in this particular election but generally why. One justice on the California Court of Appeal did a study, and maybe others have done studies, as to what is it? Why do voters vote yes or no? One thesis was the name. It's well known now that when Armand Arabian was on the ballot, he got considerably fewer votes in retention than others who were on because his name, perhaps, struck voters as something that they didn't want to endorse.

I was told not to use my middle name — that would be Kathryn Mickle Werdegar — because highlighting what we call my maiden name might

strike some voters as being too independent, too forward — I'm just quoting! I was also told to be sure to be Kathryn rather than Kay, that Kathryn was a friendly-sounding name. Anybody listening or reading this should consider, how do they vote for judges?

What we judges would tell people who ask us is generally vote yes unless you have reason to know that the individual has done something unethical or really out of line. Editorial boards usually will say, "Vote yes on judges."

So I had my apprehensions, but it all came to a happy resolution. I would never, ever go through a campaign again, but as I started out saying it had its benefits. It forced me to be more forward and outgoing and engaged with members of the public, attorney members of the public. But there were some people who gave me fundraisers where their guests were simply members of the public, and there's never any harm when a justice has to explain to the general public what the courts do and how we're supposed to be above the political fray.

Regrettably, though, being above the political fray is a luxury that may be diminishing, as you look nationally at these contested partisan elections with money from outside the state and a push from certain political elements to fashion the judiciary of the states in their vision of what they think justices should be doing. It's troubling.

MCCREERY: It is, and you had mentioned the matter of judicial independence. We're seeing some dangers to that independence in various state elections and at the national level. How have your views of that come along over time?

WERDEGAR: The cause for alarm has increased over time. Early on I didn't have any particular views, but if I did it would be the view that I have today that California has the best system. We largely have avoided being perceived as political or being politicized.

I think our system of our governor in power nominating an individual who has already been screened by the State Bar committee to find anything in that individual's background that would be cause for ethical concern or be an embarrassment to the governor; having that individual nominated; having the statewide commission — the attorney general, the chief justice of the state, and the senior-most presiding justice of the Court of Appeal in the state — review and get public commentary and speakers present their

views at the hearing; and then you have a term, but you have to be retained; and then you have another where you have to be retained. You have a safety valve if the public perceives a jurist to be completely out of line, the safety valve of recall or failure to retain.

Contested elections are just a disaster, but the public wants them, actually. The public feels they have a right to vote on people who are going to be “voting” on issues. I don’t favor life terms, as the federal bench has. I know former Chief Justice Ron George suggested a term of years. He might have said fifteen years. I think that’s a possible path to go. As someone who was retained after my first eight years and retained again after my subsequent twelve years, I would just have to think about how I feel. [Laughter] That’s my little joke, really, about how I feel about a fixed term.

But I would not ever favor contested elections. It’s a disaster, politicizing the judiciary. It just diminishes it in the eye of the public. You become nothing more than a legislator, who is supposed to vote the will of his constituents. Judges are supposed to vote where their training and their best judgment and their integrity takes them, which is different than legislators.

MCCREERY: What other improvements to our system would you like to suggest?

WERDEGAR: I think we’ve pretty much covered it.

MCCREERY: Is there anything else you’d like to add about the matter of judicial independence as it’s playing out across the nation?

WERDEGAR: We have an independent United States Supreme Court, and we had an independent Warren Court. People today, some, are very disturbed by some of the opinions of the United States Supreme Court. There were huge segments of the population that were deeply disturbed by what the Warren Court advanced. It’s an ongoing philosophical issue in our government about the role of the judiciary, but I’ll stand firm on the idea that electing judges in partisan contested elections, which is, I think, happening in more states than not — I think it’s just a shame.

I’ll go back. California’s system, I think, has served us well by and large, given the other choices.

MCCREERY: To finish off, maybe you could say a couple words about your most recent retention election, which was just last fall, 2014.

WERDEGAR: Yes. Well, I was very clear that, even if there had been some whisper of a need, I was never going to run a campaign again. But I was retained, this time by 71 percent of the vote and happy to be so.

MCCREERY: It gives you another long chunk ahead, of time, if you care to take it.

WERDEGAR: “Should you care to take it,” yes. [Laughter]

MCCREERY: We made mention a moment ago of Justice Carlos Moreno. But let’s back up a bit and talk about the circumstances under which he joined this court as your colleague in 2001, precipitated by the death of Justice Stanley Mosk.

WERDEGAR: Have we spoken as to the composition of the court when I arrived?

MCCREERY: We have somewhat, yes.

WERDEGAR: I’ll repeat that for the moment. When I arrived in 1994, replacing Justice Panelli — who of course is irreplaceable, but there you have it — he retired — the other members of the court were Chief Justice Lucas, Justice Stanley Mosk, Justice Joyce Kennard, Justice Armand Arabian, Justice Marvin Baxter, and Justice George.

Then Chief Justice Lucas and Justice Arabian retired and were replaced by Justices Chin and Brown. After Justice Mosk’s death in 2001, as you said, Governor Davis appointed Carlos Moreno.

If I haven’t said so before, I’d like to say I really, and I think everyone, keenly missed Justice Stanley Mosk. He was unique. He had a great depth of knowledge about California history and politics and the law and about the personalities that moved those elements of our society. He had a sense of humor, and he had strongly held views. He was a strong personality. He could be charming. He was a big presence. But his depth of history about the court and the politics and having been, as they say colloquially, “a player” in so much of that; he was a wonderful resource.

Justice Moreno was a wonderful replacement.

MCCREERY: Pardon me for interrupting. I wonder if you can just talk about whether you had any inkling that Justice Mosk was unwell, or how much of a surprise it was when he passed away rather suddenly?

WERDEGAR: It was a huge surprise. Of course, I don't actually remember how old he was. Do you?

MCCREERY: In his eighties.

WERDEGAR: In any case, a person gets to a certain age and the denouement is no mystery. But in his case, he seemed fine. He did not seem frail. He did not seem disengaged, unengaged. The story is well known. Privately he had told, I believe — he had told the governor and maybe our chief at that time, Ron George, that he was going to retire and had written his letter.

He went home for a doctor's appointment, took a nap, and never woke up. I probably mentioned earlier, what a gift. He was fortunate in almost every aspect of his life. Given his years, one would assume that he would retire at some point. But it was a surprise and a shock, yes.

MCCREERY: What do you recall of the transition time before a replacement for him was named?

WERDEGAR: I have no recollection. It probably was one of those times where we had pro tems come and sit. I don't think — you might know — I don't think there was a great length of time before a replacement was appointed.

Justice Moreno was most welcome. It was interesting to us. It was the first time, at least in my memory, where someone had been taken from the federal bench, district court, life tenure, to come up to our court — actually, I think, a very wise move. I would much rather be a justice of the California Supreme Court than a federal life-term judge. The issues are different, and so on.

But the court generally, insofar as we spoke among ourselves about it, was very excited to have him come, delighted that he was Hispanic and would add some diversity. He, in turn, turned out to be affable and accessible and agreeable and a delightful person that everybody, I think, liked and I certainly liked. I missed him very much when he left, as a friend and a personality.

MCCREERY: You mention friendship, and I wonder what sort of way you could work with him that might have differed from your other colleagues?

WERDEGAR: He was outgoing, and he was inclusive. When we'd be traveling, say to Sacramento, he and I would have occasion to spend some time

at dinner together or in other ways. He was just a very friendly person and friendly to me.

MCCREERY: As you say, the federal court experience is an interesting background, and he had, of course, earlier served in the state system as a trial judge in Los Angeles County. But having done both, I wonder what you might have noted about the effect of the federal experience on his approaches and his jurisprudence? Does anything rise to the top there?

WERDEGAR: I have no memory of that at all. Surely some of it came to the fore, but our issues are very different. What you do as a trial judge, whether it's a federal court or the superior court of the state, is so different than what we do here.

Have we spoken about — before we move forward with other — well, maybe when we get to my newest colleagues we'll speak about the difference in appointment between the court I joined, which is the Deukmejian court, and Wilson's appointment of me, and the court I'm now a part of — that is, Jerry Brown's court — have we talked about that?

MCCREERY: We haven't yet, no. We've been really focusing on that earlier period that you're describing. I don't know to what extent you might consider Justice Moreno as any kind of dividing point or transition point?

WERDEGAR: His background was unlike others, and I do think it's valuable to have a trial court experience, which, of course, some of my colleagues did. When Deukmejian made his judicial appointments, it was mandatory that you start in a trial court. I should remind us that in those days that meant the muni court.

I did apply for a Deukmejian appointment, and that was for the muni court, which it didn't seem would suit me all that well. Justice Panelli calling me to serve him on the Supreme Court eliminated that as an option. But it had to be muni court, then superior court. Maybe if you were lucky you'd go to the appellate court.

So when Wilson appointed me directly to the Court of Appeal, that was a notable deviation from what was *de rigueur*, and it points up how times change and what's perceived as appropriate changes.

After me, appointed to this court was Justice Chin, who had the appropriate background. He had the trial court, the D.A. That's right — I forgot the D.A. part — D.A., trial court, Court of Appeal. I was very unusual, and

much attention was paid to that at the time, positive and negative, bringing us to today, when it's so different.

But Justice Moreno, by anybody's lights, had a fine background.

MCCREERY: How did you come to think of his jurisprudence?

WERDEGAR: How did I come to think of it? If there were to be divisions on the court, sometimes he and I would agree in opposition to others. As I've mentioned before, when there are divisions there are real divisions, but our court often enough would be unanimous.

MCCREERY: Do you make any distinction between criminal matters and civil ones in thinking about that?

WERDEGAR: Possibly so. I think your career experience and your inclinations to have a certain career path — say, if you are a district attorney or a public defender — I don't think we've had any public defenders — or you're an academic — you do have, maybe, an implicit different view of what should transpire in a case. But I can't recall if he would dissent in criminal matters or not. Certainly, I have on occasion when others have not. He and I might have joined. I can't remember.

MCCREERY: But certainly it was a period of change. Then, a few years later, Justice Janice Rogers Brown was tapped by President George W. Bush to —

WERDEGAR: Right, yes. Who did she replace on the court when she came?

MCCREERY: When Justice George was elevated to chief she actually, technically, replaced him.

WERDEGAR: Right. Then she was nominated to the federal court. True.

MCCREERY: I just wonder about how you recall that transition. How did you learn about it, and what was the effect during the time before she left your company?

WERDEGAR: I was surprised when I first became aware that she was being considered for a federal appointment. But these are not things that are usually on my radar. What else would you be asking me?

MCCREERY: I just wondered how the news was delivered to you as her colleagues and the transition of acknowledging her service and saying goodbye and that sort of thing.

WERDEGAR: Oh, I see. You've probably explored this in other oral histories. I can't remember when the news came, but I do remember that the chief at the time, Ron George, offered to give her, as is traditional, some kind of a farewell at the court, and she declined. I don't think Justice Brown ever felt really a part of this court.

She early on was ahead of her time in choosing to work up outside of Sacramento, or in Sacramento maybe, which had been her previous office as a state appellate judge. Now it's more common, although most people do try to be here. But our current chief spends a lot of time in her former chambers near her home in Sacramento. Justice Brown did that earlier, so she was a pioneer in doing that.

But she wasn't around a lot, and I don't think she felt all that comfortable here. I think coming from a political background — and of course she was an appellate judge after the political background — but perhaps she expected to be able to influence the court in some of our jurisprudence more easily than any individual really can.

So she declined a farewell party, and she left.

MCCREERY: Then, as we know, Justice Carol Corrigan was selected to replace her. Talk about how you learned that news and what you might have known of Justice Corrigan before she came.

WERDEGAR: Justice Corrigan was appointed to fill my vacancy when I left the Court of Appeal. I can't remember how I heard it. Of course, we're always very excited and interested to know who is coming. It was Governor Schwarzenegger who appointed her. Yes.

She brought her own strengths of trial court judge, D.A. She had served on the First District Court of Appeal, Division Three, with Justice Chin, who had been my colleague there. She brought who she is, as every judge does, and she has a lot to offer. She has a great sense of humor.

MCCREERY: How did you see the panel itself changing in terms of your meetings together and that sort of thing now that the membership was shifting a bit? Any thoughts there?

WERDEGAR: She and Justice Chin, from the very beginning and throughout, have had a very close affinity, along with Justice Baxter. They all tended to see the world the same way, so that was a grouping that perhaps was more distinct than some others. I like former Chief Justice Ron George's

description of us as a square dance. Your partner now may be the opposing dancer later, and so on. We all are moving parts. But those three justices, I think, if one were to examine their views, were closely aligned most of the time.

MCCREERY: Speaking of Chief Justice George, his court — that is, the George Court, which, of course, did shift a bit over time — was said to have more of a center than the Lucas Court had had. Your thoughts?

WERDEGAR: That's what they say. The Lucas Court — I'm quoting what history has told us, these are not original thoughts — was put in place by Governor George Deukmejian, who campaigned on changing what had been known as the Bird Court, and he succeeded. And yes, that court — which I was not really a part of until much toward the end — that court's inclination was to rein in the direction that the Bird Court would seem to go.

But then you bring in new people who have different aspects to them, appointed by different governors, and I think it's fair to say, although I resist labels, I think moderate is how the George court was described and I think appropriately so. If you were to ask me to define moderate, I'd be hard-pressed to do it in the context of how they decided cases, but people seem to feel they know it when they see it. They seem to feel they know these labels when they see them.

Ron George, as is well known, restored some interaction and relationship with the Legislature, which — it had been unfortunate — before my time somehow had been severed with Chief Justice Lucas. Ron came to the court, famously, to reach out and be known and visit every county in the state and meet with the Legislature. I think he did a splendid job in doing that.

We've been lucky with our chiefs. Ron George was just dynamite: energy, open, collegial, neutral — you'd never know he had any private preferences about anything. And our current chief has that same quality. It's a wonderful quality, and I think we've been very fortunate.

MCCREERY: Is there anything you'd like to add about the center of the George Court or about anything to do with that period of time in the mid-2000s and your colleagues?

WERDEGAR: Not that I can remember. Who was it then? It was Ron George and Stanley Mosk and Marvin Baxter and then it was I. Oh, and

Justice Kennard. Kennard came before Baxter in seniority. I mention this because it's the order in which you speak.

I've always in recent times — not when I was the last to speak — I didn't relish that — but speaking in the middle I always enjoyed, because then you have the benefit of your more senior colleagues, and you can decide what you're going to offer or where you're going to land. Mosk always had something wonderful to say. Baxter always had a very clear point of view. But again, Justice Kennard was more senior to him, so she would speak, and then I would speak after Justice Baxter. It was a good place to be.

MCCREERY: Then with the addition later of Justices Moreno and then Corrigan?

WERDEGAR: I would move up. For many, many years it would be Justice Kennard, Justice Baxter, and myself. If there were going to be differences in a case, which there aren't always, if there were going to be I would have heard the differences by the time I had to speak.

MCCREERY: Thank you. I appreciate your reflecting on that. Let us turn then, if we might, to the matter of capital punishment and the actual administration in our state of the death penalty. Knowing you had been exposed to this part of the Supreme Court's work from an early stage of your career as a research attorney, talk a little bit about your orientation to what portion of the court's workload it is and how it's handled, if you would.

WERDEGAR: In any given year the court might, of its cases that it files, there might be one-quarter to one-third capital cases, but that doesn't speak to the impact on our workload of these capital cases, which — the impact is horrendous. Over time, and I think it was during Ron George's tenure, the Legislature funded for us a capital central staff in the hopes that we could move the cases along.

The burden of the capital cases is enormous. Justice Mosk was the last jurist after I joined the court to keep annuals on his staff. We're coming back to that, by the way, which is interesting. But he finally gave it up because the capital cases you cannot give to an annual attorney. They have a life way beyond a year. And if you're not giving them to one of your attorneys, it's not fair to give the extra burden to your other attorneys. So he finally saw the light on that and had a permanent staff.

As I say, the newer judges are going back to the annual attorney model. We'll see if they continue to do that or if they're burdened by the capital cases.

Working on a capital case, I certainly did as a staff attorney. But the briefing runs hundreds and hundreds of pages, and the time it takes to write a calendar memo to circulate among the court takes weeks if not months. Then the rest of the court weighs in and you set it for oral argument.

Then after the case is decided, that's just the beginning. Then the defendant petitions this court for habeas corpus. That briefing can run hundreds of pages and multiple, multiple issues. And preparing the conference memo as to whether we should deny the petition or grant it or issue an order to show cause can take hundreds of pages. It's just a very, very lengthy, lengthy process.

Of course, the capital cases come directly to us from the death judgment. There's no intermediate court. There's no filtering of issues. Any and every issue that any defense attorney thinks worthy of mentioning we have to resolve, which is very different from other cases where we select only the issues that are needing our attention as being in conflict or unresolved.

Then, of course, this takes several years. Then after we've resolved it they go over to the federal court, and the federal court tells the defendant, "You haven't — " and I put quotes on this, "You haven't 'exhausted' this issue in state court." They come back and they brief it in state court, and a given defendant might file multiple successive petitions here. It's a very lengthy process.

MCCREERY: I was recalling from our earlier conversation that at the time of your confirmation hearing to become a Supreme Court justice, you were questioned by some of your panelists about your views and your plan for carrying out this portion of your role. We talked about that in some detail but I wonder, when you entered the job and this began to come up in reality, what did you find was the actual challenge of working this into your overall workload?

WERDEGAR: You do it as it comes along. It is part of our work, and as I say in any given year capital cases comprised one-quarter to one-third of our opinions. I would do my share. Now that we have a capital central staff, some of each chambers' cases are assigned to the capital central staff,

but your chambers has to carefully review it and approve it and edit it and change anything, and so on.

I do feel that in many ways I was very prepared to come to this court in a way that I didn't publicly express when I was appointed, because I had done all this as a staff person. There was so much I knew that I didn't have to learn, but of course my judgment now was of significance as the actual judge.

But we did have executions. There were eleven after I was appointed, and that was a whole new dimension.

MCCREERY: As you say, it had already resumed before you arrived but not terribly long before.

WERDEGAR: Yes. There were two executions before I came on, and then we had eleven executions. We haven't had one since 2006 because a federal district court declared our three-drug execution protocol unconstitutional, I believe as cruel and unusual under the federal Constitution. There has been effectively a moratorium while California seeks to devise some other protocol.

You might be aware that within the last month or two Governor Brown settled a lawsuit that was brought to require the state to put forth a new protocol to implement the death penalty. I only know what I read in the newspaper, which was that that case was settled and it was determined that the state would propose a new protocol. When that occurs that will have to go through administrative hearings, and there will be a time lapse before it's implemented, if it ever is.

There have been initiatives on the ballot to abolish the death penalty. That last one, maybe it was 2014, sought to emphasize the fiscal cost of the penalty, which is enormous, and it failed but I think it came closer to passing than some previous ones have. And I'm told, by way of hearsay, I think there's going to be a couple of initiatives on the ballot again relating to the death penalty — this is all hearsay — one to abolish it and one to speed it along, what we call competing initiatives. You might ask me, if they both pass what do we do?

MCCREERY: What if they both pass? What do we do? [Laughter]

WERDEGAR: [Laughter] I knew you wanted to ask that. Well, I think you can imagine the answer also. The one that passes with the highest amount of votes would prevail.

MCCREERY: You may not have seen the last of that aspect either. But in any event, as you mention, the state is struggling with the matter of the implementation by drugs, and that matter is being taken up elsewhere presently.

WERDEGAR: Yes. We have nothing to say about that. There is so much related to the death penalty that this court has nothing to say about.

MCCREERY: Let me ask you, if you would, to describe your own experience of your role requiring you to be a part of an actual execution taking place. I gather the first one you were in on was in early 1996, so you had been on the court since mid-1994. What do you recall about that, and what exactly was your role?

WERDEGAR: Yes. I don't have a distinct memory of that first one except that it's a solemn experience. It's an uncomfortable experience. There was a tradition, under Ron George certainly — first of all, all the justices have to be available on execution day in case there's a last-minute petition relating to halting the execution. If such a petition comes in, the staff has to hastily read the petition, read the opposition, work up a memorandum for the members of the court. Each justice's attorney would advise the justice, the justice would consider it herself, and we vote on it.

That may have happened once or twice in those eleven. I can't remember. I'm sure it did at least once. Frantic dealing with last-minute papers. So the justices have to be available, and we didn't use to have cell phones so everybody would be in the building or maybe available by telephone, but mostly in the building.

On the day or evening of the execution — because they were usually scheduled around midnight — and again, hearsay only — I was told that this was to avoid facilitating demonstrations outside San Quentin. I don't know if that's true. But we would gather in the chief justice's chambers, sit around the conference table.

The chief would open a line to San Quentin, a phone line. We would be asked, as the execution was about to be put in process, we would be asked, "Is there anything pending before the court?"

That was the critical question. And the chief would respond, "No, there is not."

That line would stay open, and someone in the area where the execution was going to take place would announce to us what was happening, such as, “The IV has been placed.” This and that. We would stay around the table until whoever was responsible at San Quentin would announce that the individual was declared dead. So it would make an impression on one.

I would reflect on the fact that it was not this court that pronounced the death judgment. It was the jury who had heard the case and had decided that, under the laws of the State of California, this was going to be the judgment and then we, in the intervening time — which, given the delays, could be many, many years — had done our job by reviewing the record and the arguments of the defense counsel as to the validity of this judgment and had determined that it was valid. But it was a somber and solemn experience.

MCCREERY: May I ask what effect it might have had on your views of this as a penalty that is one of several available to juries?

WERDEGAR: You may ask, but I won’t respond. My job is to uphold it if it’s a constitutionally valid judgment. My personal views, whether with respect to any particular case or the death penalty in general, are not something that I bring to my work.

Going back to your opening observation that I was questioned at length — one might say I was grilled — on my views of the death penalty or whether I would uphold it, anything that I might privately believe or feel is not relevant to what I do as a judge reviewing these cases.

MCCREERY: You mentioned a few minutes ago the economic aspects of having a death penalty in this state and of administering it, and that’s an argument that’s being made to voters in these initiatives, as you pointed out. Certainly, it’s a study in contrasts, the two options of life in prison without possibility of parole versus a judgment of death. From the economic perspective, what are your thoughts on our system?

WERDEGAR: I’m hardly an expert. But you can’t be around here without hearing comments about the cost of the death penalty. I’m not the one to say definitively. I think life in prison without the possibility of parole costs the state much less than the death penalty.

First of all, so many of the prisoners are — it’s not as if the judgment’s pronounced and they are executed. They are spending their life, many,

many years of it, in special facilities apart from the general prison population. And the resources that are devoted to appealing and reviewing and sending over to the federal courts their cases are enormous. Studies have been done, and I can't quote them, but they're readily available to anyone who is interested as to the actual fiscal impact. Life in prison without parole probably costs the state too, but these are judgments for our politicians and our voters to assess and to resolve.

MCCREERY: In terms of how juries are instructed to consider these options, as far as you know without having been directly involved in that process, are we well enough set up to make the options and the distinctions and the responsibilities of the jury clear to them in trials?

WERDEGAR: They are given the choice — well, first of all, before they are even chosen for the jury it's described to them that, should it come to a penalty phase, they will have this sentencing choice of execution — capital punishment — or life in prison without the possibility of parole. They're deeply examined as to whether, whatever private reservations or biases they might have about the penalty, can they put those aside and based on the instructions given them by the court consider the evidence and the aggravating and mitigating evidence, should it come to a penalty phase, and decide the penalty according to how they are instructed?

There's much back and forth during voir dire by the attorneys as they interview each juror. We have a lot of cases about whether a juror should have been disqualified from serving on the jury because of her responses during this voir dire. But the United States constitutional law is that, because a juror personally doesn't favor the death penalty, that's not grounds for disqualifying that juror if the juror attests that she can put aside her personal views, listen to the evidence, and follow the instructions of the court.

So they get that during voir dire, and then after the case if they do determine that the defendant is guilty of these capital crimes, they hear mitigating evidence. That's when the trial turns to the background, history, whatever good deeds the defendant might have done, mitigating evidence, and the aggravating evidence, other crimes and so forth. They are instructed that, if they find that aggravating outweighs mitigating it's their responsibility to impose the ultimate punishment. But if they find that there's more mitigation than aggravation, they can leave it with life without parole.

MCCREERY: As you say, the juror's role is quite different. But it has this same aspect of their being asked to separate the personal view from the role of the juror, just as you're suggesting you separate your personal view from your role as a justice.

WERDEGAR: Whatever it might be, yes. We haven't spoken to what it actually is. I'm just feeling it's inappropriate for me to get into that.

MCCREERY: I only wanted to give you the chance to do so if you care to.

WERDEGAR: Yes. Thank you.

MCCREERY: It is a solemn duty, and just lastly, I wonder if participating in the way that your role requires changes you in any way over time?

WERDEGAR: The death cases generally have changed me. First of all, the crimes where the jury has imposed capital punishment, there's a wide spectrum. But some of them are so heinous, so depraved, so beyond your worst imagining, that it's a revelation that people that have not been exposed to the facts and the knowledge of these crimes just can't imagine that humans can engage in. So it's widened my awareness in that very unpleasant way.

When you get to the background of some of the defendants that have inflicted these crimes on other humans, again, if you haven't been exposed to it you just could not imagine how some human beings are, to use the word, "raised," treated as they are growing up.

Now, this is not every case and every defendant, but the aspects of human life that you learn on both sides of the ledger — if you haven't been involved in working over the years, as I have, as a staff attorney and a Supreme Court justice, on these death cases, it would go beyond your imagining. I wouldn't wish it on anybody. It's a dark, dark side of life and humanity.

Some of the crimes are beyond belief, the callousness, the horrific nature of them. Again — and I'm not a juror sitting and evaluating mitigation, but I'm talking about the facts, the lives that these cases expose you to are horrible — not every case, of course.

You're saying did it change me? Yes, just the awareness that nobody would seek to have, frankly. The awareness that most people wouldn't have, it's not a welcome awareness. But that has certainly changed me.

MCCREERY: Our system is such that the governor has a role or a possible role to play, too, and is often asked to grant clemency and so on. As a matter of interest, when the executions in California were resumed before you joined the court in Governor Wilson's time, he continued as governor during a number of these executions.

WERDEGAR: I think two. Two before I joined the court.

MCCREERY: Several overall. Exactly. Then there were a number of others while Governor Davis was in office and then finally a few when Governor Schwarzenegger was in office.

WERDEGAR: Oh, really?

MCCREERY: I'm only wondering if, from where you sat, it made any difference who was in that office at the time in terms of how things played out?

WERDEGAR: Not at all that I can remember. You mentioned clemency, and I will speak to that. If a clemency petition is presented to the governor, if the individual who's seeking clemency has two felonies before this capital crime I think the Constitution or the law requires that the governor present the petition to the court for its evaluation.

I can only remember — I could be wrong because I didn't research this, but I can remember only one time when — and I don't know who the governor was — when we were asked as a court to advise the governor of our view of whether clemency was justified. Speaking with my staff attorney some time back about this in connection with the whole capital-case procedures, on that occasion we did have a clemency staff attorney who would look at the petition, look at the opposition, explore the laws pertaining thereto, and so forth, and recommend to the court.

The court, on the only occasion that I'm aware of, recommended that the governor refuse clemency. I'm not here to say that the governor is bound by that, but clemency was not granted. It might be that in the circumstance where the individual has two felonies ahead of time that we *are* determinative. I'm not sure. And of course it's been almost ten years since we had an execution.

Effectively we don't have — it's been said — we really don't except in the books have a death penalty, since 2006 anyway. All the avenues and recourse that a condemned individual has to pursue: our appellate process,

our habeas process, the federal court habeas process, back to us for exhaustion, back to the federal habeas, back to us for exhaustion — it's more of an abstract. Of course, not for those who did experience it. But given these few that have been executed as against the 700 who are on death row, it's an unlikely outcome.

You may be aware that a federal district court judge has declared our death penalty unconstitutional. Because of that delay, I believe that the federal district court declared our death penalty arbitrary, unconstitutionally arbitrary. That opinion is on appeal to the Ninth Circuit, and that's just a matter of interest, what a federal district court judge says. It doesn't necessarily have an effect, except by the force of its reasoning. It has no binding effect on us. But it's something that, when the issue comes to our court, we would certainly look at the reasoning. But it has no impact on the California Supreme Court, nor would the Ninth Circuit either way, except to be something for this court to give serious consideration to the reasoning.

MCCREERY: Just to wrap up with a couple of practical matters of your process here, you touched earlier on the fact that there's now a capital central staff specifically to handle this large caseload. Talk about the adding of that special staff and how well it's worked out over time.

WERDEGAR: Certainly it has relieved the individual chambers of some of the workload. There are seven capital central staff attorneys. So I say it's worked out well, but if people are hoping that we're just going to move these cases along, there seem so many steps along the way including, initially, appointment of counsel, and correction of the record, and briefing by counsel, and response to briefing. It's been a help, but anybody who is hoping that the death penalty cases will accelerate — it's hard to see it happening.

It's very frustrating to people who are favoring the death penalty. As I say, I've heard there's going to be some initiative on the ballot forcing the state to do something. Part of it would be funding, funding for more attorneys, which is totally out of our control.

MCCREERY: Any other thoughts about streamlining the process or anything?

WERDEGAR: No. People have studied this, have debated it. Apart from more money for more attorneys, we have tried in our jurisprudence to streamline this habeas corpus procedure back and forth.

I authored an opinion called *In re Reno* for a unanimous court that tried to set out the limits on how many times a defendant can come back to us again and again and again raising really the same issues time and time again.³³ Their attorneys, of course, are dedicated to any possible impediment available to them, devoted to their client.

We, in our jurisprudence, have tried to impose discipline and reasonableness on these multiple petitions that come back to the court. The court did, in that *In re Reno* opinion, try to strictly enforce a prohibition on repetitious and duplicative issues that counsel will raise time and time and time again. And in an earlier opinion, maybe more than twenty years ago, *In re Clark*,³⁴ I believe, this court set out bars to these habeas corpus petitions, procedural bars. “You raised it in the trial court. You raised it on appeal. So you can’t raise it now.” Or, “You had the knowledge before, so you can’t raise it on this petition.”

It’s a difficult task to try to streamline the jurisprudence of the death cases. Some reforms maybe have been suggested, that these cases go first to the Court of Appeal and we then, like every other case, just take the issues that require resolution because they’re unresolved or there’s a conflict.

No steps that I’m aware of have been taken to implement that. And there are arguments against it, being that we, at least, have an expertise in the issues of death penalty cases, whereas a Court of Appeal panel might see one in a year and have no overview. In addition to which, the resources needed for *them* in staffing to go through — I mean, some of the records can be a thousand pages.

MCCREERY: It’s a different line of work for them, in a sense?

WERDEGAR: It is, definitely.

MCCREERY: Thank you for reflecting on that. But I’m curious what sort of support you had from your colleagues on *In re Reno* and the thoughts you were putting forth there?

³³ 55 Cal.4th 428 (2012).

³⁴ 5 Cal.4th 750 (1993).

WERDEGAR: I think everybody appreciated the tremendous amount of work that this chambers put into that case, and everybody, I think, of any persuasion about the death penalty in general understood that the process of these habeas petitions was being abused. Since that opinion we have seen more discipline with respect to some of the habeas petitions that have come back to us for exhaustion from the federal courts.

MCCREERY: That's on an individual basis, I take it, the restrictions?

WERDEGAR: Yes. There was an experiment when Ron George was chief. We get these enormous first habeas petitions, enormous, and the staff work that goes into writing up a memo addressing each of the multiple habeas issues can run 150 pages.

But the order that is issued if we don't grant the petition is a denial order. It might say, "Argument 1.3.4 denied," and cite a case that had disposed of the issue, or "denied because the questions were dealt with on appeal." So it would be a very short order denying and citing a governing case.

Then the case goes to the federal courts, and they have no idea the substance of what went into these denials. So we had an experiment — short-lived — to write not the full 120-page memo that the court used in its denial but some kind of a succinct statement but more than just citing a case to tell the federal court we had looked at this in depth, and this is what we considered, and this is what we saw.

It didn't work. We couldn't agree among all seven of us what should be in that. Justice A might deny that claim for reason #1, and Justice B might deny it for reason #6, and it just didn't work. But it was an effort to tell the federal courts, who after us have to look at these cases, that we truly had looked at it, and this is what we were looking at, and this is why we came to this conclusion, and help them. But the experiment didn't work.

MCCREERY: What would you like to add to our discussion of capital punishment and execution?

WERDEGAR: I think I've spoken to it all, the solemnity and reflection when an execution does occur; the cumbersomeness of the process and, so far, frustrated efforts to make it work; the resources that it consumes.

I would like to repeat that so many of these issues are political. The court just tries to do its work, which is, with integrity, review these judgments and, lacking a constitutional violation or the unusual circumstance

where there's not enough evidence, to sustain the conviction; reviewing them for fairness and validity. That's our job, and we all try to do it very conscientiously.

MCCREERY: Thank you, Justice Werdegar. Let's stop there for today.

WERDEGAR: Okay. Thank you.

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