

May 5, 2021

Memorandum 2021-07

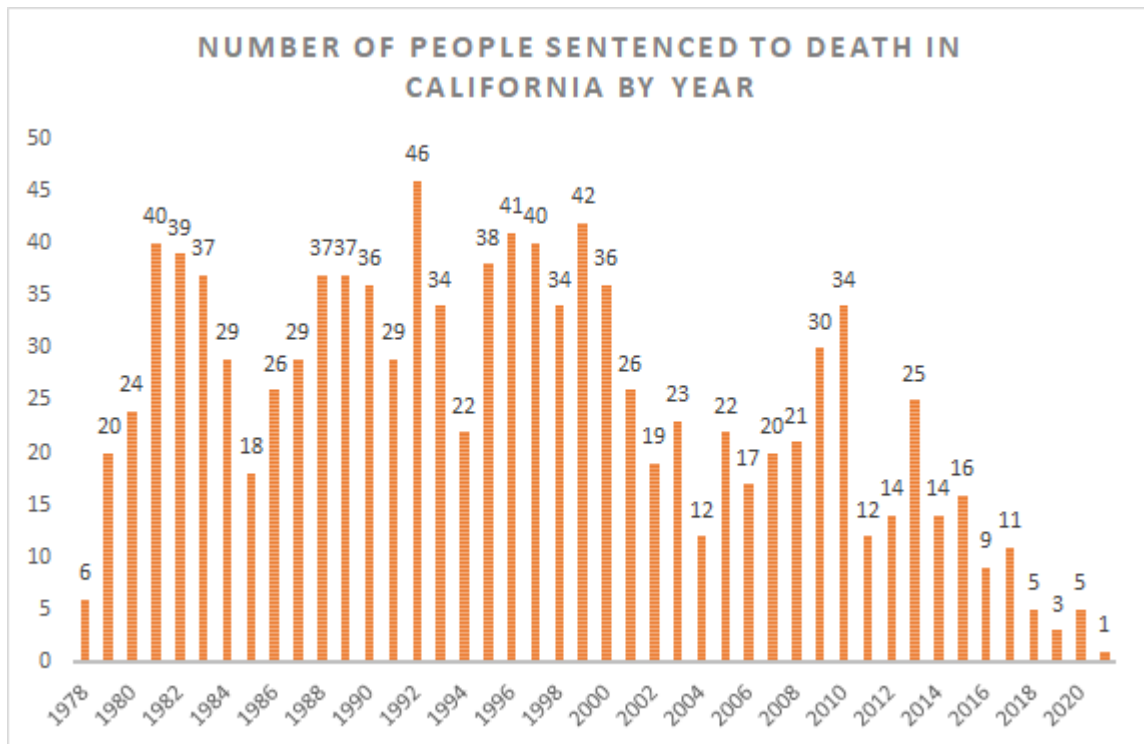
Capital Punishment: Updates on Possible Recommendations

This memorandum provides a summary of updates on areas that the Committee directed staff to research, a discussion of incremental proposals discussed at the March meeting, and additional staff recommendations.

SUMMARY UPDATES ON STAFF RESEARCH

1. Number of people sentenced to death in California by year.

At the Committee’s March meeting, Committee members directed staff to research the number of people sentenced to death in California by year. The chart below illustrates the results.¹



¹ Data provided by the Habeas Corpus Resource Center and the California Department of Corrections and Rehabilitation.

2. Percentage of death-eligible homicides compared to the number of actual death sentences.

At the Committee's March meeting, Committee members directed staff to research the percentage of death-eligible homicides compared to the number of actual death sentences in the state.

Several studies conducted in California have compared the number of death sentences imposed to the number of cases in which a murder was death-eligible. Each study concluded that most murders could qualify as a death penalty case—yet very few are charged as such.

In 1997, Steven Shatz conducted a study that sampled appellate first-degree murder cases from 1988 to 1992.² It found that 84 percent of first-degree murder convictions were factually death-eligible but that death sentences were imposed in only 9.6 percent of the cases.³ A later study of all first-degree murder convictions from 2003 to 2005 found that 84.6 percent of convictions were death-eligible but that death sentences were imposed in 5.5 percent of cases.⁴

The most recent study was conducted by a group of researchers that included professors David Baldus and Catherine Grosso.⁵ The study analyzed 27,453 California convictions for first-degree murder, second-degree murder, and voluntary manslaughter with offense dates between January 1978 and June 2002.⁶ The research concluded that 95 percent of all first-degree murder convictions were death-eligible.⁷ Of the death-eligible cases, only 4.3 percent resulted in a death sentence.⁸

² Shatz, et al., *The California Death Penalty Scheme: Requiem for Furman?*, 72 N.Y.U. L.Rev. 1283, 1338-43 (1997).

³ *Id.* at 1332.

⁴ Shatz, et al., *Chivalry Is Not Dead: Murder, Gender and the Death Penalty*, 27 Berkeley J. Gender L. & Just. 64, 93 (2012).

⁵ Baldus, et al., *Furman at 45: Constitutional Challenges from California's Failure to (Again) Narrow Death Eligibility*, 16 J. Empirical Legal Stud. 693 (2019).

⁶ *Id.* at 707.

⁷ *Id.* at 713.

⁸ *Id.* at 724.

3. Geographic disparities in California.

Panelists at the Committee's March meeting explained that there exists substantial geographic disparity in death sentences meted out in California. Several counties account for the majority of death sentences, whereas many other counties rarely or never sentence anyone to death. The Committee directed staff to research whether constitutional challenges have been raised in California based on evidence of geographic disparities.

While many have acknowledged that some counties' prosecutors seek death in circumstances where others may not,⁹ the California Supreme Court has continually found this prosecutorial discretion to be constitutional despite resulting geographical disparities.¹⁰ In doing so, the Court has noted that factual nuances and the strength of evidence may differ between facially similar cases, and that "prosecutorial discretion to select those eligible cases in which the death penalty will actually be sought does not . . . offend principles of equal protection, due process, or cruel and/or unusual punishment."¹¹

In contrast to California, many of the other 26 states with legalized capital punishment¹² require comparative review by an appellate court to eliminate such disparities.¹³ For example, Georgia law requires that the state supreme court review all death sentences and determine "whether the sentence of death is

⁹ *People v. Adcox*, 47 Cal.3d 207, 275-76 (1988) (Broussard, J. concurrence); *People v. Vines*, 51 Cal.4th 830, 889-90 (2011).

¹⁰ *People v. Merriman*, 60 Cal. 4th 1, 107 (2014). Accord *People v. Silveria*, 10 Cal.5th 195, 326 (2020), petition for cert. pending; *People v. Cordova*, 62 Cal.4th 104, 150 (2015); *People v. Myles*, 53 Cal.4th 1181, 1224 (2012); *People v. Vines*, 51 Cal.4th 830, 889-90 (2011); *People v. Bennett*, 45 Cal.4th 577, 629 (2009); *People v. Ayala*, 23 Cal.4th 225, 304 (2000); *People v. Ochoa*, 19 Cal.4th 353, 479 (1998); *People v. Holt* (1997) 15 Cal.4th 619, 702; *People v. Keenan*, 46 Cal.3d 478, 505 (1988).

¹¹ *People v. Vines*, 51 Cal.4th 830, 889-90 (2011); *People v. Keenan*, 46 Cal.3d 478, 505 (1988).

¹² Three of these states, California, Oregon, and Pennsylvania, have death penalty moratoriums imposed by their governors.

¹³ See, e.g., Ala. Code § 13A-5-53(b)(3); Ga. Code § 17-10-35; Ky. Rev. Stat. Ann. § 532.075(3)(c); La. Code Crim. Proc. Ann. art. 905.9.1; Miss. Code Ann. § 99-19-105(3)(c); Mont. Code Ann. § 46-18-310(1)(c); Neb. Rev. Stat. §§ 29-2521.01(5), 03,29-2522(3); Nev. Rev. Stat. Ann. § 177.055(2)(e); N.H. Rev. Stat. Ann. § 630:5(XI)(c); N.C. Gen. Stat. § 15A-2000(d)(2); Ohio Rev. Code Ann. § 2929.05(A); S.C. Code Ann. § 16-3-25(C)(3); S.D. Codified Laws Ann. § 23A-27A-12(3); Tenn. Code Ann. § 39-13-206(c)(1)(D). See also *Brewer v. State*, 417 N.E.2d 889, 899 (Ind. 1981); *State v. Pierre*, 572 P.2d 1338, 1345 (Utah 1977); *State v. Simants*, 250 N.W.2d 881, 890 (Neb. 1977) (comparison with other capital prosecutions where death has and has not been imposed); *Collins v. State*, 548 S.W.2d 106,121 (Ark. 1977).

excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.”¹⁴

Attorneys who represent individuals on death row have filed numerous unsuccessful habeas claims challenging death sentences based on this lack of geographical uniformity in death penalty sentencing, although these challenges have generally not been based on empirical data.¹⁵ The arguments that have been made highlighted the large pool of death-eligible defendants due to the many possible special circumstances chargeable in murder cases, that prosecutors in each county have complete discretion about whether to seek a sentence of death, and the lack of statewide standards to guide each prosecutor’s exercise of discretion.¹⁶ Some of these unsuccessful claims have also presented case-specific evidence of similar cases where death was not sought.¹⁷

Empirical, statistical data illustrating geographic disparities has not been presented in these habeas claims, likely due to difficulties in making the showing required to prevail. For example, in order to mount a successful Equal Protection challenge under the Fourteenth Amendment, the petitioner must demonstrate that “prosecutorial discretion was exercised with intentional and invidious discrimination” *in his or her case*.¹⁸

Of note, Justice Stephen Breyer noted empirical evidence of geographic disparities in his dissenting opinion in *Glossip v. Gross*,¹⁹ as one of the factors supporting the conclusion that the death penalty as applied in the US is unconstitutional. Justice Breyer observed that, “studies indicate that the factors that most clearly ought to affect application of the death penalty—namely, comparative egregiousness of the crime—often do not. Other studies show that circumstances that ought *not* to affect application of the death penalty, such as race, gender, or geography, often *do*.”²⁰ Justice Breyer noted that “*within* a death

¹⁴ Georgia Code § 17-10-35 (c)(3).

¹⁵ Communications with attorneys at the Office of the State Public Defender and the Federal Public Defender’s Office in the Central District of California.

¹⁶ See, e.g., appellate opening briefs in *People v. Holt*, 15 Cal.4th 619 (1997) and *People v. Merriman* 60 Cal.4th 1 (2014) on file with Committee staff.

¹⁷ *People v. Keenan*, 46 Cal.3d 478, 505 (1988).

¹⁸ *Keenan*, 46 Cal. 3d at 568 (citing *McClesky v. Kemp*, 481 U.S. 279, 293-97 (1987)).

¹⁹ *Glossip v. Gross*, 576 U.S. 863 (2015) (J. Breyer dissenting).

²⁰ *Id.*

penalty State, the imposition of the death penalty heavily depends on the county in which a defendant is tried,” citing several empirical studies.²¹ Justice Breyer identified several potential causes of geographical disparities including the discretion given local prosecutors, variability in quality of the defense, racial composition of the counties, and political pressures.²²

4. Demographics of counties compared to death sentences.

The Committee directed staff to research the demographics of counties that sentence the most people to death. The charts on the following pages depict data on racial demographics, crime and homicide rates, and death sentences over time for the five counties that have sentenced the most people to death since 1978 (charts are presented in order of highest to lowest number of death sentences).²³

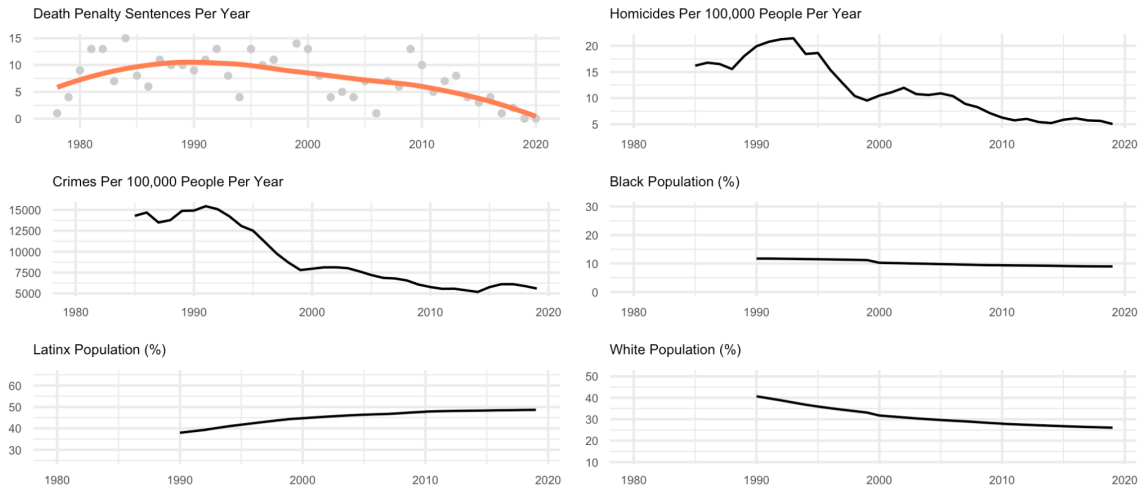
In all five counties, the crime and homicide rates have substantially decreased since the early 1990s. During the same time period, the white population decreased, the Latinx population increased, and the Black population remained roughly stable. In all counties but Riverside, the number of death sentences has drastically decreased in recent years, with zero death sentences in Los Angeles since 2018, Orange since 2017, and Alameda since 2016.

²¹ *Id.*

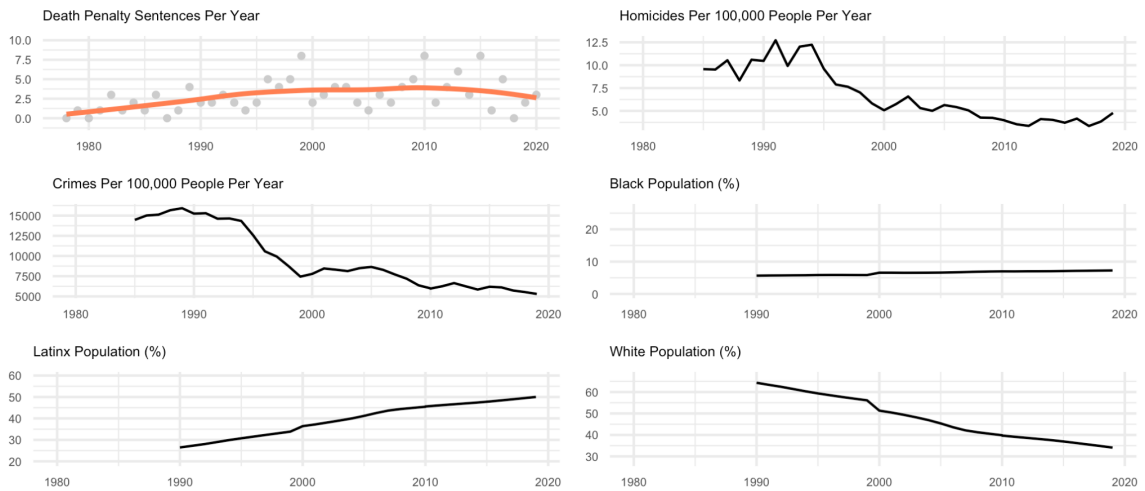
²² *Id.*

²³ Data was gathered from the United States Census Bureau, California Department of Corrections and Rehabilitation, the Office of the State Public Defender, and the California Department of Justice. County data on crime and homicide rates was not available pre-1985. Accurate racial demographic information was not available until 1990, as prior to that time the Latinx population had been grouped in with the white population.

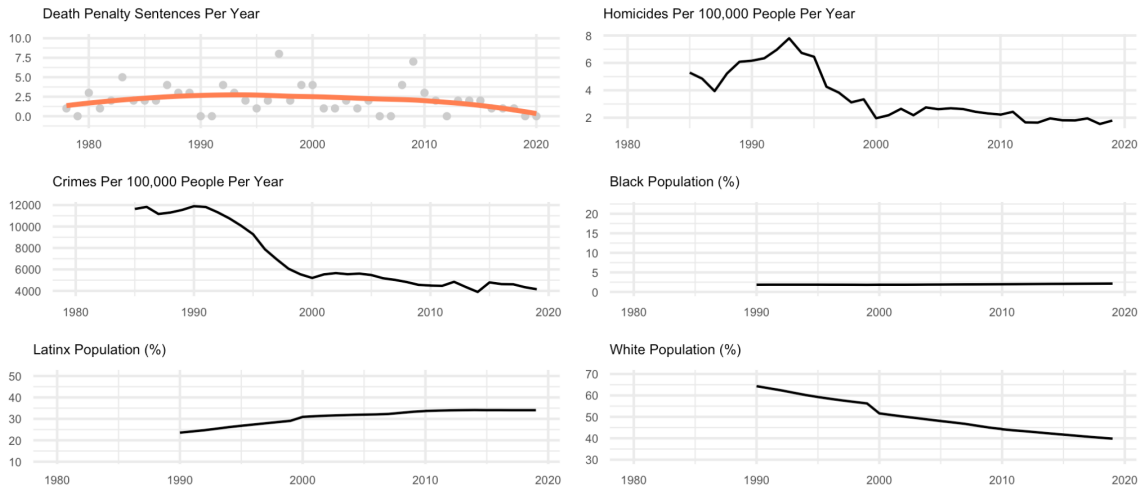
Los Angeles County Over Time



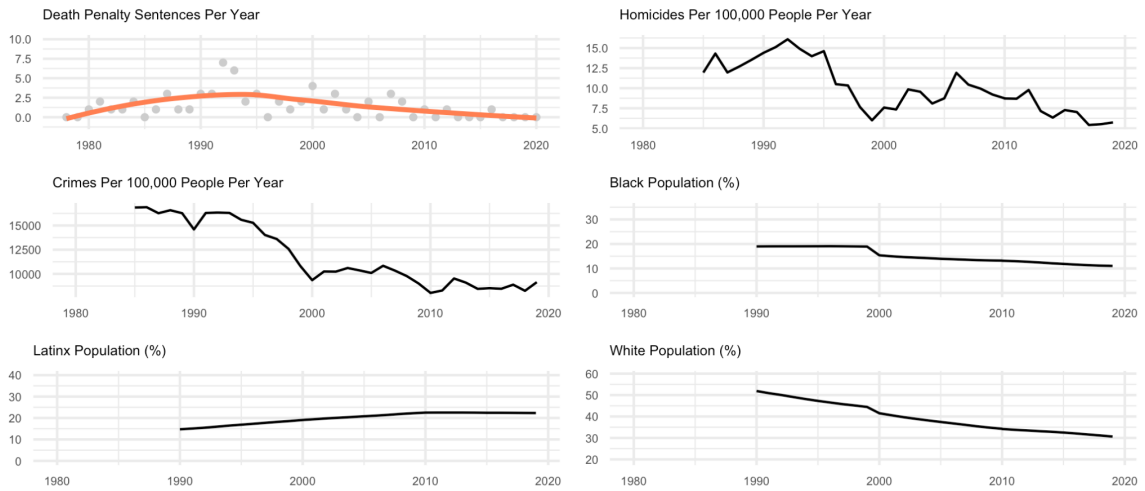
Riverside County Over Time



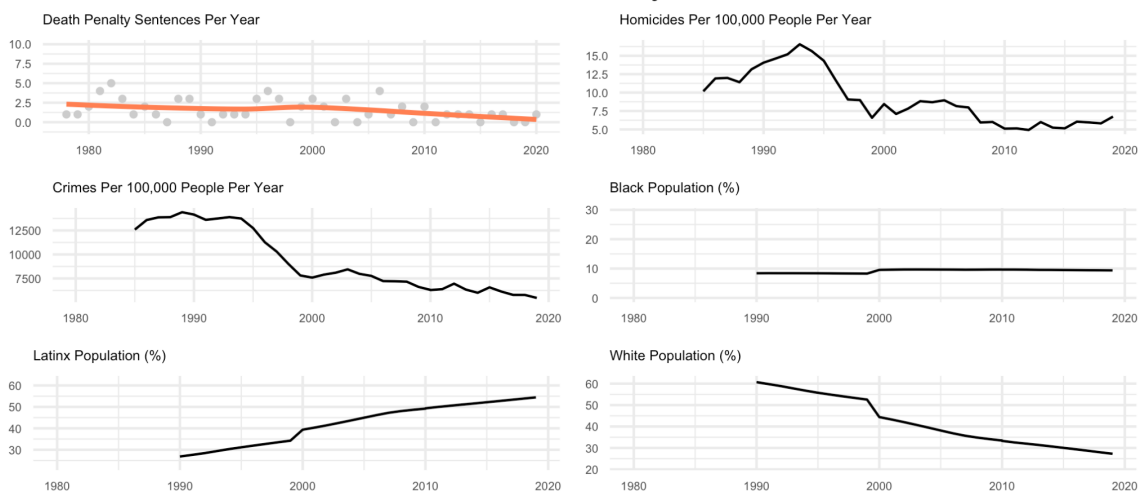
Orange County Over Time



Alameda County Over Time



San Bernardino County Over Time



5. Description of variables researchers account for in research on racial bias in death penalty cases.

The Committee directed staff to research the type of variables researchers have considered when studying potential racial bias in death sentencing.

Researchers who have studied the potential impact of racial bias in capital cases in multiple jurisdictions over a broad range of years have accounted for hundreds of variables not associated with race in their methodology. In Steven Shatz's study of homicide convictions in San Diego County for homicides committed between November 8, 1978 and May 1993, he and other researchers accounted for variables including the different special circumstances present, whether there was a vulnerable victim, whether the victim was a stranger or was known to the defendant, whether a firearm was used, whether the defendant had prior felony convictions, whether the defendant was on probation or parole and whether the defendant was a gang member.²⁴ Accounting for these variables, Shatz found, "a substantial factor in prosecutors' decision whether to charge special

²⁴ Shatz, et al., *Race, Ethnicity, and the Death Penalty in San Diego County: The Predictable Consequences of Excessive Discretion*, 51 Colum. Hum. Rts. L.Rev. 1070, 1083-84 (2020).

circumstances and in the District Attorney's decision whether to seek the death penalty was the race/ethnicity of the victims and defendants."²⁵

In a study of all reported homicides committed in California in the 1990s conducted by Glenn Pierce and Michael Radelet, researchers considered the possibility that the homicides in which white victims were killed were more "aggravated" or "deserving of the death penalty" than those with non-white victims.²⁶ To determine whether this was true, they divided the pool of cases into three categories: those with no aggravating circumstances, those with one aggravating circumstance, and those with two aggravating circumstances.²⁷ The "aggravators" included whether the victim was a stranger to the defendant, among other factors considered. If homicides with white victims were indeed more aggravated than those with Black or Latinx victims, then the number of death sentences would be similar across each category of victim ethnicity for each level of aggravation. However, the results of the research found that cases involving white victims were not more aggravated.²⁸ Instead, strong differences in the death sentencing rate in cases with white victims, compared to cases with Black or Latinx victims persisted across the different levels of aggravation.²⁹

In a 2007 study, Catherine Lee examined all death-eligible homicides in San Joaquin County from 1977 through 1986 in an effort to determine whether racial bias negatively impacted Hispanics.³⁰ Her investigation controlled for variables such as defendant's prior record, the number of victims, the nature of the relationship between the defendant and the victim, the method of the killing, and the weight of the evidence.³¹ Controlling for these variables, Lee found defendants

²⁵ *Id.* at 1096.

²⁶ Pierce, et al., *The Impact of Legally Inappropriate Factors on Death Sentencing for California Homicides, 1990-1999*, 46 Santa Clara L.Rev. 1, 22 (2005).

²⁷ *Id.* (The aggravated circumstances considered were whether the homicide was committed with any accompanying felony and whether the incident involved more than one victim.).

²⁸ *Id.* at 24.

²⁹ *Id.*

³⁰ Lee, *Hispanics and the death penalty: Discriminatory charging practices in San Joaquin County, California*, 35 J. Crim. Justice 17 (2007).

³¹ *Id.* at 22.

in Hispanic victim cases were less likely to face a death-eligible charge than defendants in white victim cases.³²

In a 2016 study that found cases with Black and Latinx victims were less likely to be prosecuted with a death-eligible charge in Los Angeles County, researcher Nick Petersen accounted for victim characteristics including gender, marital status, education level, and victim-offender relationship.³³

6. Procedures for presenting pre-trial mitigation in different counties.³⁴

Pre-trial mitigation. Throughout California, capital defendants' trial counsel may present pre-trial mitigation (such as childhood abuse and trauma, mental health and intellectual functioning, education, socio-economic factors, etc.) to the charging district attorney's office in an attempt to dissuade prosecutors from seeking the death penalty.³⁵ The procedures to do so vary by county.

Death Penalty Committees. Many district attorneys' offices, including those in counties that most frequently seek the death penalty in California, employ internal committees to review death-eligible cases and determine whether to seek the death penalty.³⁶ Such committees are typically staffed by senior members of the district attorneys' offices. For example, San Luis Obispo's committee is comprised of the elected district attorney, the assistant district attorney, all three chief deputy district attorneys, the chief investigator, and sometimes other staff. Other district attorneys convene committees when necessary or use senior staff for this

³² *Id.*

³³ Petersen, *Examining the Sources of Racial Bias in Potentially Capital Cases: A Case Study of Police and Prosecutorial Discretion*, 7(1) *Race & Justice* 7 (2016).

³⁴ The California Public Defenders Association and the California District Attorneys Association assisted staff to survey public defenders and district attorneys in over 40 counties, including those that most often seek the death penalty, to provide the information reflected in this section.

³⁵ None of the officers surveyed were aware of any county that would not allow defense counsel to present pre-trial mitigation in death eligible cases.

³⁶ Counties that have standing death penalty committees include, but are not limited to: Alameda, Calaveras, Contra Costa, Fresno, Kern, Kings, Los Angeles (prior to current District Attorney George Gascon's election), Marin, Mendocino, Monterey, Orange, Riverside, Sacramento, San Bernardino, San Luis Obispo, San Diego, San Mateo, Santa Barbara, Shasta, Sonoma, Stanislaus, Placer, Tulare, and Ventura. In some counties a decision is made around the time of filing that the death penalty is not appropriate, so the case is not reviewed by the standing committee.

purpose.³⁷ Counties that do not utilize standing death penalty committees generally have few murders or have rarely sought the death penalty and/or have extremely small staff.³⁸ In all counties surveyed, the elected district attorney makes the final decision on whether to seek the death penalty.

Process for presenting pre-trial mitigation. In many counties, defense attorneys may appear in person to give a presentation to the district attorney's office or committee. In others, only prosecutors are permitted to give in-person presentations, while defense attorneys are limited to submitting material in writing. After hearing presentations, reading any written submissions, and often consulting with the victim's family, the committee votes and the elected district attorney makes her decision.

Limitations on pre-trial mitigation presentation. Not all defense counsel avail themselves of the opportunity to present pre-trial mitigation to district attorneys. Some defense attorneys believe that presenting the district attorney with such mitigating evidence before trial could undermine their trial strategies. Moreover, as noted in the Committee's analysis, the quality of the defense in death penalty cases varies greatly and is hampered by systemic problems such as flat fee contracts and payment structures that incentivize taking a case to trial over settlement. In addition, internal review committees within district attorney offices are staffed by individuals who support the death penalty, as prosecutors who do not support the death penalty opt-out of this assignment. Thus, the panels rarely reflect a cross-section of views even within the district attorney's office.

REFORMS DISCUSSED AT THE COMMITTEE HEARING

During the Committee discussion on the death penalty, three potential reforms were discussed: (1) require the Attorney General to provide approval before a county district attorney may seek the death penalty; (2) require that district attorneys use internal panels to review cases and allow defense counsel to present

³⁷ Mono, Merced, Tehama, and Tuolumne are four such counties.

³⁸ Alpine, Del Norte, Humboldt, Inyo, Napa, Lassen, Sierra, and Siskiyou fall into this category.

mitigation prior to making the decision to seek the death penalty; and (3) require counties to pay for the state costs related to a death sentence imposed by that county. Each of these proposals has challenges.

1. Require Attorney General approval for death penalty prosecutions.

Some have proposed that California require the Attorney General to provide approval before a county district attorney may seek the death penalty. This proposal is based on the federal system in which all death penalty prosecutions are approved by the US Attorney General.

The California Constitution, Article V, section 13 states, “It shall be the duty of the Attorney General to see that the laws of the State are uniformly and adequately enforced. The Attorney General shall have direct supervision over every district attorney....” This section potentially empowers the Attorney General to direct district attorneys not to seek the death penalty without prior approval from their office.

This power of the Attorney General is rarely exercised. California’s district attorneys are independently elected and clearly empowered by the state constitution, county charters, and state law to make charging decisions.³⁹ There is no precedent for the state Attorney General to assume primary responsibility for charging decisions in a category of cases. This proposal would certainly face legal challenges and political backlash.

If implemented, this proposal would only address variability in the decision to seek the death penalty by district attorneys. Variability in use of the death penalty by county district attorneys contributes to geographic disparities in death sentencing but is not the sole cause; jury verdicts and the quality of the defense also contribute to the problem. In addition, there is no evidence that this proposal will address concerns regarding racial bias in administration of the death penalty, the overbreadth and other potential legal infirmities with California’s death penalty, or the other issues identified in the Committee’s analysis. Proponents of this proposal appear to believe it will result in fewer death sentences. However, a unitary standard implemented by the Attorney General may result in more death

³⁹ See California Constitution Article XI, section 4; Government Code section 26500 et seq.

penalty prosecutions statewide, not less, given the number of county district attorneys who have completely stopped pursuing the death penalty.

2. Require that district attorneys utilize internal panels to review cases.

During the Committee discussion, the question was raised whether the use of internal review committees and the opportunity to present pre-trial mitigation improves administration of the death penalty.

As noted, the use of internal review committees and/or the opportunity to present pre-trial mitigation is already standard practice in California and it has not addressed the systemic problems with the death penalty identified by the Committee. Notably, allowing the defense to present mitigation is only an effective policy if the defendant is represented by experienced death penalty attorneys with sufficient resources, which is often not the case. In addition, there is no indication that the use of these internal review committees provides any protection against racial bias in charging the death penalty, as evidenced by the data from Los Angeles.⁴⁰

3. Require counties to pay the state costs of the death penalty.

Critics of the death penalty have observed that only a small number of counties continue to seek the death penalty while the entire state pays the high costs for death row housing and post-conviction review. The suggestion has been made to make the counties that seek the death penalty pay for the costs of the system.

Proposition 66 inadvertently shifted some costs for post-conviction review to counties. The initiative shifted habeas corpus petitions in death penalty cases from the California Supreme Court to the county level Superior Courts. Because the Attorney General's Office generally does not appear in the Superior Courts, this has shifted some of the work for post-conviction litigation to county district attorney offices.

⁴⁰ ACLU, *The California Death Penalty Is Discriminatory, Unfair, and Officially Suspended: So Why Does Los Angeles District Attorney Jackie Lacey Seek to Use It*, 2 (2019).

Any further cost shifting from the state to the counties is likely to face complications because of the state mandate rule. The California Constitution, Article XIII B, section 6, provides in relevant part,

“(a) Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the State shall provide a subvention of funds to reimburse that local government for the costs of the program or increased level of service, [...]

(c) A mandated new program or higher level of service includes a transfer by the Legislature from the State to cities, counties, cities and counties, or special districts of complete or partial financial responsibility for a required program for which the State previously had complete or partial financial responsibility.”

Because the state has long been responsible for paying for the costs of death row housing and post-conviction legal proceedings, any effort to shift those costs to the counties would be challenged as a state mandate. If determined to be a state mandate, then the state would be required to continue paying for these costs.

STAFF RECOMMENDATIONS

Staff recommends two proposals: (1) California should repeal the death penalty, and (2) California should take steps to reduce the size of death row.

1. Repeal the death penalty

Eliminating the death penalty is a critical step towards creating a fair and equitable justice system for all in California, as the ultimate punishment is plagued by legal, racial, bureaucratic, financial, geographic, and moral problems that have proven intractable.

Since 2004, the nation and the world have moved step by step away from the death penalty. Recently on March 24, 2021, Virginia became the twenty-third state to end the death penalty and the first Southern state to do so. In signing the new law, Governor Ralph Northam said, “It is the moral thing to do to end the death

penalty in the Commonwealth of Virginia This is an important step forward in ensuring that our criminal justice system is fair and equitable to all.”⁴¹ Only a small minority of countries continue to use the death penalty, and those nations have questionable records on human rights, at best.⁴²

As the previous memorandum documents, there are a myriad of problems with the administration of the death penalty in California and, as a result, in practice it does not serve a legitimate penological purpose. In the face of this overwhelming reality, continuing to sentence people to death and continuing to house more than 700 people on death row undermines the legitimacy of our entire criminal justice system.

2. Reduce the size of death row

For decades, California has had the distinction of housing the nation’s largest death row, currently representing 28% of all people sentenced to death in the entire nation.

California’s death row population appears to have peaked at 746 in 2015, steadily declining since then to today’s level of 705.⁴³ Although a small number of counties continue to sentence people to death, exits from death row have exceeded new death sentences for the past six years. Since April of 2015, 41 people have had their sentences or convictions reversed in state or federal court.⁴⁴ An additional 54 people have died, most by natural causes,⁴⁵ a significant number due to COVID-

⁴¹ Whitney Evans, *Virginia Governor Signs Law Abolishing The Death Penalty, A 1st In The South* (Mar. 24, 2021).

⁴² Amnesty International, *Death Penalty*.

⁴³ Robert Dunham, executive director of Death Penalty Information Center, provided this information to staff based on a review of the NAACP Legal Defense Fund’s quarterly report, “LDF’s Death Row USA,” going back to from 1999 to the present; California Department of Corrections and Rehabilitation, *Condemned inmate list*, as of April 7, 2021.

⁴⁴ Data provided by Habeas Corpus Resource Center. Reversals include 13 cases reversed in federal court, 15 cases reversed in state court on direct appeal, 11 cases reversed in state court on habeas, and two cases in which the defendants’ death sentences were reversed in state court and their convictions were then reversed in federal court.

⁴⁵ California Department of Corrections and Rehabilitation, *Condemned inmates who have died since 1978*, as of April 17, 2021. Other listed causes of death are: acute drug toxicity (6), suicide (5), and homicide (1).

19 (potentially the cause of death for as many as 22 people who were on death row).⁴⁶ Only one was executed - in Virginia.⁴⁷

Should California policymakers wish to reduce the size of death row, there are various options available.

- **Clemency**

The Governor may use his executive clemency power to reduce the size of death row. For cases in which the individual has a felony conviction from a separate proceeding, the concurrence of a majority of the California Supreme Court is also needed.⁴⁸ According to CDCR data, at least 314 people currently on death row have prior felony convictions and would need Supreme Court approval for sentence commutation from the Governor.

- **Resolution of pending post-conviction cases**

The Attorney General has constitutional and statutory authority to resolve legal challenges in the post-conviction context.⁴⁹ Indeed, “ethical rules direct prosecutors to ‘consider potential negotiated dispositions or other remedies’ in collateral attacks if such action serves the interests of justice.”⁵⁰ There are a handful of examples of death penalty cases that were settled by the Attorney General’s office.⁵¹ The next Attorney General could take a more proactive approach to seeking resolution in all death penalty cases pending on appeal or in habeas corpus proceedings.

- **Recall and resentencing in death penalty cases**

⁴⁶ *Id.* Since the pandemic began, 220 people on death row have died of “natural causes” or their cause of death is listed as “pending.”

⁴⁷ *Id.*

⁴⁸ California Constitution Article V, section 8(a).

⁴⁹ Samuel Weisovitz, *The California Attorney General’s constitutional authority over criminal justice reform during the COVID-19 pandemic*, SCOCA Blog (Apr. 21, 2020).

⁵⁰ *Id.*

⁵¹ *Id.*

Pursuant to Penal Code section 1170(d), district attorneys have the authority to request recall and resentencing in any case. The ultimate decision of whether to resentence an individual is made by the Superior Court judge. This process may be used by district attorneys to pursue resentencing of individuals sentenced to death from their counties.

- **Legislative reforms**

Although the Legislature does not have the authority to repeal the death penalty, it may advance reforms to facilitate removing individuals from death row. Four specific proposals are described here; three are currently pending in the Legislature.

- 1) Reform the felony murder special circumstance

Senate Bill 300 (Cortese), The Sentencing Reform Act of 2021, will limit the felony murder special circumstance to aiders and abettors who acted with intent to kill and will allow for resentencing for anyone currently sentenced to death or life without parole who did not kill nor intend for anyone to die. The bill will also restore judicial discretion to dismiss any special circumstance after a jury finding that the special circumstance is true, which would allow judges greater flexibility in resentencing cases with special circumstance findings. This bill still requires a two-thirds vote to pass in the Legislature because it amends Proposition 115, approved by the voters in 1990.

- 2) Judicial dismissal of special circumstances

Assembly Bill 1224 (Levine) will restore judicial discretion to dismiss any special circumstance after a jury has found the special circumstance true, similar to SB 300. AB 1224 goes further by permitting a convicted individual to petition the court for resentencing at any time and by creating a presumption in favor of dismissing the special circumstance if more than 20 years has passed since the offense and “the defendant has not committed or attempted an act of violence against any other individual since the pronouncement of judgment.” This

presumption can be overcome if “the prosecution demonstrates beyond a reasonable doubt that the defendant would commit a future violent offense.” This bill requires a 2/3 vote to pass the Legislature as it amends Proposition 115, approved by the voters in 1990.

3) Make the California Racial Justice Act of 2020 retroactive

Assembly Bill 256 (Kalra), The California Racial Justice Act for All, will apply retroactively the California Racial Justice Act, adopted last year. This will allow individuals on death row a meaningful opportunity to challenge racial bias in their convictions and sentences. This is a majority vote bill.

4) Create a process to remove the permanently incompetent from death row

As noted in the Committee’s analysis, there are at least six people on death row who are permanently incompetent and cannot be executed under constitutional standards. Yet, there appears to be no legal process to convert these death sentences to life without the possibility of parole. The Legislature can modify the existing statute regarding incompetency proceedings to create such a process. This would be a majority vote bill.

CONCLUSION

The American Law Institute concluded that there are “intractable institutional and structural obstacles to ensuring a minimally adequate system for administering capital punishment.” The Committee should consider reaching a similar conclusion and recommending that California repeal the death penalty and that elected officials take steps to reduce the number of people on death row.

Respectfully submitted,

Rick Owen & Lara Hoffman
Staff Counsel