

Admin.

June 16, 2021

Memorandum 2021-09

Draft of Death Penalty: Report and Recommendations

At its May 2021 meeting, the Committee voted to recommend that California repeal the death penalty and that the Governor, Attorney General, local prosecutors, and the Legislature take other steps to remove people from death row. The attached draft of the report, which builds on earlier staff memorandums, presents the Committee's recommendations about the death penalty as well as extensive background on the issue. **The data referenced throughout the draft report is not final and should not be relied upon for any reason.**

The Committee now needs to decide whether to approve the attached draft of the report, with or without changes. Upon approval of the Committee, the report will be finalized by Committee staff with assistance from graphic design and copy-editing consultants. Any changes made at this stage will not affect the substance of the Committee's report or recommendations. Such changes may include adding citations, data, and graphics, and other non-substantive stylistic, editorial revisions.

Does the Committee approve the attached draft Death Penalty: Report and Recommendations with or without changes, with the understanding that further revisions may be made by the staff, with approval of the Chair, before the report is formally submitted to the Governor and Legislature?

Respectfully submitted,

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Draft Death Penalty: Report and Recommendations
Committee on Revision of the Penal Code
June 2021

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Executive Summary

The Legislature directed the Committee on Revision of the Penal Code to recommend changes to the law that would “simplify and rationalize” California’s Penal Code. As part of this mandate, the Committee has studied the history and current practice of California’s death penalty system.

After a thorough examination, the Committee has determined that the death penalty as created and enforced in California does not and cannot ensure justice and fairness for all Californians. Decades of experience have shown that the death penalty is the opposite of a simple and rational scheme: it has become so complicated and costly that it takes decades for cases to be fully resolved and it is imposed so arbitrarily — and in such a discriminatory fashion — that it cannot be called rational, or constitutional. Hundreds of California capital sentences adjudicated in state and federal courts have been reversed on appeal or otherwise thrown out as unconstitutional.

Furthermore, recent efforts to improve, simplify, and expedite California’s system of capital punishment have failed to accomplish their stated goals, and may have made things even worse.

For the reasons contained in this report, including new data presented here for the first time, the Committee recommends repealing California’s death penalty. Because we appreciate that this is a difficult goal, in the interim, the Committee recommends reducing the size of California’s death row by the following means:

- Award clemency to commute death sentences.
- Settle pending legal challenges to death sentences.
- Recall death sentences under Penal Code § 1170(d)(1).
- Limit the felony-murder special circumstance.
- Restore judicial discretion to dismiss special circumstances.
- Amend the Racial Justice Act of 2020 to give it retroactive application.
- Remove from death row people who are permanently mentally incompetent.

Recommendations

Repeal the death penalty

For the multiple reasons described in this report, the death penalty should be repealed in California, and California's death row dismantled.

Reduce the size of death row

Even without repeal of the death penalty, the Governor, Attorney General, Legislature, and local prosecutors can take significant steps to reduce the size of California's death row. These decision-makers can also take these steps while awaiting repeal of the death penalty.

Clemency

The Governor should use his executive clemency power to reduce the size of death row by commuting death sentences to life without the possibility of parole, indeterminate life sentences, or to a specific term of years.¹ Multiple governors have broadly granted clemency to people on death row, even while the death penalty remained in their states.²

Settle pending post-conviction cases

The Attorney General has the power to resolve death penalty cases on post-conviction review.³ Attorneys General in California have done this a handful of times. The Attorney General should take a more proactive approach to seeking resolution in all death penalty cases in post-conviction review.

Recall and resentencing in death penalty cases

Local district attorneys have the authority to request recall and resentencing in any case but the ultimate decision of whether to resentencing an individual is made by a Superior Court judge.⁴ This process should be used by district attorneys to pursue resentencing of death cases from their counties.

¹ 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. California Constitution Article V, section 8(a). According to CDCR, at least 314 people currently on death row — about 45% — have separate felony convictions and would need California Supreme Court approval for sentence commutation from the Governor.

² DPIC, *Notable Grants of Clemency*.

³ See Samuel Weissovitz, *The California Attorney General's constitutional authority over criminal justice reform during the COVID-19 pandemic*, SCOCA Blog (Apr. 21, 2020). See also Am. Bar Assn., Criminal Justice Standards for the Prosecution Function, Standard 3-8.5 (ABA's model ethical rule for prosecutors regarding post-conviction review directs prosecutors to "consider potential negotiated dispositions or other remedies, if the prosecutor and the prosecutor's office reasonably conclude that the interests of justice are thereby served.").

⁴ Penal Code § 1170(d)(1). For most capital cases, a judge may only convert a death sentence into a life without parole sentence. But for any death penalty case in which the offense occurred before June 5, 1990, the judge has the discretion to impose a sentence of life without parole or may dismiss the special circumstances and impose a sentence of 25 years to life with parole, or another sentence depending on the

Legislative reforms

1. Reform the felony-murder special circumstance

Current law allows people to be sentenced to death even if they did not personally kill or intend anyone to die.⁵ This was not always the case: as originally enacted, California’s death penalty was limited to people who acted with intent to kill.⁶ In 1990, the voters approved Proposition 115, which now permits a death sentence or life without the possibility of parole for an accomplice to a felony who did not personally kill nor intend for anyone to die, if the person acted with reckless indifference and was a major participant in the felony offense.⁷

The Legislature should reverse the expansion of the felony-murder special circumstance enacted through Proposition 115 and should provide retroactive relief to those currently serving sentences based on this provision.⁸

2. Judicial dismissal of special circumstances

Current law allows judges to dismiss charges and enhancements in almost any circumstance.⁹ But when “special circumstances” are charged making the case one where a death or life without parole sentence can be imposed, the judge cannot dismiss these allegations after they have been found true.¹⁰ Again this was not always the case: this limitation was also imposed through Proposition 115.¹¹

The Legislature should restore to judges the power to dismiss special circumstances in all cases.¹²

specific enhancements and charges proven. This is because on June 5, 1990, the voters passed Proposition 115, enacting Penal Code section 1385.1 which removed from judges the discretion to dismiss special circumstances after they have been found true.

⁵ California’s felony-murder rule — created in its current form by voter initiative in 1990 by Proposition 115 — allows a death sentence or life without the possibility of parole for an accomplice to a felony who did not personally kill nor intend for anyone to die, if the person acted with reckless indifference and was a major participant in the felony offense.

⁶ *Carlos v. Superior Court*, 35 Cal. 3d 131 (1983). Four years later, the Court overruled this holding and concluded that the felony-murder special circumstance also permitted imposition of the death penalty or life without parole for an individual who personally killed someone while committing a felony offense, even if the person did not act with intent to kill. *People v. Anderson*, 43 Cal.3d 1114 (1987).

⁷ Penal Code § 190.2(b)-(d).

⁸ Senate Bill 300 (Cortese), introduced in the Legislature in 2021, is one example of this type of Legislative reform. This bill requires a two-thirds vote to pass in the Legislature because it amends Proposition 115.

⁹ Penal Code § 1385.

¹⁰ Penal Code § 1385.1

¹¹ See *People v. Williams*, 30 Cal. 3d 470 (1981).

¹² Two bills that would accomplish this goal were introduced in the Legislature in 2021, Assembly Bill 1224 (Levine 2021), and SB 300 (Cortese 2021). Both require 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

In 2020, the Legislature enacted the Racial Justice Act to eliminate racial bias and racially discriminatory practices in the criminal justice system, including both capital and non-capital cases.¹³ But the Racial Justice Act only applies to cases that were not final on January 1, 2021.

The Legislature should make the Racial Justice Act retroactive.¹⁴

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

More than three decades ago, the United States Supreme Court held that incompetent people cannot be executed.¹⁵ Nevertheless, there are at least six people on California's death row who are permanently incompetent and cannot be executed under constitutional standards. Current law provides no clear process to remove these people from death row.

The Legislature should modify the existing statute regarding incompetency proceedings to create a clear process to resentence people who are permanently incompetent and cannot be legally executed.

¹³ Assembly Bill. No. 2542 (2019-2020 Reg. Sess.) (creating Penal Code § 745).

¹⁴ Assembly Bill 256 (Kalra), introduced in 20201, would make the Racial Justice Act retroactive.

¹⁵ *Ford v. Wainwright*, 477 U.S. 399 (1986).

Recent Developments and Research

The Committee's report is the first comprehensive examination of the death penalty in California by a state agency or organization since 2008. That 2008 report, by the California Commission on the Fair Administration of Justice, conducted an exhaustive review of the state's death penalty system and concluded it was dysfunctional. The Commission on the Fair Administration of Justice identified three ways to address the dysfunction: (1) dramatically increase funding for the death penalty system, (2) narrow the scope of the death penalty, or (3) repeal the death penalty altogether.¹⁶ California did none of these things.

The Committee found that all of the problems identified in 2008 have only gotten worse. As context for the Committee's report, what follows is an overview of the major changes in law and policy since that 2008 report, as well as a summary of new data and research. This overview shows that California's death penalty continues to be defined by intractable problems. We therefore take the recommendation of the Commission on the Fair Administration of Justice a step further to recommend abolition.

Developments in the administration of the death penalty since 2008

A continued reduction in jurisdictions that have the death penalty:

- In 2004, the death penalty was permitted in all but twelve states. Since then, eleven states have eliminated it, with Virginia being the most recent and first Southern state to do so this spring. Now, twenty-three states do not have a death penalty and two other states (in addition to California) have moratoriums on its use. As a result, a majority of states in the United States — as well as the overwhelming majority of nations — do not have the death penalty in law or practice.
- In 2009, the American Law Institute, the nation's most prominent law reform body, voted to remove the death penalty from its Model Penal Code. The Model Penal Code's death penalty scheme had previously been a national basis for death penalty statutes and had been approved by the U.S. Supreme Court. As the *New York Times* put it, the American Law Institute "pronounced its project a failure and walked away from it."¹⁷

Problems with California's death penalty have continued to accumulate and led to its decline:

- In 2014, a federal judge found that California's death penalty was unconstitutional because of long delays in executing people. That legal decision was reversed, but only on procedural grounds, and has not since been addressed in federal court.

¹⁶ Cal. Com. on the Fair Administration of Justice, *Final Report, Death Penalty* at 112-182 (2008) (hereinafter *CCFAJ Report*).

¹⁷ Adam Liptak, *Group Gives Up Death Penalty Work*, *New York Times* (Jan. 11, 2010).

- In 2016, California voters approved Proposition 66, which aimed to reduce costs, provide more attorneys for people on death row, and speed up executions. But more than four years later, costs have increased, just as many people (363) on death row remain in need of lawyers, and delays in cases have continued to grow. In 2008, the capital case post-conviction review process took an average of 22 years. Today, it's 30 years.¹⁸ Most people die before their appeals are concluded and the death penalty costs \$150 million a year.
- In 2018, Vincente Benavides Figueroa became the fifth person on California's modern death row to be exonerated. The California Supreme Court determined that Figueroa was wrongfully convicted and that his convictions were based on false evidence of sexual assault and strong evidence that the victim's death was an accident that did not involve Benavides at all.¹⁹
- In 2019, Governor Gavin Newsom declared a moratorium on executions in California. The Governor explained that "California's death penalty system is unfair, unjust, wasteful, protracted and does not make our state safer."²⁰ The Governor also noted, "death sentences are unevenly and unfairly applied to people of color, people with mental disabilities, and people who cannot afford costly legal representation."²¹
- In 2020, Governor Newsom took the unprecedented step of filing an amicus brief at the California Supreme Court arguing that the death penalty has been applied in an unconstitutional and a racially biased manner.
- In 2021, Rob Bonta became California Attorney General after his appointment by Governor Newsom. Attorney General Bonta— whose office defends death sentences after conviction— clarified his opposition to the death penalty after his appointment: "I think the death penalty is inhumane. It does not deter. Studies show it's long had a disparate impact on defendants of color, especially when the victim is white."²² California's last three Attorney Generals expressed similar reservations about the death penalty while continuing to defend it in court.²³
- In addition to the state-wide moratorium on executions, District Attorneys in three major California jurisdictions — Los Angeles, San Francisco, and Santa Clara County — have recently declared they will not seek the death penalty in any case and will work to resentence people now on death row. These District Attorneys — as well as the District Attorneys from San Joaquin and Contra Costa counties — have also recently told the California Supreme Court that the death penalty as currently administered does not meet constitutional standards. As a

¹⁸ Data compiled by the Office of the State Public Defender.

¹⁹ *Id.* at 588-589.

²⁰ Governor's Exec. Order N-09-19 (Mar. 13, 2019)

²¹ *Id.*

²² Bob Egelko, *California Attorney General Rob Bonta sees state moving away from death penalty*, San Francisco Chronicle (May 17, 2021).

²³ *Id.*

result, the majority of Californians live in a county where the elected district attorney does not support California’s current death penalty.

- New death sentences have declined dramatically over the past decade: In 2010, 34 death sentences were imposed statewide. In 2019, there were three new death sentences. In 2020, there were five. So far in 2021, only one new death sentence has been imposed.²⁴
- California’s most recent execution was fifteen years ago. Exits from death row have exceeded new death sentences every year since 2015, when the death row population peaked at 746. As of June 1, 2021, there are 703 people on death row. The exits have resulted from nearly equal parts reversals and deaths from natural and other non-execution causes.

Finally, the nation was recently forced to briefly confront the reality of what a regularly-operating death penalty looks like. In the final months of President Trump’s administration, the federal government executed thirteen people over a seven-month period. The executions continued despite important legal questions unresolved in unsigned, late-night orders from the U.S. Supreme Court.²⁵ Justice Sonia Sotomayor decried this “unprecedented, breakneck timetable of executions.”²⁶ If California adopted the same pace of executions — an average of one every two weeks — it would take more than twenty-five years to clear the state’s death row.

New data and recent research

The continued decline of the death penalty has been spurred in part by continued revelations from research showing that the death penalty will inevitably be applied in an arbitrary and discriminatory manner. This report presents the most recent data and research on the death penalty’s use in California.²⁷

New evidence of the overall dysfunction of the California death penalty:

- Of more than 1,000 death sentences since 1978 in California, 230 people have had their death judgments reversed.²⁸ 160 people obtained relief in the California Supreme Court²⁹ and 70 people obtained relief in federal court.³⁰

²⁴ Several months pass between a jury recommendation of death and final imposition of sentence. The number of death sentences in 2021 likely is partly a result of the limitations on conducting jury trials during the pandemic in 2020.

²⁵ James Romoser, *Over sharp dissents, court intervenes to allow federal government to execute 13th person in six months*, SCOTUSblog, Jan. 16, 2021.

²⁶ *United States v. Higgs*, 59 U.S. __ (2021) (Sotomayor, dis. opn.)

²⁷ The data below about imposed death sentences is taken from the California Department of Justice’s *Homicide in California* reports from 2010-2019, Table 36. 2020 data was provided by CDCR Office of Research. demographic information is from U.S. census data between 2010-2019.

²⁸ Office of the State Public Defender, *California’s Broken Death Penalty*, March 2021, 58–59.

²⁹ *Id.* The California Supreme Court has reversed death sentences 126 times in 784 direct appeals. Thirty-nine of the reversals related to guilty-phase issues and 87 related to penalty phase issues. The California Supreme Court has granted relief thirty-four times in state habeas petitions.

³⁰ *Id.*

- The reversal rate in federal court is 60%. Most of the reversals in federal courts were because trial counsel provided constitutionally defective representation.³¹ The majority of cases have not reached federal court.
- In 2020, the average time from sentencing to resolution of the state habeas proceedings had increased to 20 years,³² up from 17 years in 2015,³³ and 12 years in 2008.³⁴ Federal review adds a minimum of ten years to the process.
- Since 1978, forty-eight death sentences have been affirmed after completing the post-conviction review process. Eleven people have been executed.³⁵ Thirty-two people are eligible for execution, and six have died of natural causes after their appeals were complete.³⁶
- The 32 people eligible for execution who have exhausted all appeals have spent an average of roughly 34 years awaiting execution on death row.³⁷

New data on racial disparities in death sentencing:

- In 2018 and 2019, all the people sentenced to death in California were Latinx. In 2020, three of the five people sentenced to death in California were Latinx. Latinx people accounted for less than half of homicide arrests in the state between 2010 and 2019.³⁸
- Despite accounting for only 6.5% of California’s population,³⁹ 36% of people on death row are Black.⁴⁰
- California has sentenced young people of color to death at alarming rates: 80% of people of color on death row were 21 or younger at the time of their offense.⁴¹

New data on racial disparities in death sentencing in the California counties that have most aggressively pursued the death penalty:

- In Los Angeles County from 2010 to 2020, 95% of the people sentenced to death were people of color. Of the 222 people currently on death row who were

³¹ This data, compiled by the Office of the State Public Defender, is on file with Committee staff.

³² Habeas Corpus Resource Center, *Annual Report 2020*, at 11 (2020) (hereinafter, *HCRC Report*).

³³ *Jones v. Davis* (9th Cir. 2015) 806 F.3d 538, 543 (“By the time the inmate’s state habeas petition is decided, he will likely have spent a combined 17 years or more litigating his direct appeal and petition for state habeas review before the California Supreme Court.”).

³⁴ *CCFAJ Report*, at 123.

³⁵ The total number of people executed in California since reinstatement of the death penalty is 13 because two individuals waived their appeals and volunteered for execution, Robert Lee Massie, executed in 2001, and David Mason executed in 1993. See DPIC, *Execution Volunteers*.

³⁶ This data was compiled by the Office of the State Public Defender.

³⁷ *Id.*

³⁸ Arrest data is from the California Department of Justice’s *Homicide in California* reports from 2010-2019, Table 31.

³⁹ U.S. Census Bureau, Quick Facts California (2019).

⁴⁰ Data provided by CDCR Office of Research.

⁴¹ *Id.*

convicted in Los Angeles County since 1979, nearly 50% are Black, nearly 29% are Latinx and less than 15% are white.⁴²

- In Orange County from 2010 to 2020, 73% of the people sentenced to death were people of color. Between 2010-2015, Orange County's capital sentencing rate was 5.4 times the rest of the state per 100 homicides.⁴³ During the same time period, 89% of the individuals sentenced to death in the county were people of color.⁴⁴ In total, of the 60 individuals currently on death row who were sentenced in Orange County, nearly 62% are people of color.⁴⁵
- In Riverside County from 2010 to 2020, 86% of people sentenced to death were people of color. Black people made up 6% of the population during this time but accounted for 26% of those sentenced to death. Of the 92 people currently on death row who were sentenced in Riverside County, 76% are people of color.⁴⁶ Since 2012, Riverside County has sentenced to death more people of color than any other county in the United States has imposed on all people.⁴⁷
- In San Bernardino County from 2010 to 2020, Black people made up 8% of the population but accounted for 38% of the 8 death sentences. Of the 39 people currently on death row who were sentenced in San Bernardino County, 49% are people of color.⁴⁸

New research examining thousands of cases from 1978-2002 — which account for 75% of the people currently on death row — showing racial disparities in how capital cases are charged and sentenced:

- People accused of killing at least one white victim were more likely to be charged with a special circumstance and sentenced to death than those accused of killing non-white victims.⁴⁹
- Racial disparities have been shown in the application of several of the special circumstances — such as those involving gangs and felony-murder — that make a person eligible for a death sentence.⁵⁰

⁴² Data provided by CDCR Office of Research.

⁴³ Fair Punishment Project, *Too Broken to Fix Part II: An In-depth Look at America's Outlier Death Penalty Counties*, 39 (2016) (hereinafter *FPP II*).

⁴⁴ *Id.* at 43.

⁴⁵ Data provided by CDCR Office of Research.

⁴⁶ Data provided by CDCR Office of Research.

⁴⁷ Death Penalty Information Center, U.S. Death Sentences 2012-2020 by County.

⁴⁸ Data provided by CDCR Office of Research.

⁴⁹ Letter of Catherine M. Grosso, Jeffrey Fagan, and Michael Laurence, to Committee on Revision of the Penal Code, March 22, 2021, 2-3.

⁵⁰ Grosso, et al., *Death by Stereotype: Race, Ethnicity, and California's Failure to Implement Furman's Narrowing Requirement*, 66 UCLA L.Rev. 1394, 1426 (2019) (reviewing cases from 1978-2002).

New data on geographic disparities in California based on county:

- Between 2015 and 2019, a total of six counties imposed 89% of the death sentences in the state.⁵¹
- Five counties account for approximately 65% of all people currently on death row, but comprise less than half of California’s total population.⁵²
- Riverside County is a national outlier. In 2015, Riverside County sentenced more people to death than every other state in the country, except for Florida and California itself.⁵³ In 2020, Riverside County was responsible for three of the five death sentences pronounced in the state.⁵⁴
- State-wide, counties with high homicide rates are not the ones that use the death penalty the most. And counties with very similar homicide rates have different usage of the death penalty. For example, Santa Clara County and Orange County both have homicide rates around 2.5 per 100,000 residents but have varied greatly in their application of the death penalty over the past two decades.
- Homicide rates have fallen at similar rates over the past thirty years in counties that frequently use the death penalty and counties that don’t.

New evidence that California’s death penalty system fails to identify those most culpable, with many death sentences imposed on the intellectually disabled, those with severe mental illness, and young people:

- Between 70 and 100 people now on death row have presented evidence that they are intellectually disabled in court filings. Since half of the people on death row do not have attorneys to present their habeas claims, this figure likely underrepresents the scope of the problem.
- More than one third of death row — at least 242 individuals — are being treated for severe mental illness.
- 45% of the people currently sentenced to death in California – or 318 people — were 25 or under at the time of their offense.⁵⁵ 167 of them were 21 or younger.⁵⁶ Twenty-four were only 18 years old.⁵⁷

⁵¹ Data provided by CDCR Office of Research. The counties are Los Angeles, Riverside, Orange, Alameda, and San Bernardino and San Diego.

⁵² Data provided by CDCR Office of Research. The counties are Los Angeles, Riverside, Orange, Alameda, and San Bernardino.

⁵³ Fair Punishment Project, *Too Broken to Fix: Part I: An In-depth Look at America’s Outlier Death Penalty Counties*, 31 (2016) (hereinafter *FPP I*).

⁵⁴ Data provided by CDCR Office of Research.

⁵⁵ Data provided by CDCR Office of Research.

⁵⁶ *Id.*

⁵⁷ California Department of Corrections and Rehabilitation, *Condemned Inmate List*.

I. Introduction

California has the largest death row in the country, currently numbering 703 people, as of the date of this report. In total, more than 1,000 people have been sentenced to death since 1977 in California. Yet, no executions have occurred in the last 15 years and only 13 total executions have taken place since reinstatement of the death penalty in 1977. And 230 people have had their death sentences reversed.

Currently, 363 people on death row – more than half – are still awaiting appointment of post-conviction counsel, and it now averages more than 30 years for people convicted of capital offenses to exhaust their appeals. Indeed, most people die of natural causes before their appeals are resolved. Furthermore, it is estimated that the state has spent more than \$4 billion tax dollars on the death penalty since it was reinstated in 1977.

[Graphic: death sentences & executions by year]

Meanwhile, over the past decade, California voters have (narrowly) signaled support for the death penalty in the results of three separate ballot measures.⁵⁸ California has tried to make the death penalty system work. The state has enacted statutes and constitutional provisions to prioritize death penalty cases, to expedite record review, and to provide victims with speedy resolution of cases.⁵⁹ The state has dedicated two state agencies⁶⁰ and contracts with a third agency⁶¹ to provide defense services to individuals on death row. At the federal level, the Anti-Terrorism and Effective Death Penalty Act was enacted in 1996 in an effort to expedite review of death penalty cases.⁶²

Yet these attempts to improve California's death penalty system have largely failed. The time to adjudicate death sentences has never been longer, and victims are no closer to resolution.

Acknowledging the failures of California's system of capital punishment, Governor Newsom declared a moratorium on executions upon taking office and late last year took the unprecedented step of arguing in the California Supreme Court that the death penalty is applied in California in an unconstitutional and racially-biased manner.

In addition, District Attorneys in Los Angeles, Santa Clara, and San Francisco have openly declared that their offices will not seek the death penalty. These District Attorneys, along with the District Attorneys of San Joaquin and Contra Costa counties, have also asserted in the California Supreme Court that the state's death penalty is

⁵⁸ *California Proposition 34, Abolition of the Death Penalty Initiative (2012); California Proposition 62, Repeal of the Death Penalty (2016); California Proposition 66, Death Penalty Procedures (2016).*

⁵⁹ *Assem. Bill No. 195 (1995-96 Reg. Sess.); Penal Code sections 190.6 and 190.8; Cal. Const. Art. 1, sec. 28(a)(6).*

⁶⁰ The Habeas Corpus Resource Center is completely dedicated to death penalty work. The Office of the State Public Defender was completely dedicated to death penalty work until July 1, 2020, when it expanded to also provide training and technical assistance to county indigent defense providers.

⁶¹ The California Appellate Project is a non-profit that is under contract with the Judicial Council of California to provide assistance to attorneys appointed to represent individuals on death row.

⁶² The Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214.

applied in an arbitrary and unconstitutional manner.⁶³ A group of nearly 100 current and former elected prosecutors, Attorneys General, and law enforcement leaders, including the current District Attorneys of Contra Costa, San Francisco, Santa Clara, and Los Angeles Counties, recently stated, “[m]any have tried for over forty years to make America’s death penalty system just. Yet the reality is that our nation’s use of this sanction cannot be repaired, and it should be ended.”⁶⁴

Against this convoluted and conflicted backdrop, the Committee undertook its analysis of the current state of the death penalty. The Committee conducted a lengthy hearing in March 2021 and heard from academic experts about the history and current application of California’s death penalty. Committee staff also consulted extensively with practitioners and other experts from across California and collected relevant data. This report reviews the extensive literature on California’s death penalty, including new studies and data not previously available.

After careful consideration, the Committee has concluded that the death penalty should be repealed in California and that the size of California’s death row should be reduced.

II. Legal and Historical Background

A. History of California’s modern death penalty law

California has had the death penalty since its founding.⁶⁵ But in 1972, the punishment was struck down by the California Supreme Court as a violation of the state constitution’s prohibition against cruel or unusual punishment: “We have concluded that capital punishment is impermissibly cruel. It degrades and dehumanizes all who participate in its processes. It is unnecessary to any legitimate goal of the state and is incompatible with the dignity of man and the judicial process.”⁶⁶

The California Supreme Court’s ruling was short-lived. Less than a year later, voters approved Proposition 17 to amend the California Constitution to explicitly allow capital punishment.⁶⁷

The death penalty did not immediately return to California because of the actions of the United States Supreme Court. A few months before Proposition 17 was approved, the U.S. Supreme Court ruled in *Furman v. Georgia* that the death penalty as then administered violated the United States Constitution’s prohibition against cruel and

⁶³ Death Penalty Information Center, *California Governor, 6 District Attorneys File Briefs Saying State’s Death Penalty is Arbitrary and ‘Infected by Racism’* (October 28, 2020). See also San Francisco District Attorney’s Office, Press Release (Jul. 7, 2020); Los Angeles District Attorney’s Office, Special Directive 2011 (Dec. 7, 2020); Salonga, *Exclusive: Santa Clara DA Abandoning Death Penalty Pursuit in all Cases*, Mercury News (Jul. 21, 2020).

⁶⁴ Fair and Just Prosecution, Joint Statement By Criminal Justice and Law Enforcement Leaders in Opposition to Application of the Federal Death Penalty (Dec. 2020).

⁶⁵ Kara Dansky, *Understanding California Sentencing*, 43 University of San Francisco Law Review 45, 47–50 (2008).

⁶⁶ *People v. Anderson*, 6 Cal.3d 628, 656 (1972).

⁶⁷ *California Proposition 17, Death Penalty in the California Constitution* (1972)

unusual punishment.⁶⁸ The crux of the ruling lay in the plurality’s conclusion that the death penalty had been applied in an arbitrary manner, summarized in the oft-quoted statement of Justice Potter Stewart that the death penalty is “cruel and unusual in the same way that being struck by lightning is cruel and unusual.”⁶⁹

The *Furman* decision invited the states to try again by narrowing who deserved the ultimate punishment of death. The states proceeded in two ways: some, including California,⁷⁰ adopted statutes that mandated the death penalty in specific circumstances and others adopted the discretionary death penalty statute proposed by the American Law Institute in its Model Penal Code.

Four years after the *Furman* ruling, the U.S. Supreme Court approved a discretionary statute in *Gregg v. Georgia*, thus officially inaugurating America’s “modern” death penalty era.⁷¹

In 1977, the California Legislature replaced its mandatory death penalty statute with one modeled on the Model Penal Code statute approved by the U.S. Supreme Court in *Gregg*.⁷² Then-Governor Jerry Brown vetoed the bill, but the Legislature overrode his veto, marking the death penalty’s official return to California.⁷³

The following year, California voters approved a sweeping initiative to expand the death penalty. The initiative was dubbed the “Briggs Initiative” after its proponent Senator John Briggs and officially identified as Proposition 7. The initiative expanded the scope of California’s death penalty to effectively encompass nearly all homicides.⁷⁴ As described in the voter materials, the initiative “was intended to ‘give Californians the toughest death-penalty law in the country,’” one that would “apply to every murderer.”⁷⁵

In the years that followed, California’s death penalty statute was expanded several more times.⁷⁶ For example, subsequent amendments expanded the law to allow a sentence of death or life in prison with no possibility of parole even if the defendant did not kill nor intend to kill, and removed a judge’s discretion to dismiss the special

⁶⁸ *Furman v. Georgia*, 408 U.S. 238 (1972).

⁶⁹ *Id.* at 309 (conc. opn. of Stewart, J.).

⁷⁰ Stats. 1973, ch. 719, at 1297. This law was struck down by the California Supreme Court in December 1976 because it made death sentences mandatory in certain circumstances. *Rockwell v. Superior Court*, 18 Cal.3d 420, 445 (1976).

⁷¹ *Gregg v. Georgia*, 428 U.S. 153, 193-195 (1976) (joint op. of Stewart, Powell, and Stevens, JJ.)

⁷² Covey, *Exorcizing Wechsler’s Ghost: The Influence of the Model Penal Code on Death Penalty Sentencing Jurisprudence* 31 *Hastings Const. L.Q.* 189, 207 (2004).

⁷³ Turner, *California Legislature Overrides Veto of Death Penalty*, *New York Times* (Aug 12, 1977).

⁷⁴ Shatz, et al., *The California Death Penalty Scheme: Requiem for Furman?*, 72 *N.Y.U. L.Rev.* 1283, 1310 & n. 154 (1997) (quoting State of California, *Voter’s Pamphlet* 34 (1978).)

⁷⁵ *Id.*

⁷⁶ Grosso, et al., *Death by Stereotype: Race, Ethnicity, and California’s Failure to Implement Furman’s Narrowing Requirement*, 66 *UCLA L.Rev.* 1394, 1406 (2019).

circumstances, making life without the possibility of parole the mandatory minimum punishment for anyone convicted of first degree murder with special circumstances.⁷⁷

Twice in recent years, voters have been presented the opportunity to repeal the death penalty and both times narrowly rejected that path. Instead, in 2016 voters approved Proposition 66 to “speed up” the review of death penalty judgements in an effort to “fix” the system.⁷⁸ As described below, four years after the passage of Proposition 66, the pace of litigation in death penalty cases has only slowed further.

B. California’s modern death penalty process

In California, a case becomes a potential death penalty case when the district attorney charges murder with special circumstances, which only carries two possible punishments: death or life imprisonment without the possibility of parole.⁷⁹

Death penalty trials have two parts: the guilt phase and the punishment phase. The guilt phase is similar to any murder trial with the additional requirement that the prosecution must prove the special circumstances alleged.⁸⁰ The punishment phase is unique. During the punishment phase, the prosecution presents aggravating evidence and the defense presents mitigating evidence.⁸¹ The jury is asked to evaluate the aggravating and mitigating evidence and to determine if death or life without parole is the appropriate punishment.⁸² If the jury chooses life without parole, the judge must impose that sentence; the judge has no discretion to impose a sentence of death and no discretion to impose a lesser sentence of life imprisonment *with* the possibility of parole.⁸³ But if the jury chooses death, the judge retains the discretion to choose life without parole or may impose the death sentence.⁸⁴

Following imposition of a death sentence, the post-conviction process begins. This process has three parts. First, the California Constitution requires an automatic, direct

⁷⁷ *California Proposition 115, the “Crime Victims Justice Reform Act” (1990)*. Proposition 115 overrode the California Supreme Court opinions in *Carlos v. Superior Court*, 35 Cal. 3d 131 (1983), and *People v. Anderson*, 43 Cal. 3d 1104 (1987). Other initiatives added more special circumstances – killing a juror, “car-jacking”, “drive-by-shootings,” and “gang related” murders – and expanded the definitions of kidnapping and arson under the felony murder special circumstance. *California Proposition 195, Special Circumstances Punishable by the Death Penalty (1996)*; *California Proposition 196, Murders Committed by Firing from Vehicles are Punishable by Death (1996)*; *California Proposition 21, Treatment of Juvenile Offenders (2000)*.

⁷⁸ In 2012, California voters rejected Proposition 34, with 52% opposed and 48% in support. Four years later, voters rejected Proposition 62, with 53% opposed and 47% in support. By an even narrower margin, in 2016 the voters approved Proposition 66, an initiative intended to speed up litigation in death penalty cases, supported by 51% of voters. (*California Proposition 34, Abolition of the Death Penalty Initiative (2012)*; *California Proposition 62, Repeal of the Death Penalty (2016)*; *California Proposition 66, Death Penalty Procedures (2016)*).

⁷⁹ Penal Code §§ 190, 190.2.

⁸⁰ Penal Code § 190.1.

⁸¹ Penal Code §§ 190.3, 190.4.

⁸² *Id.*

⁸³ Penal Code § 190.4(e); Penal Code section 1385.1.

⁸⁴ Penal Code § 190.4(e).

appeal in all death penalty cases to the California Supreme Court.⁸⁵ The direct appeal considers legal challenges to the death sentence based solely on the trial transcript.

Second, in addition to the direct appeal, a person under sentence of death will also pursue a habeas corpus challenge in state court.⁸⁶ The state habeas corpus challenge considers evidence that was not available or presented at trial.⁸⁷

Third, following the completion of review of the death judgment in state court, the person sentenced to death can file a habeas corpus challenge in federal court.⁸⁸ The purpose of this challenge is to determine if the state court correctly resolved legal issues based on the U.S. Constitution. These proceedings are governed by the Anti-Terrorism and Effective Death Penalty Act (AEDPA), passed by Congress in 1996 with the goal of increasing the speed of federal review of death penalty cases.⁸⁹ Obtaining reversal of a death judgment in federal court is extremely difficult.⁹⁰

C. Most death sentences are eventually overturned by courts

Despite these extra safeguards at trial and difficult standard of review, most sentences of death ultimately are reversed in California and throughout the United States.⁹¹ Of more than 1,000 death sentences since 1978 in California, 230 people have had their death judgments reversed.⁹²

160 people obtained relief in the California Supreme Court.⁹³ Although the California Supreme Court has one of the highest rates of affirming death penalty cases in the nation,⁹⁴ California death sentences are frequently reversed in federal court after decades of litigation expenditures in the state courts.⁹⁵ Federal courts have granted relief

⁸⁵ Cal. Constitution Art. IV sec. 11.

⁸⁶ Penal Code § 1473.

⁸⁷ Previously, California law required all habeas petitions in death penalty cases to be filed at the California Supreme Court. Proposition 66 shifted these cases to the Superior Courts, though the Supreme Court retains discretion to keep cases previously filed there. Penal Code § 1509.

⁸⁸ 28 U.S.C. § 2261-2266.

⁸⁹ See Anti-Terrorism and Effective Death Penalty Act, Cornell Law School Legal Information Institute.

⁹⁰ See 8 U.S.C. § 2254(d) (relief is only available if state court decision “was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.”). See also Radley Balko, Opinion: Joe Biden Fought This Destructive Law. 25 Years Later He Can Help Repeal It, Washington Post, April 27, 2021 (“This pernicious, dizzyingly complicated law created a minefield of procedural barriers and deadlines that, if not scrupulously followed, prohibit federal courts from reviewing the merits of state convictions.”)

⁹¹ Baumgartner, et al., *Deadly Justice: A Statistical Portrait of the Death Penalty*, 139 (2018) (hereinafter *Deadly Justice*) (noting that between 1973 and 2013, reversal of the sentence on appeal was the most frequent outcome in death penalty cases nationally).

⁹² Office of the State Public Defender, *California’s Broken Death Penalty*, March 2021, 58–59.

⁹³ *Id.* The California Supreme Court has reversed death sentences 126 times in 784 direct appeals. Thirty-nine of the reversals related to guilty-phase issues and 87 related to penalty phase issues. The California Supreme Court has granted relief thirty-four times in state habeas petitions.

⁹⁴ Cal. Com. on the Fair Administration of Justice, *Final Report, Death Penalty* at 120–21 (2008) (hereinafter *CCFAJ Report*); data compiled by the Office of the State Public Defender and the Habeas Corpus Resource Center.

⁹⁵ *Deadly Justice*, at 151; *CCFAJ Report*, at 120-121, n. 21 (citing Uelmen, *Review of Death Penalty Judgments By the Supreme Courts of California: A Tale of Two Courts*, 23 Loyola L.A. L.Rev. 237 (1989)). In 1986, three

in 70 of the 118 California capital cases that have final federal judgments – a reversal rate of 60.3%.⁹⁶

As Committee panelist Sean Kennedy explained, “federal judges have been more willing to find that an error may have been prejudicial, specifically at the penalty phase, because of the understanding that a wide variety of mitigators can appeal to at least one juror sitting on the penalty phase and change the verdict.”⁹⁷ Most of the people who obtained relief in state or federal court were resentenced to life without parole or less.⁹⁸

D. California does not have a functional method to execute people.

Following the execution of Clarence Ray Allen in 2006, later that same year a federal district court concluded that California’s lethal-injection protocol could cause “pain so extreme that it offends the Eighth Amendment.”⁹⁹ This ruling resulted in a court-imposed moratorium on executions while the state sought to devise a new procedure. Although that case has since been settled, active litigation continues as discussed further below.

Shortly after taking office in 2019, Governor Newsom issued an executive order imposing a moratorium on all executions, stating “California’s death penalty system is unfair, unjust, wasteful, protracted and does not make our state safer.”¹⁰⁰ The Governor also noted, “death sentences are unevenly and unfairly applied to people of color, people with mental disabilities, and people who cannot afford costly legal representation.”¹⁰¹ In addition to granting a reprieve to all individuals on death row, the Governor ordered the death chamber dismantled and halted all steps to devise a new method of execution.¹⁰²

In light of the Governor’s moratorium, the parties settled the court challenge to California’s execution protocol, with the proviso that the case will automatically be reinstated should the moratorium be lifted.¹⁰³

E. The majority of states do not have the death penalty in practice or effect

At its height in 2004, the death penalty was law in the United States in all but 12 states.¹⁰⁴ Since 2004, the death penalty has been overturned – either through legislative

California Supreme Court justices were not reelected in a campaign “dominated by the death penalty.” Bright, et al., *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L.Rev. 759, 761 (1995). Since that time, the high court has affirmed almost 90% of death penalty cases. CCFAJ Report, at 120-121, n. 21.

⁹⁶ Office of the State Public Defender, *California’s Broken Death Penalty*, March 2021, 58–59.

⁹⁷ Committee on Revision of the Penal Code, Meeting on Mar. 25, 2021, 0:39:11–0:42:07.

⁹⁸ *Id.*

⁹⁹ *Morales v. Tilton*, 465 F. Supp. 2d 972, 974 (N.D. Cal. 2006).

¹⁰⁰ Governor’s Exec. Order N-09-19 (Mar. 13, 2019).

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Morales v. Diaz*, 3:06-cv-00219-RS (N.D. Cal. Jul. 24, 2020), ECF No. 755.

¹⁰⁴ Death Penalty Information Center, *State by State*.

repeal or through decisions of the state’s highest court – in ten additional states.¹⁰⁵ Virginia became the 23rd state to eliminate the death penalty and the first Southern state to repeal the death penalty since the founding of the nation.¹⁰⁶ In addition, beyond California, the Governors of Oregon and Pennsylvania have placed a moratorium on executions, bringing to 26 the total number of states that do not have the death penalty in law or effect.¹⁰⁷ Another 14 states have not carried out an execution in five years.¹⁰⁸

In total, 39 states have not carried out an execution for five years or do not have the death penalty in law. The jurisdictions of Puerto Rico, the District of Columbia, and all other U.S. territories also do not have the death penalty.¹⁰⁹

[Graphic of states without death penalty in effect]

In 2009, the Model Penal Code Committee at the American Law Institute voted to withdraw the model capital statute on which the California capital statute and those of many other states are based, finding that there are “institutional and structural obstacles to ensuring a minimally adequate system for administering capital punishment.”¹¹⁰ As noted by Committee panelist and death penalty expert Carol Steiker, this was the first change made to the Model Penal Code since its promulgation in 1962.

Internationally, the death penalty is used in only a small minority of countries. The death penalty has been formally abolished or was never law in 106 nations.¹¹¹ The vast majority of executions are carried out by China, Iran, Saudi Arabia, Iraq, and Egypt.¹¹² Several international treaties and covenants either restrict or prohibit use of the death penalty, most notably the European Convention on Human Rights.¹¹³

III. Legal Problems with California’s Death Penalty

California’s death penalty system has several legal infirmities that set it apart from other states.

A. California’s death penalty applies to almost any murder.

As discussed above, for a state’s death penalty to be constitutional, the statute must limit death eligibility to those most culpable for committing the gravest murders. But studies have consistently shown that California’s death penalty statute fails to

¹⁰⁵ *Id.*

¹⁰⁶ Whitney Evans, *Virginia Governor Signs Law Abolishing The Death Penalty, A 1st In The South* (Mar. 24, 2021).

¹⁰⁷ Death Penalty Information Center, *State by State*.

¹⁰⁸ Death Penalty Information Center, *States With No Recent Executions*.

¹⁰⁹ Death Penalty Information Center, *State and Federal Info: Puerto Rico*; Constitution of the Commonwealth of Puerto Rico, Art. II, Section 7 (1952).

¹¹⁰ The American Law Institute, *Model Penal Code*; Committee on Revision of the Penal Code, Meeting on Mar. 25, 2021, 0:11:00–0:11:35.

¹¹¹ Amnesty International, *Death Penalty*.

¹¹² *Id.*

¹¹³ *Id.*

meaningfully narrow death eligibility because nearly all homicides fit under one or more special circumstance. The most recent research shows that 95% of all first-degree murder convictions and 59% of all second-degree murder and voluntary manslaughter convictions were death eligible.¹¹⁴ Other research made similar findings.¹¹⁵

B. Jurors do not need to agree on why someone should receive the death penalty and do not need to be convinced beyond a reasonable doubt that death is appropriate.

California juries are not required to unanimously agree on aggravating factors during penalty phase deliberations of a death penalty trial. They also are not required to find beyond a reasonable doubt that aggravating factors outweigh mitigating factors or that death is the appropriate punishment.¹¹⁶ As a result, individual jurors could have different assessments of the truth or weight of the aggravating and mitigating factors. And some jurors might vote for death, despite lingering concerns consistent with reasonable doubt as to the appropriate punishment.

The California Supreme Court recently heard oral argument on whether this practice contravenes the state constitution.¹¹⁷ Governor Newsom also took the unprecedented step of filing an amicus brief urging the Court to answer this question in the affirmative.¹¹⁸ The Governor noted that “[n]ationally and in California, non-unanimous verdicts have been intended to entrench White jurors’ control of deliberations.”¹¹⁹ The District Attorneys’ amicus brief discussed above was filed in the same case, arguing that the failure to instruct on unanimity and beyond a reasonable doubt amplify the arbitrariness in application of California’s death penalty. The Court held oral argument in this case on June 2, 2021, and will issue an opinion by September 2021.

C. Extreme delays caused by overall dysfunction make death sentences irrational.

In 2014, the overall dysfunction of California’s death penalty led a Federal District Court Judge to conclude that the death penalty as administered in California violated the ban on cruel and unusual punishment. The court concluded that “systemic delay

¹¹⁴ Baldus, et al., *Furman at 45: Constitutional Challenges from California’s Failure to (Again) Narrow Death Eligibility* 16(4) J. Emp. Legal Studies 693, 707–724 (2019) (study of 27,453 California convictions for first-degree murder, second-degree murder, and voluntary manslaughter with offense dates between January 1978 and June 2002 concluded that 95% of all first-degree murder convictions were death-eligible. This was the highest eligibility rate in the country. Of the death-eligible cases, only 4.3% resulted in a death sentence).

¹¹⁵ Shatz, et al., *Chivalry Is Not Dead: Murder, Gender and the Death Penalty*, 27 Berkeley J. Gender L. & Just. 64, 93 (2012) (study of all first-degree murder convictions from 2003 to 2005 found that 84.6% of convictions were death-eligible but that death sentences were imposed in 5.5% of cases); Shatz, et al., *The California Death Penalty Scheme: Requiem for Furman?*, 72 N.Y.U. L.Rev. 1283, 1332–43 (1997) (study sampled appellate first-degree murder cases from 1988 to 1992 found that 84% of first-degree murder convictions were factually death-eligible but that death sentences were imposed in only 9.6% of the cases).

¹¹⁶ See briefing documents in *People v. McDaniels*, No. S171393, available at www.ospd.ca.gov/legal-developments/

¹¹⁷ *Id.*

¹¹⁸ Amicus brief in the case of *People v. McDaniels*, No. S171393, filed October 26, 2020.

¹¹⁹ *Id.* at 22.

has made execution so unlikely that the death sentence carefully and deliberately imposed by the jury has been quietly transformed into one no rational jury or legislature could ever impose: life in prison, with the remote possibility of death.”¹²⁰ This ruling was later reversed by the Ninth Circuit on procedural grounds.¹²¹ The issue has yet to be addressed by the California Supreme Court on a record that includes the evidence presented to the federal court.

D. The facts of capital cases are not reviewed by courts to ensure the death sentence is proportional to the crime.

Proportionality review – comparing cases to ensure fair and proportional sentencing – is an important safeguard to address bias in the criminal legal system. There are two forms of proportionality review: inter-case review compares outcomes across individuals in different cases while intra-case review compares outcomes among defendants involved in the same event. California is one of only a handful of states that does not require inter-case proportionality review of death sentences across different cases.¹²²

California has numerous stark examples of disproportionality, including multiple cases in which an accomplice who did not kill was sentenced to death while the individual who actually committed the murder was not.¹²³ And the most prolific serial killer in California history was sentenced to life in prison without the possibility of parole, while individuals who did not kill nor intend to kill remain on death row under felony murder special circumstances.¹²⁴ In some cases, the accomplice who did not kill remains on death row while the actual killer has already been released on parole.¹²⁵

¹²⁰ *Jones v. Chappell*, 31 F.Supp.3d 1050, 1053 (C.D. Cal. 2014) revd. *sub nom. Jones v. Davis*, 806 F.3d 538, 543 (9th Cir. 2015).

¹²¹ *Jones v. Davis*, 806 F.3d 538, 543 (9th Cir. 2015).

¹²² See *People v. Riel*, 22 Cal.4th 1153, 1223 (2000); *People v. Taylor*, 47 Cal.4th 850, 900 (2009); *People v. Arias*, 13 Cal.4th 92, 193 (1996); *Pulley v. Harris*, 465 U.S. 37, 50–51 (1984); Submission by the ACLU of Northern California to the California Commission on the Fair Administration of Justice (Jan. 9, 2008); Timothy V. Kaufman-Osborn, *Capital Punishment, Proportionality Review, and Claims of Fairness (With Lessons from Washington State)*, 79 Wash. L. Rev. 775, 790-792 (2004).

¹²³ For example, Jarvis Masters was sentenced to death for allegedly producing a weapon that was used to kill a correctional officer, while the individuals responsible for the killing received lesser sentences. *In re Masters*, 7 Cal.5th 1054 (2019). See also *People v. Howard*, 51 Cal. 4th 15, 39–40 (2010); *People v. McDermott* 28 Cal.4th 946 (2002).

¹²⁴ Compare Wamsley, *Golden State Killer Sentenced To Life In Prison Without Possibility Of Parole*, National Public Radio (Aug. 21, 2020), with Ewing, *I've Made My Share of Wrongs, But I Haven't Killed No One*, The Appeal (Feb. 9, 2019) (discussing the case of Demetrius Howard who was sentenced to death as an accomplice in a robbery while the actual killer received a lesser sentence).

¹²⁵ *People v. Gordon*, 50 Cal.3d 1223 (1990). Patrick Gordon was the getaway driver who waited in the car while two other individuals entered a K-Mart and killed an armored truck driver. Gordon was sentenced to death while the other two individuals were sentenced to life without parole. Michael Caputo, the admitted trigger man, had his sentence commuted to life with parole and was released on parole in 2019. (Communication from counsel for Mr. Gordon.)

IV. California’s Death Penalty is Racially Biased

A. California’s history of lynching

“The death penalty in California today is a product of its history. Its history and therefore its present day administration is marred by race discrimination that influences every stage of the proceedings,” Director of the University of California, Berkeley Death Penalty Clinic Elisabeth Semel told the Committee in March.¹²⁶ Furthermore, America’s history of racial violence against people of color, especially through the practice of lynching must be considered when discussing capital punishment.¹²⁷

While lynching was more prominent in Southern states, it also happened in California. Lynchings in California mirrored that of Southern states where ethnic minorities were disproportionately targeted for violence.¹²⁸ Like Blacks in the south, Mexican and Mexican Americans in the west were often lynched after being accused of victimizing a white person, with little process and no trial.¹²⁹ At least 350 people may have been lynched in California between 1850 and 1935.¹³⁰ There are only two public markers for any of these killings.¹³¹

Although lynching was an extra-judicial process, the practice was closely tied to the criminal legal system because it regularly occurred in response to an allegation of serious crime.¹³² Black people who were accused of committing a crime were often executed without receiving any trial or process.¹³³

As calls to end the practice of lynching grew in the mid-twentieth century, the promise of swift, officially sanctioned executions were offered as a compromise.¹³⁴ Indeed, United States Supreme Court Justice Potter Stewart acknowledged the role of capital punishment in curtailing lynching, writing that the, “expression of society’s moral outrage” channeled by capital punishment “is essential in an ordered society that asks its citizens to rely on legal processes, rather than self-help to vindicate their wrongs.”¹³⁵

¹²⁶ Committee on Revision of the Penal Code, Meeting on Mar. 25, 2021, Discussion Panel 2, 0:20:59–0:21:12.

¹²⁷ Between 1865 and 1950, at least 6,400 people were lynched in the United States. Equal Justice Initiative, *Reconstruction in America: Racial Violence after the Civil War, 1865-1876*, 44 (2020) (hereinafter *Reconstruction in America*).

¹²⁸ Delgado, *The Law of the Noose: A History of Latino Lynching*, 44 Harv. Civil Rights-Civil Liberties L.Rev. 297, 301 (2009) (citing Carrigan, et al., *The Lynching of Persons of Mexican Origin or Descent in the United States, 1848 to 1928*, 37 J. Soc. Hist. 411, 415 (2003)).

¹²⁹ Equal Justice Initiative, *Lynching in America: Confronting the Legacy of Racial Terror*, 56 (2017) (hereinafter *Lynching in America*).

¹³⁰ Arellano, *Column: California has a history of racist lynchings too. Ignoring that fact is mass delusion*, Los Angeles Times, May 10, 2021 (citing the work of artist Ken Gonzales-Day).

¹³¹ *Id.*

¹³² Garland, *Penal Excess and Surplus Meaning: Public Torture Lynchings in Twentieth-Century America*, 39 L. and Soc. Rev. 793, 810-820 (2005).

¹³³ *Reconstruction in America*, at 67.

¹³⁴ Death Penalty Information Center, *Enduring Justice: The Persistence of Racial Discrimination in the U.S. Death Penalty*, 12 (2020).

¹³⁵ *Gregg*, 428 U.S. at 183.

However, the legal process considered by Justice Stewart was often markedly different for people of color charged with capital offenses.¹³⁶ Death sentences imposed against people of color after expedited criminal processes have been dubbed “legal lynching” by some experts.¹³⁷

It was against this historical backdrop that the United States Supreme Court considered the various challenges to capital punishment in the 1950’s through the 1970’s.¹³⁸ The constitutional challenges often explicitly alleged some form of racism as their basis.¹³⁹ Although notable decisions amended capital laws and procedures, the Court, “fail[ed] to address forthrightly the death penalty’s racialized history.”¹⁴⁰

B. California data

The Committee has gathered data about the imposition of death sentences in California and has reviewed the most recent statistical research into California’s death penalty. These sources all show a consistent theme: race often determines when the death penalty is sought and when it is imposed.

1. Disparities based on race of victim

Extensive research has shown that the race of the victim impacts who is sentenced to death in California. Newly-released studies focused on death sentences imposed in 2002 or earlier, accounting for 75% of people currently on death row who were sentenced during the time that the research considers.¹⁴¹ According to University of San Francisco Professor Emeritus Stephen Shatz, the findings of the several studies delivers a clear message that, “white lives matter, Black lives and Latinx lives, not so much. And white lives matter most when the person who took the white life is a Black.”¹⁴²

The musts recent research — provided to the Committee though not yet finalized — examined murder and manslaughter convictions from 1978–2002. It found that people accused of killing at least one white victim were more likely to be charged with one or more special circumstances than those accused of killing non-white victims.¹⁴³ Additionally, people accused of killing at least one white victim were more likely to be sentenced to death than those accused of killing non-white victims.¹⁴⁴

¹³⁶ Steiker, et al., *The American Death Penalty and the (In)visibility of Race*, 82 Univ. Chicago L.Rev. 243, 251-252 (2015).

¹³⁷ *Id.*

¹³⁸ *Id.* at 244.

¹³⁹ *Id.*

¹⁴⁰ Steiker, et al., *Courting Death*, 78-115 (2016).

¹⁴¹ Data provided by CDCR Office of Research.

¹⁴² Committee on Revision of the Penal Code, Meeting on Mar. 25, 2021, Discussion Panel 2, 0:20:14–0:20:38.

¹⁴³ Letter of Catherine M. Grosso, Jeffrey Fagan, and Michael Laurence, to Committee on Revision of the Penal Code, March 22, 2021, 2–3.

¹⁴⁴ *Id.*

In addition to this most recent research, several previous studies conducted in various California jurisdictions over a broad range of years have made similar findings.

In a statewide study of death sentences imposed in California in the decade of 1990, researchers Glenn Pierce and Michael Radelet found that Black and Latinx defendants who kill white victims were more likely to be sentenced to death than those who kill Black or Latinx victims.¹⁴⁵ In a study on capital charging in San Diego County from 1978–1993, researchers found that the District Attorney was more likely to seek the death penalty when Black and Latinx defendants were alleged to have killed white victims.¹⁴⁶ In a study of capital cases in Los Angeles County from 1990–1994, researchers found that “defendants accused of killing White victims are more likely to be charged with a death-eligible offense than those accused of killing minority victims.”¹⁴⁷ A study of charging practices in San Joaquin County from 1977–1986 found that the likelihood of being charged with a special circumstance for defendants in cases with a Black victim was one-fifth the likelihood in cases with a white victim.¹⁴⁸ In cases with Latinx victims, the likelihood was one-twentieth of that for cases with white victims.¹⁴⁹

2. Disparities based on race of defendant

A major study published in 2019 examined thousands of cases from 1978–2002 and, after controlling for level of culpability, victim race, offense year, found that some special circumstances were disproportionately applied by race or ethnicity.¹⁵⁰ In particular, the special circumstances of lying in wait, robbery / burglary felony murder, drive by shooting, and gang membership were more likely to be found or present in cases with Black or Latinx defendants.¹⁵¹

While the research described above does not consider cases past 2002, current data on racial disparities based on the race of the defendant suggests that race still plays a role in how the death penalty is administered in California. While further analysis would need to be conducted to draw a causal link between race and the imposition of a death sentence, this raw data presents troubling trends.¹⁵²

¹⁴⁵ Pierce, et al., *The Impact of Legally Inappropriate Factors on Death Sentencing for California Homicides, 1990- 1999*, 46 Santa Clara L.Rev. 1, 19-20 (2005).

¹⁴⁶ 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, 1095-1096 (2020).

¹⁴⁷ Petersen, *Examining the Sources of Racial Bias in Potentially Capital Cases: A Case Study of Police and Prosecutorial Discretion*, 7(1) Race & Justice 7, 23 (2016).

¹⁴⁸ Lee, *Hispanics and the death penalty: Discriminatory charging practices in San Joaquin County, California*, 35 J. Crim. Justice 17, 21 (2007).

¹⁴⁹ *Id.*

¹⁵⁰ Grosso, et al., *Death by Stereotype: Race, Ethnicity, and California's Failure to Implement Furman's Narrowing Requirement*, 66 UCLA L.Rev. 1394, 1441 (2019).

¹⁵¹ *Id.* at 1433–35 (2019). The study also found that white defendants were disproportionately likely to face “torture” special circumstances.

1426–1435.

¹⁵² The data below about imposed death sentences is taken from the California Department of Justice’s *Homicide in California* reports from 2010-2019, Table 36. 2020 data was provided by CDCR Office of Research. demographic information is from U.S. census data between 2010-2019.

Despite accounting for only 6.5% of California’s population,¹⁵³ over one third of people on death row in the state are Black.¹⁵⁴ While Latinx people accounted for less than half of homicide arrests in the state between 2010 and 2019,¹⁵⁵ all eight of the people sentenced to death in the state in 2018 and 2019 were Latinx. In 2020, three of the five people sentenced to death in California were Latinx.

[Graphic: racial demographics of current death row]

[Graphic: last ten years of capital sentences broken down by race]

Data from 2010 to 2020 from individual counties is also concerning:

- In Riverside County, 86% of people sentenced to death were people of color. While Black people made up 6% of the population during this time, they accounted for 26% of those sentenced to death. Of the 92 people currently on death row who were sentenced in Riverside County, 76% are people of color.¹⁵⁶
- In Los Angeles County, only two of the 40 people sentenced to death were white. Of the 222 people currently on death row who were convicted in Los Angeles County, nearly 50% are Black, nearly 29% are Latinx and less than 15% are white.¹⁵⁷
- In San Bernardino County, Black people made up 8% of the population but accounted for 38% of the 8 death sentences. Of the 39 people currently on death row who were sentenced in San Bernardino County, 49% are people of color.¹⁵⁸
- In Orange County, 73% of the people sentenced to death were people of color. Between 2010-2015 Orange County’s capital sentencing rate was 5.4 times the rest of the state per 100 homicides.¹⁵⁹ During the same time period, 89% of the individuals sentenced to death in the county were people of color.¹⁶⁰ Of the 60 individuals currently on death row who were sentenced in Orange County, nearly 62% are people of color.¹⁶¹

C. Sources of bias

Like other areas of the criminal legal system, many sources contribute to racially biased practices and outcomes in the context of the death penalty. Racial disparities in

¹⁵³ U.S. Census Bureau, Quick Facts California (2019).

¹⁵⁴ Data provided by CDCR Office of Research.

¹⁵⁵ Arrest data is from the California Department of Justice’s *Homicide in California* reports from 2010-2019, Table 31.

¹⁵⁶ Data provided by CDCR Office of Research.

¹⁵⁷ Data provided by CDCR Office of Research.

¹⁵⁸ Data provided by CDCR Office of Research.

¹⁵⁹ *FPP II*, at 39.

¹⁶⁰ *Id.* at 43.

¹⁶¹ Data provided by CDCR Office of Research.

policing¹⁶² and the broad discretion afforded prosecutors in determining when to seek the death penalty¹⁶³ have been cited as potential sources.

However, the jury selection process for capital offenses deserves special consideration. Though both the California and United States Supreme Courts have adopted rules to prevent racial bias from impacting who serves on a jury,¹⁶⁴ juries in California continue to be disproportionately white.¹⁶⁵ This is especially true in capital cases because of the process of “death qualification” and the use of peremptory challenges.¹⁶⁶

Unlike an ordinary criminal trial, potential jurors in capital cases are allowed to be questioned about their attitudes toward the death penalty. If a juror expresses an opinion against the death penalty that can “substantially impair” their ability to consider imposing a death sentence, they are excluded from serving.¹⁶⁷ This process has been shown to disproportionately exclude Black people because they are more likely to be opposed to the death penalty than are white people.¹⁶⁸ Even when potential jurors survive the death qualification process, prosecutors can use peremptory challenges to excuse those who were indecisive about the penalty.¹⁶⁹

The result of this process, according to the Director of the University of California, Berkeley Death Penalty Clinic, Elisabeth Semel, “is that men and women whose views about race, poverty, marginalization, adversity, and yes, mercy, [which] have been informed by their history and experience, are disproportionately removed from the

¹⁶² According to researchers, homicides in Los Angeles involving minority victims are less likely to be solved. Lee, *The value of life in death: multiple regression and event history analysis of homicide clearance in Los Angeles County*, *Journal of Criminal Justice*, 33, 527-534 (2005); See also Nick Petersen, *Neighborhood context and unsolved murders: the social ecology of homicide investigations*, *Policing and Society* 27:4, 372-392 (2015). This may reflect a national trend – in 2018, the Washington Post analyzed homicide arrest data from 52 large cities across the U.S., including several in California, and found that in more than 18,600 of the approximately 26,000 unsolved cases, the victim was Black. Lowery, et al., *Murder with Impunity: An Unequal Justice*, *The Washington Post* (Jul. 25, 2018).

¹⁶³ Prosecutors can choose from a list of 22 different “special circumstances” that make a first-degree murder eligible for the death penalty, including “felony murder” which lists 13 different felonies that can serve as the predicate for a capital sentence even if the death was accidental. Penal Code § 190.2. Committee staff have been unable to find published practices or policies on the death penalty from any District Attorney office throughout the state. Staff was able to determine that a number of counties have standing death penalty committees that inform the decision of whether the death penalty should be sought.

¹⁶⁴ *People v. Wheeler*, 22 Cal. 3d 258 (1978); *Batson v. Kentucky*, 476 U.S. 79 (1986).

¹⁶⁵ Berkeley Law Death Penalty Clinic, *Whitewashing the Jury Box: How California Perpetuates the Discriminatory Exclusion of Black and Latinx Jurors*, 3-5 (2020).

¹⁶⁶ *Id.*

¹⁶⁷ Lynch, et al., *Death Qualification in Black and White: Racialized Decision Making and Death-Qualified Jurors*, 40 *Law & Pol’y* 148 (2018) (citing *Morgan v. Illinois*, 504 U.S. 719, 738 (1992); *Wainwright v. Witt*, 469 U.S. 412, 424 (1985)).

¹⁶⁸ Unnever, et al., *Race, Racism, and Support for Capital Punishment*, 37 *Crime & Just.* 45, 54 (2008); See also Lynch, et al., *Death Qualification in Black and White: Racialized Decision Making and Death-Qualified Jurors*, 40 *Law & Pol’y* 148, 153-159 (2018).

¹⁶⁹ Lynch, et al., *Death Qualification in Black and White: Racialized Decision Making and Death-Qualified Jurors*, 40 *Law & Pol’y* 148, 166 (2018).

capital jury, which is no longer heterogeneous, diverse or representative of a fair cross-section of our community.”¹⁷⁰

Additionally, penalty phase instructions are “notoriously difficult for jurors to understand and apply,”¹⁷¹ and research has shown that most jurors do not understand the instructions.¹⁷² When jurors do not fully comprehend the instructions, they are more likely to allow bias to impact their decisions.¹⁷³ Indeed, researchers have found that jurors with the poorest comprehension of the instructions were the most prone to deciding based on racial bias.¹⁷⁴

V. California’s Death Penalty is Geographically Biased

Data indicates that geographic bias also impacts who is sentenced to death in California.¹⁷⁵ As Professor Shatz told the Committee, geographical disparities occur in California because “[p]rosecutors have virtually unlimited discretion when they charge a murder case . . . to charge special circumstances and seek death.”¹⁷⁶

As a result, the majority of death judgments in California are imposed by a handful of California’s 58 counties. Between 2015 and 2019, six counties imposed 89% of the death sentences in the state.¹⁷⁷ Moreover, five of these counties account for approximately 65% of all people currently on death row, despite comprising less than half of California’s total population.¹⁷⁸

One California county—Riverside—sentences people to death so frequently that it has become a national outlier. In 2017, nearly one-third of new death penalty sentences in the United States came from one of just three counties, Riverside, California; Clark, Nevada; and Maricopa, Arizona.¹⁷⁹ In 2015, Riverside County sentenced more people to death than every other state in the country, except for Florida and California itself.¹⁸⁰ In

¹⁷⁰ Committee on Revision of the Penal Code, Meeting on Mar. 25, 2021, Discussion Panel 2, 0:28:21–0:28:42.

¹⁷¹ Lynch, et al., *Mapping the Racial Bias of the White Male Capital Juror: Jury Composition and the “Empathic Divide,”* 45 Law & Soc. Rev. 69, 74 (2011) (hereinafter *White Male Capital Juror*).

¹⁷² Lynch, et al., *Capital Jury Deliberation: Effects on Death Sentencing, Comprehension, and Discrimination,* 33 Law & Hum. Behav. 481, 482 (2009).

¹⁷³ *White Male Capital Juror*, at 74.

¹⁷⁴ Lynch, et al., *Discrimination and Instructional Comprehension: Guided Discretion, Racial Bias, and the Death Penalty,* 24 Law & Hum. Behav. 337, 344-45 (2000).

¹⁷⁵ ACLU of Northern California, *Death by Geography: A County by County Analysis of the Road to Execution in California,* 3 (2009).

¹⁷⁶ Committee on Revision of the Penal Code, Meeting on Mar. 25, 2021, Part 2, 0:12:09–0:16:05.

¹⁷⁷ Data provided by CDCR Office of Research. The counties are Los Angeles, Riverside, Orange, Alameda, San Bernardino, and San Diego.

¹⁷⁸ Data provided by CDCR Office of Research. The counties are Los Angeles, Riverside, Orange, Alameda, and San Bernardino.

¹⁷⁹ Death Penalty Information Center, *DPIC Year End Report: New Death Sentences Demonstrate Increasing Geographic Isolation* (Dec. 15, 2017).

¹⁸⁰ *FPP I*, at 31.

2020, Riverside County was responsible for three of the five death sentences in California.¹⁸¹

The geographic disparities in death sentencing cannot be explained by some counties having higher homicide rates. As the figure below shows, counties with high homicide rates are not the ones that use the death penalty the most. And counties with very similar homicide rates have different usage of the death penalty. For example, Santa Clara County and Orange County both have homicide rates around 2.5 per 100,000 residents. And although both counties have lower poverty, higher median incomes, and somewhat similar demographics, they have varied greatly in their application of the death penalty over the past two decades.

[Graphic: Death penalty usage rate compared to homicides rate]

Homicide rates have fallen at similar rates over the past thirty years in counties that frequently use the death penalty and counties that don't:

[Graphic: changes in homicide rates grouped by death penalty usage]

While a county's homicide rate does not explain its death penalty usage, other factors not related to crime may. Unsurprisingly, there is a correlation between support for the death penalty in a county and usage. In counties where the population more heavily favors the death penalty, more people are sentenced to death per homicide. In the chart below, California counties with a higher percentage of votes against abolishing the death penalty—a "no" on Proposition 62 in 2016—have a higher rate of death penalty sentences per homicide.

[Graphic: relationship between support for Prop 62 and capital sentences]

VI. California Has Sentenced People With Severe Mental Illness, People With Histories Of Traumatic Abuse, And Young People To Death

The modern death penalty is supposed to be imposed on "the worst of the worst."¹⁸² The United States Supreme Court has categorically excluded people with intellectual disability and people who committed their crimes before the age of 18 from death eligibility,¹⁸³ finding that their execution violated the Eighth Amendment's prohibition on cruel and unusual punishment and served "no legitimate penological purpose" due to the limited deterrent effect and their diminished culpability.¹⁸⁴

But many people remain on California's death row despite having been diagnosed with intellectual disability and many others have cognitive characteristics and deficits comparable to those of people with intellectual disability and juveniles:

¹⁸¹ Data provided by CDCR Office of Research.

¹⁸² *Kansas v. Marsh*, 548 U.S. 163, 206 (2006) (dis. opn. of Souter, J.) ("within the category of capital crimes, the death penalty must be reserved for 'the worst of the worst'").

¹⁸³ *Atkins v. Virginia*, 536 U.S. 304 (2002) (intellectual disability); *Roper v. Simmons*, 543 U.S. 551 (2005) (youth).

¹⁸⁴ *Hall v. Florida*, 572 U.S. 701, 708 (2014), citing *Atkins*, 536 U.S. at 320 ("No legitimate penological purpose is served by executing the intellectually disabled.").

- Only twelve people in California have had their death sentence removed because of intellectual disabilities.¹⁸⁵ Many more cases raising this claim have yet to be resolved: between 70 and 100 people on death row have presented evidence in court filings that they are intellectually disabled.¹⁸⁶ Since half of the people on death row do not have attorneys to present their habeas claims, this figure likely underrepresents the scope of the problem.
- The clinical definition of “intellectual disability” is also narrow, only applying to people who show evidence of the disability at a young age, and excluding people who have suffered traumatic brain injury (TBI) or dementia later in life.¹⁸⁷ The American Psychiatric Association, American Psychological Association, the National Alliance of the Mentally Ill, and the American Bar Association’s Task Force on Mental Disability and the Death Penalty all adopted recommendations that the categorical exclusion from the death penalty for people with intellectual disabilities should be extended to include people with similar intellectual functioning caused by TBI and dementia.¹⁸⁸
- The United States Supreme Court has also forbidden executing people who are “incompetent,” meaning they do not understand the nature or reasons for their execution.¹⁸⁹ California’s Attorney General has recognized eight people on death row as “permanently incompetent,” individuals whose intellectual functioning or psychological conditions have deteriorated (such as from age-related dementia) so dramatically during their incarceration that they have little likelihood of regaining competency.¹⁹⁰ One of these individuals died in 2019 while legal proceedings remained pending, two were recently resentenced to life without parole and the others remain on death row.¹⁹¹ This number is likely to increase with time as the death row population continues to age. There is no statute or clear legal process for resentencing these individuals to remove them from death row, creating confusion in the Superior Courts about how to proceed.

¹⁸⁵ Communication with Harry Simon, Federal Public Defender.

¹⁸⁶ Of the currently 175 petitions for writ of habeas corpus pending in the California Supreme Court or the Superior Courts, at least 40% and potentially as many as 50% raise *Atkins* claims. Habeas Corpus Resource Center, *Annual Report 2020* (2020), at 11.

¹⁸⁷ Cal. Pen. Code § 1076, subd. (a)(1) (the disability must “manifest[] before the end of the developmental period”).

¹⁸⁸ ABA Task Force on Mental Disability and the Death Penalty, *Recommendation and Report on the Death Penalty and Persons with Mental Disabilities*, 30 *Mental & Physical Disability L.Rep.* 668, 669 (Sept.–Oct. 2006) (hereinafter *ABA Task Force Report*).

¹⁸⁹ *Ford v. Wainwright*, 477 U.S. 399 (1986) (“Whether its aim be to protect the condemned from fear and pain without comfort of understanding, or to protect the dignity of society itself from the barbarity of exacting mindless vengeance, the restriction finds enforcement in the Eighth Amendment.”)

¹⁹⁰ *In Re McPeters*, California Supreme Court Case No. S2269918, *In Re Jeffrey Jones*, Sacramento Superior Court Case No. 19HC00474; *In Re Billy Riggs*, Riverside Superior Court Case No. RIC1821277; *In re Antonio Espinoza*, San Joaquin County Superior Court Case No. STK-CR-FE-1983-0000031; *In Re David Welch*, Alameda Superior Court Case No. HC 103289-1; *In Re Justin Merriman*, Ventura County Superior Court Case No. CR46564; *In Re Ronald Bell*, California Supreme Court Case No. S244042; and *In Re Darren Stanley*, Alameda County Superior Court Case No. HC103289-1.

¹⁹¹ California Department of Corrections and Rehabilitation, *News Release: Condemned Inmate Ronald Bell Dies*. March 11, 2019; see cases cited in the preceding footnote.

- At least one-third of death row is being treated for severe mental illness, according to the attorneys in a class action case about CDCR’s mental health treatment.¹⁹² The American Bar Association, the American Psychiatric Association, the American Psychological Association, the National Alliance on Mental Illness, and Mental Health America have all recommended prohibiting the execution of those with severe mental illness, agreeing with the statement of the ABA that, as with juveniles and people with intellectual disabilities, “this population simply does not have the requisite moral culpability.”¹⁹³
- Many people on California’s death row experienced chronic violence and trauma as children, including extreme levels of physical and sexual abuse.¹⁹⁴ These traumatic backgrounds are not unique to California’s death row.¹⁹⁵ Research, including a recent report from the California Surgeon General, has demonstrated that such “Adverse Childhood Experiences” can cause neurological, psychological, and hormonal changes linked to lawbreaking and violent behaviors.¹⁹⁶
- In California, 45% of the people currently sentenced to death – or 318 people — were 25 or under at the time of their offense¹⁹⁷ 167 of them were 21 or younger.¹⁹⁸ Twenty-four were only 18 years old.¹⁹⁹

Although the United States Supreme Court set the line of who may be executed at 18, research shows that the same reasons that forbid executing people under 18 also apply to other young people.²⁰⁰ Advances in neuroscience have revealed an

¹⁹² As of February 2021, 153 are in treatment for “serious mental disorders,” including schizophrenia, psychotic disorders, and bipolar disorder; 71 more are being treated for “acute onset or significant decompensation, including delusional thinking, hallucinations, and vegetative affect,” and 18 are receiving inpatient care due to “acute exacerbation of a chronic major mental illness, marked impairment, and dysfunction in most areas.” Communication with Rosen Bien Galvan & Grunfeld LLP, attorneys representing plaintiffs in *Coleman v. Newsom*, March 1, 2021. Definitions in Stanford Justice Advocacy Project, “The Prevalence and Severity Of Mental Illness Among California Prisoners On The Rise” (2017).

¹⁹³ *ABA Task Force Report*, at 669. Ohio recently adopted a statute based on these recommendations, excluding individuals with severe mental illness from being sentenced to death. See Death Penalty Information Center, *Ohio Bars Death Penalty for People with Severe Mental Illness*, Jan 11, 2021. The California Supreme Court has consistently rejected any prohibition on sentencing the severely mentally ill to death. See, e.g., *People v. Steskal*, 485 P.3d 1, 33–37 (2021).

¹⁹⁴ See Office of the State Public Defender, *California’s Broken Death Penalty*, March 2021, 44–46 (collecting cases). See also, e.g., *In re Lucas* 16 Cal.Rptr.3d 331, 335, 342, 351–59 (2004) (describing “the severe emotional and physical abuse suffered by petitioner as a preschooler and young child”)

¹⁹⁵ DPIC, *The Death Penalty in 2020: Year End Report*, p. 20 (Dec. 2020); DPIC, *The Death Penalty in 2019: Year End Report* p. 16 (Dec. 2019); DPIC, *The Death Penalty in 2018: Year End Report* p. 12 (Dec. 2018); Robert Dunham, INSIGHT: Vast Majority on Federal Death Row Have Significant Impairments, *Bloomberg Law*, July 8, 2020; Chammah, et al., *What Lisa Montgomery Has in Common With Many on Death Row: Extensive Trauma*, *The Marshall Project* (Jan. 8, 2021), citing Death Penalty Information Center.

¹⁹⁶ Office of the Surgeon General, *Roadmap for Resilience: The California Surgeon General’s Report on Adverse Childhood Experiences, Toxic Stress, and Health* (2020).

¹⁹⁷ Data provided by CDCR Office of Research.

¹⁹⁸ *Id.*

¹⁹⁹ California Department of Corrections and Rehabilitation, *Condemned Inmate List*.

²⁰⁰ Shulman, et al., *Deciding in the Dark: Age Differences in Intuitive Risk Judgment*, 50 *Developmental Psychology* 167, 172-173 (2014).

extended maturation process in the brain, demonstrating that parts of the brain critical to decision-making, reward-seeking, and impulse-control continue developing at least through the early twenties.²⁰¹ Sentencing young adults to the death penalty is not consistent with the principal that only those with “extreme culpability” can be executed.²⁰²

[Graphic: % of death row whose offense was under 25/21 /and at 18]

Racial disparities are especially pronounced with young people: while 68% of all people on death row are people of color, the figure jumps to 80% for people who were 21 or younger.²⁰³

[Graphic: race breakdown for people on death row under 21 at time of offense]

VII. California Has Sentenced Innocent People To Death

Five innocent men on death row have been fully exonerated and released since California’s reinstatement of the death penalty, after serving a combined total of 87 years in prison for murders they did not commit.²⁰⁴ All five are people of color.

The most recent exoneration was Vincente Benavides Figueroa in 2018.²⁰⁵ He had been sentenced to death in 1993 for the sexual assault and murder of his girlfriend’s 21-month-old daughter.²⁰⁶ After 25 years, the California Supreme Court overturned his conviction after the prosecution agreed that the convictions were based on false evidence of sexual assault and strong evidence that the child’s death was an accident that did not involve Benavides at all.²⁰⁷ Prosecutors subsequently dropped all charges.²⁰⁸

²⁰¹ See, e.g., Steinberg, *Adolescent Brain Science and Juvenile Justice Policymaking* 23(4) *Psychology, Public Policy, and Law* 410, 413-414 (2017); Casey et al., *The Adolescent Brain*, 1124(1) *Ann. N.Y. Acad. of Sci* 111, 121-122 (2008); Steinberg, et al., *Age Differences in Future Orientation and Delay Discounting*, 80 *Child Development* 28, 39 (2009); Steinberg, et al., *Age Difference in Sensation Seeking and Impulsivity as Indexed by Behavior and Self-Report Evidence for a Dual Systems Model*, 44 *Developmental Psychology* 1764, 1774-1776 (2008); Johnson, et al., *Adolescent Maturity and the Brain: The Promise and Pitfalls of Neuroscience Research in Adolescent Health Policy*, *Journal of Adolescent Health* (Sept. 2009).

²⁰² See *Simmons*, 543 U.S. at 571 (“Retribution is not proportional if the law’s most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity.”). The Legislature has recognized that young people have extraordinary capacity for change and given certain young adults earlier chances to be released from prison, these reforms exclude people sentenced to death or life without parole as young adults. See Penal Code § 3551, amended by AB 1308 (2018).

²⁰³ Data provided by CDCR Office of Research.

²⁰⁴ Death Penalty Information Center, *Innocence Database* (2021). A sixth man, Jerry Bigelow, was acquitted of murder after being sentenced to death, is also no longer on death row. See *Bigelow v. Superior Court*, 256 Cal.Rptr. 528, 536 (1989). Because his related convictions for kidnapping and robbery were affirmed, he has not been included in some exoneration lists.

²⁰⁵ *In re Figueroa*, 4 Cal.5th 576, 579 (2018).

²⁰⁶ *Id.*

²⁰⁷ *Id.* at 588-589.

²⁰⁸ *Vicente Benavides, Sentenced to Death by False Forensics, to Be Freed after 26 Years on Death Row*, *Death Penalty Information Center* (Apr. 18, 2018).

Serious questions have also been raised about the innocence of other people currently on California’s death row.²⁰⁹ For example, in May 2021, Governor Newsom ordered an independent investigation into the death sentence of Kevin Cooper, who was convicted of four murders in 1983 but maintains that he was framed.²¹⁰ In addition, Loyola Professor Sean Kennedy explained to the Committee that the Loyola Project for the Innocent currently has five additional death penalty cases under active investigation, “where they have unearthed credible, new evidence of innocence.”²¹¹ According to Professor Kennedy, “in all likelihood, we’re going to see many more death row exonerations in the future.”²¹²

Nationally, 185 people on death row have been exonerated to date, as well as another 192 exonerations of innocent people sentenced to LWOP.²¹³ According to a 2014 study by the National Academy of Sciences, there are many more innocent people on America’s death row who have not yet been discovered.²¹⁴

VIII. Costs and Dysfunction

The California death penalty costs approximately \$150 million per year.²¹⁵ Even with those costs, the state is not spending enough money: people sentenced to death routinely wait decades to be assigned lawyers to pursue appeals and other proceedings because there are insufficient funds to pay for attorneys. According to the calculations of some experts, California has executed thirteen people at a cost of \$4 billion.²¹⁶

A. Since Proposition 66 in 2016, costs have not decreased.

In 2016, California voters approved Proposition 66, which was promoted as a way to bring costs down by executing people convicted of capital offenses more quickly, “after five to ten years” of time for appeals.²¹⁷ Proponents of the proposition argued that swift

²⁰⁹ See Bazelon, *As COVID-19 Ravages California’s Death Row, the State’s Attorney General Fights to Keep it Packed*, Slate (Jul. 27, 2020) (discussing the case of Michael Hill who asserts his innocence). See also Kristof, *Is An Innocent Man Still Languishing on Death Row?* New York Times (Jan. 23, 2021) (discussing the case of Kevin Cooper who asserts his innocence). See also Sheff, *The Buddhist on Death Row: How One Man Found Light in the Darkest Place* (Jan. 23, 2020) (discussing the life and case of Jarvis Masters who asserts his innocence).

²¹⁰ Associated Press, *Gov. Newsom Orders Independent Investigation into Death Row Inmate Kevin Cooper’s murder Conviction* (May 28, 2021).

²¹¹ Committee on Revision of the Penal Code, Meeting on Mar. 25, 2021, 0:28:12–0:29:27.

²¹² *Id.*

²¹³ *Id.* at 0:26:50–0:17:07

²¹⁴ Gross, et al., *Rate of False Conviction of Criminal Defendants Who Are Sentenced to Death*, Proceedings of the National Academy of Sciences (May 20, 2014) (hereinafter *Rate of False Conviction*).

²¹⁵ Legislative Analyst’s Office, *Proposition 62: Death Penalty. Initiative Statute* (Nov. 8, 2016).

²¹⁶ Alarcon, et al., *Executing the Will of the Voters?: A Roadmap to Mend or End the California Legislature’s Multi-Billion Dollar Death Penalty Debacle*, 44 Loy. L.A. L. REV. S41 (2011) (hereinafter *Death Penalty Debacle*). According to Professor Paula Mitchell and Judge Arthur Alarcon, California spent a total of \$4 billion exclusively on the death penalty from 1978 through 2011, but executed only 13 people.

²¹⁷ See *Voter Information Guide: Argument in Favor of Proposition 66*, Cal. Secretary of State, Elections Division, 108-9 (Nov. 8, 2016) (“Together, these reforms will save California taxpayers over \$30,000,000 annually . . .”).

executions would save California taxpayers money on “meals, healthcare, privileges and endless legal appeals” for people on death row.²¹⁸

But costs and delay have not decreased since the passage of Proposition 66. Costs remain significantly greater at every stage of death penalty litigation compared to LWOP cases, as are prison expenditures to house people on death row. A death penalty trial adds between \$500,000²¹⁹ and \$1.2 million²²⁰ to the costs of a murder trial for a number of reasons,²²¹ which have not changed since the passage of Proposition 66. State post-conviction proceedings are also time consuming and costly.²²² And federal law requires that attorneys be appointed to represent people sentenced to death in their federal habeas proceedings, which has been estimated to cost more than \$775 million for California death penalty cases from the 1970s through 2010.²²³ Finally, it costs around \$40,000 more each year to house someone on death row.²²⁴ Though Proposition 66 gave the California Department of Corrections and Rehabilitation authority to move people off death row, only 33 individuals have been transferred to other prisons.²²⁵

B. People on death row wait decades to be assigned attorneys and complete post-conviction review

A person sentenced to death in California can expect to wait more than 30 years before their case moves through all phases of post-conviction review.²²⁶ Most people die before

²¹⁸ *Id.*

²¹⁹ *CCFAJ Report*, at 145 (finding this to be a conservative estimate).

²²⁰ *Death Penalty Debacle*, at S74 (discussing the results of a 1993 study). Some death penalty trials are much more costly, including those of Charles Ng (\$10.9 million), Donald Bowcutt (\$5 million), and Scott Peterson (\$3.2 million excluding defense costs since he retained his own counsel). *Id.* at S74-75 (discussing the results of an ACLU study of homicide trials).

²²¹ For example, pursuant to Penal Code § 987(d) and *Keenan v. Superior Court*, 31 Cal.3d 424 (1982), two trial defense attorneys are permitted to represent people facing the death penalty. Also, the separate “penalty phase” trial requires supplemental experts and extensive investigation generally unrelated to the “guilt phase” of a death penalty trial. (Legislative Analyst’s Office, *Proposition 62: Death Penalty Initiative Statute* (Nov. 8, 2016))

²²² The current annual budgets for (1) the Habeas Corpus Resource Center (a state organization dedicated to capital habeas defense in state and federal court), is \$16.8 million, (2) capital defense at the Office of the State Public Defender is \$15 million, (3) the California Appellate Project (publicly funded organization that provides assistance for death penalty defense) is \$5.8 million, and (4) Court Appointed Counsel (CAC) is \$5.6 million. (Staff interviews with Michael Hersek, Executive Director, Habeas Corpus Resource Center; Mary McComb, State Public Defender; Joe Schlesinger, Executive Director, California Appellate Project; Tina Carroll, California Judicial Council (2021).)

²²³ *Death Penalty Debacle*, at S98-S99.

²²⁴ *Costs of Capital Punishment* at S4 n.3 (2012) (discussing a 2012 study by Trisha McMahon and Tim Gage — the former director of the California Department of Finance — which found that it costs \$40,000 more per year to house a person on death row versus someone sentenced to LWOP); *see also* Death Penalty Information Center, *Costs*.

²²⁵ Data provided by CDCR Office of Research.

²²⁶ Data compiled by the Office of the State Public Defender.

their appeals are concluded. Since 1978, a total of 153 people on death row have died from natural causes, suicide, COVID-19, or other non-execution related reasons.²²⁷

While the proponents of Proposition 66 promised to speed up cases by modifying the state habeas process, the average time it takes for a capital case to proceed from a sentence of death to final resolution of habeas proceedings has continued to increase. In 2020, the average time from sentencing to resolution of the state habeas proceedings had increased to 20 years,²²⁸ up from 17 years in 2015,²²⁹ and 12 years in 2008.²³⁰ Completing the federal habeas review process adds additional time. The Commission on the Fair Administration of Justice found in 2008 that it took 10.4 years on average for a capital case to move through and conclude the federal review process and there is no indication that the pace has increased in recent years.²³¹

The main reason for these delays is a lack of qualified attorneys to handle state habeas corpus proceedings.²³² On average, it takes 19.9 years after being sentenced to death for state habeas counsel to be appointed.²³³ Currently, there are 363 death-sentenced people awaiting appointment of counsel for state habeas, more than half of all people sentenced to death in California.²³⁴ Eighty-five people on death row have been waiting for appointment of habeas counsel for more than 20 years.²³⁵

C. Proposition 66 has slowed down post-conviction proceedings

Despite arguments by proponents of Proposition 66 that the measure would “speed up” death penalty appeals,²³⁶ post-conviction proceedings have slowed after its passage for several reasons.

First, in 2017 the California Supreme Court struck Proposition 66’s five-year deadline for the judicial review of all appeals in capital cases, finding that the deadline was not a mandatory requirement but instead was merely “an exhortation to the parties and the

²²⁷ *Condemned Inmates Who Have Died Since 1978*, California Department of Corrections and Rehabilitation (June 2, 2021).

²²⁸ Data provided by CDCR to Committee staff.

²²⁹ *Jones v. Davis* (9th Cir. 2015) 806 F.3d 538, 543.

²³⁰ *CCFAJ Report*, at 123.

²³¹ *HCRC Report*, at 12-13.

²³² As of December 2020, the average time on death row for the 29 people who have exhausted their appeals was 33.8 years. *HCRC Report* at 13. Since that time, two additional people, Dean Carter and Deondre Staten, have exhausted their federal and state appeals and have spent over 31 years and 29 years on death row respectively.

²³³ *HCRC Report* at 10.

²³⁴ *Id.*

²³⁵ Habeas Corpus Resource Center, *Annual Report 2020 (2020)*, at 9. To address this problem, the Commission on the Fair Administration of Justice recommended in 2008 that California fund an expansion of the HCRC from 34 to 150 lawyers and increase the budget by 500%. *CCFAJ Report*, at 135. This recommendation has never been adopted, and HCRC continues to employ the same number of attorneys 13 years later.

²³⁶ See *Voter Information Guide: Argument in Favor of Proposition 66*, Cal. Secretary of State, Elections Division, 108 (Nov. 8, 2016).

courts to handle cases as expeditiously as is consistent with the fair and principled administration of justice.”²³⁷

Second, under Proposition 66, Superior Courts are now in charge of appointing capital habeas counsel instead of the California Supreme Court. So far only three additional attorneys have been included in the pool of prospective capital habeas counsel under the new system, and no new appointments of habeas counsel have been made.²³⁸

Third, according to the Habeas Corpus Resource Center, many Superior Courts “have no affinity for state habeas corpus” and have little familiarity with this type of law.²³⁹ Thus, it will likely take longer for Superior Courts to adjudicate capital habeas claims than it previously did for the California Supreme Court, which has decades of experience with this arcane area of law.

Finally, by requiring that Superior Courts process habeas cases in the first instance, Proposition 66 created an additional level of review: either side may appeal the habeas decision of the Superior Court, and entirely new counsel must then be appointed in the California Court of Appeals. Because no method of paying the new counsel was created with Proposition 66, the cases of 19 petitioners are currently stayed in the California Court of Appeal, waiting to have habeas counsel appointed.²⁴⁰

In total, at the close of 2020, the same number of individuals on death row (363 people), were waiting for habeas counsel to be appointed in their case as in 2016 when Proposition 66 passed.²⁴¹ And practitioners such as Loyola Law Professor Sean Kennedy continue to “expect long delays” because of Proposition 66.²⁴²

D. Poor quality defense at trial leads to death sentences

When Governor Newsom initiated a death penalty moratorium in 2019, he highlighted that capital sentences in California are “unjustly and unfairly applied to people who cannot afford legal representation.”²⁴³

Indeed, over half (37) of the 70 California death sentences overturned by federal courts occurred on grounds that trial counsel provided prejudicially ineffective assistance.²⁴⁴ In most of those 37 cases, the death judgment was reversed because defense counsel failed

²³⁷ *Briggs v. Brown*, 3 Cal.5th 808, 859 (Cal. 2017).

²³⁸ *HCRC Report*, at 10 n. 3, 25.

²³⁹ Committee on Revision of the Penal Code, Meeting on Mar. 25, 2021, 0:52:10–0:52:55.

²⁴⁰ *HCRC Report*, at 10-11.

²⁴¹ *Id.* at 9.

²⁴² Committee on Revision of the Penal Code, Meeting on Mar. 25, 2021, 0:53:56–0:54:23.

²⁴³ Governor’s Executive Order N-09-19 (Mar. 13, 2019). *See also* Mitchell, et al., Alarcón Advocacy Ctr., *California Votes 2016: An Analysis of the Competing Death Penalty Ballot Initiatives* 1 Loyola Law School Special Report, 27 (2016) (“[i]t is universally acknowledged that ineffective counsel is the primary reason so many defendants are sentenced to death.”)

²⁴⁴ This data, compiled by the Office of the State Public Defender, is on file with Committee staff.

to investigate or present potential mitigating evidence during the penalty phase of the trial.²⁴⁵

Nearly all people on death row were appointed defense counsel funded by the county because they did not have the financial resources to retain private counsel.²⁴⁶ Attorneys with histories of ineptitude have repeatedly been appointed to represent indigent people facing death.²⁴⁷ In LA County, attorneys with “prior or subsequent misconduct charges” represented over one-third of the 22 cases where individuals received death sentences in 2013–2019.²⁴⁸ Counties that most frequently pursue death sentences also do not provide adequate pay or resources to indigent capital counsel.²⁴⁹ Additionally, some counties employ flat-fee contracts that discourage trial counsel from attempting to negotiate a less severe sentence or conduct early investigation because fees are reduced by half if the prosecution decides not to seek the death penalty before trial and reduced by 70-75% if the client agrees to take a plea.²⁵⁰

IX. Conclusion

The Committee’s study of California’s death penalty has led it to conclude that is beyond repair. California should abolish the death penalty and death row should be dismantled.

²⁴⁵ *Id.* In total, federal courts have overturned 31 death judgments and reversed 6 capital murder convictions due to ineffective assistance of counsel.

²⁴⁶ Data compiled by the California Appellate Project.

²⁴⁷ *FPP II*, at 17-18, 42; *FPP I*, at 34, 38-39.

²⁴⁸ American Civil Liberties Union, *The California Death Penalty is Discriminatory, Unfair and Officially Suspended. So Why Does Jackie Lacey Continue to Use it?*, 2 (2019).

²⁴⁹ *CCFAJ Report*, at 130.

²⁵⁰ *FPP I*, *supra*, at 33. Staff confirmed that this same contract is still in effect.