

March 12, 2021

## Memorandum 2021-04

**Capital Punishment in California****I. Introduction**

Consistent with its mandate to “simplify and rationalize the substance of criminal law,” the Committee on the Revision of the Penal Code undertakes this analysis of the state’s death penalty system to determine if there is a rational path forward that will ensure justice and fairness for all Californians. It is the first examination of the death penalty in California by a state agency or organization since 2008.

California has the largest death row in the country, currently numbering 707 people, and has sentenced more than 1,000 people to death since 1977. Yet, no executions have occurred in the last 15 years and only 13 total executions have taken place since reinstatement of the death penalty. 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. It is estimated that the state has spent more than \$5 billion tax dollars on the death penalty since it was reinstated in 1977. At the same time, a majority of death cases to be fully litigated in California have been reversed on appeal or in other post-conviction proceedings.<sup>1</sup>

Meanwhile, over the past decade, California voters have (narrowly) signaled support for the death penalty in three separate ballot measures.<sup>2</sup> No area of criminal law in California is more deeply confounding politically, legally, and morally.

California has made several attempts to make the state’s 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 a right to speedy resolution of

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<sup>1</sup> Data compiled by the Office of the State Public Defender.

<sup>2</sup> *California Proposition 34, Abolition of the Death Penalty Initiative (2012)*, Ballotpedia. At: [https://ballotpedia.org/California\\_Proposition\\_34,\\_Abolition\\_of\\_the\\_Death\\_Penalty\\_Initiative\\_\(2012\);](https://ballotpedia.org/California_Proposition_34,_Abolition_of_the_Death_Penalty_Initiative_(2012);) *California Proposition 62, Repeal of the Death Penalty (2016)*, Ballotpedia. At: [https://ballotpedia.org/California\\_Proposition\\_62,\\_Repeal\\_of\\_the\\_Death\\_Penalty\\_\(2016\)#cite\\_ref-65;](https://ballotpedia.org/California_Proposition_62,_Repeal_of_the_Death_Penalty_(2016)#cite_ref-65;) *California Proposition 66, Death Penalty Procedures (2016)*, Ballotpedia. At: [https://ballotpedia.org/California\\_Proposition\\_66,\\_Death\\_Penalty\\_Procedures\\_\(2016\).](https://ballotpedia.org/California_Proposition_66,_Death_Penalty_Procedures_(2016).)

cases.<sup>3</sup> The state has dedicated two state agencies<sup>4</sup> and contracts with a third agency<sup>5</sup> 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.<sup>6</sup>

It has been 13 years since a state commission undertook a deep analysis of the death penalty. In 2008, the California Commission on the Fair Administration of Justice conducted an exhaustive review of the state's death penalty system. The Commission found that California's death penalty system was dysfunctional and identified three paths forward 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.<sup>7</sup> The state has yet to choose one of these paths.

Since the 2008 study, much has changed. Now, a majority of states in the U.S. and the overwhelming majority of nations do not have the death penalty in law or practice. In 2019, Governor Newsom declared a moratorium on executions and late last year took the unprecedented step of filing an amicus brief in the California Supreme Court arguing that the death penalty is unconstitutional and applied in a racially biased manner. District Attorneys in Los Angeles, Santa Clara, and other large California counties have openly declared that their offices will not seek the death penalty and likewise have asserted in the California Supreme Court that the state's death penalty should be struck down.<sup>8</sup> A group of nearly 100 current and former elected prosecutors, Attorneys General, and law enforcement leaders, including the 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."<sup>9</sup>

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<sup>3</sup> Assem. Bill No. 195 (1995-96 Reg. Sess.); Penal Code sections 190.6 and 190.8; Cal. Const. Art. 1, sec. 28(a)(6).

<sup>4</sup> 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 the mandate of the office was expanded to also provide training and technical assistance to county indigent defense providers.

<sup>5</sup> 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.

<sup>6</sup> The Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214.

<sup>7</sup> Cal. Com. on the Fair Administration of Justice, Final Report, Death Penalty pp. 112-182.

<sup>8</sup> 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) ("My office has not sought and will not seek the death penalty, and I am pleased that we have been able to ensure that no one previously sentenced in San Francisco will remain on death row either."); Los Angeles District Attorney's Office, Special Directive 2011 (Dec. 7, 2020) ("A sentence of death is never an appropriate resolution in any case."); Salonga, *Exclusive: Santa Clara DA Abandoning Death Penalty Pursuit in all Cases*, Mercury News (Jul. 21, 2020).

<sup>9</sup> Fair and Just Prosecution, Joint Statement By Criminal Justice and Law Enforcement Leaders in Opposition to Application of the Federal Death Penalty (Dec. 2020).

Nevertheless, the voters of California remain conflicted on the issue and some prosecutors continue to pursue death sentences and to actively seek the return of executions, arguing that it provides justice for the victims. A recent poll conducted by U.C. Berkeley's Institute for Government Studies found that a majority of Californians supported the Governor's action in imposing a moratorium on executions.<sup>10</sup> The very same poll found 61 percent of Californians supported keeping the death penalty as a possible punishment for serious crimes.<sup>11</sup>

Against this convoluted and conflicted backdrop, the Committee undertakes this analysis of the current state of the death penalty. This memo reviews the extensive literature on California's death penalty and considers several new studies and data not previously available.

## II. Legal and Historical Background

### A. California's modern death penalty law

California's original death penalty was struck down in 1972 by the California Supreme Court in *People v. Anderson*, (1972) 6 Cal.3d 628. In *Anderson*, the Court ruled that the death penalty violated the California state constitution's prohibition against cruel or unusual punishment. The Court stated, "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."<sup>12</sup>

The *Anderson* ruling was short lived. Less than a year later, voters approved an initiative amending the California Constitution to say, "The death penalty [...] shall not be deemed to be, or to constitute, the infliction of cruel or unusual punishments within the meaning of Article 1, Section 6 nor shall such punishment for such offenses be deemed to contravene any other provision of this constitution."<sup>13</sup>

The death penalty did not immediately return to California because of the actions of the United States Supreme Court. In June 1972, the Court ruled in *Furman v. Georgia* (1972) 408 U.S. 238, that the death penalty as then administered in the country was inconsistent with the Eight Amendment prohibition against cruel and unusual punishment.<sup>14</sup> 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

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<sup>10</sup> Willon, *Poll finds Californians support the death penalty - and Newsom's moratorium on executions*, Los Angeles Times (Jun. 17, 2019).

<sup>11</sup> *Id.*

<sup>12</sup> *People v. Anderson*, 6 Cal.3d 628, 656 (1972).

<sup>13</sup> *California Proposition 17, Death Penalty in the California Constitution (1972)*. Ballotpedia. At: [https://ballotpedia.org/California\\_Proposition\\_17,\\_Death\\_Penalty\\_in\\_the\\_California\\_Constitution\\_\(1972\)](https://ballotpedia.org/California_Proposition_17,_Death_Penalty_in_the_California_Constitution_(1972)).

<sup>14</sup> *Furman v. Georgia*, 408 U.S. 238 (1972).

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.”<sup>15</sup>

The *Furman* decision invited the states to try again, allowing that the death penalty might be found constitutional if the statutory scheme effectively delineated the narrow few who deserved the ultimate punishment of death from the many who did not. The states proceeded in two ways: some adopted statutes that mandated the death penalty in specific circumstances (California chose this path)<sup>16</sup> and others adopted the discretionary death penalty statute proposed by the American Law Institute in its Model Penal Code.<sup>17</sup>

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.<sup>18</sup>

In 1977, the California Legislature approved a death penalty statute modeled on the Model Penal Code statute approved by the U.S. Supreme Court in *Gregg*.<sup>19</sup> Then-Governor Jerry Brown vetoed the bill, but the Legislature overrode his veto, marking the death penalty’s official return to California.<sup>20</sup> 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.<sup>21</sup> 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.”<sup>22</sup>

In the years that followed, California’s death penalty statute was expanded several more times.<sup>23</sup> 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 circumstances, making life without the possibility of parole the mandatory minimum punishment for anyone convicted of first degree murder with special circumstances.<sup>24</sup> Other initiatives

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<sup>15</sup> *Id.* at 309 (conc. opn. of Stewart, J.).

<sup>16</sup> Stats. 1973, ch. 719, at 1297.

<sup>17</sup> 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) (hereinafter *Exorcizing Wechsler’s Ghost*).

<sup>18</sup> *Gregg v. Georgia*, 428 U.S. 153, 193-195 (1976) (joint op. of Stewart, Powell, and Stevens, JJ.)

<sup>19</sup> *Exorcizing Wechsler’s Ghost, supra*, at 207.

<sup>20</sup> Turner, *California Legislature Overrides Veto of Death Penalty*, *New York Times* (Aug 12, 1977). At: <https://www.nytimes.com/1977/08/12/archives/california-legislature-overrides-veto-of-death-penalty.html>.

<sup>21</sup> 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).)

<sup>22</sup> *Id.*

<sup>23</sup> 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).

<sup>24</sup> *California Proposition 115, the “Crime Victims Justice Reform Act”* (1990). Ballotpedia. At: [https://ballotpedia.org/California\\_Proposition\\_115,\\_the\\_22Crime\\_Victims\\_Justice\\_Reform\\_Act22\\_\(1](https://ballotpedia.org/California_Proposition_115,_the_22Crime_Victims_Justice_Reform_Act22_(1)

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.<sup>25</sup>

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 Prop. 66 to “speed up” the review of death penalty judgements in an effort to “fix” the system.<sup>26</sup> As described below, four years after the passage of Proposition 66, the pace of litigations in death penalty cases has only slowed further.

## **B. California’s challenges with executions**

For the 25-year period from 1967 until 1992, California did not carry out any executions.<sup>27</sup> Robert Alton Harris became the first person executed during the modern death penalty era when he was put to death in the gas chamber in 1992.<sup>28</sup> The state carried out one additional execution by lethal gas before the courts found that method of execution cruel and inhumane.<sup>29</sup>

Like the rest of the nation, California switched to lethal injection as the primary form of execution and proceeded to carry out eleven more executions using this method.<sup>30</sup> The last person executed using this method in California was Clarence Ray Allen, executed in January of 2006.

Following this execution, a federal district court ruled that “California’s lethal-injection protocol – as actually administered in practice – create[d] an undue and

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990). (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).)

<sup>25</sup> *California Proposition 195, Special Circumstances Punishable by the Death Penalty* (1996). Ballotpedia. At: [https://ballotpedia.org/California Proposition 195, Special Circumstances Punishable by the Death Penalty \(1996\)](https://ballotpedia.org/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), Ballotpedia. At: [https://ballotpedia.org/California Proposition 196, Murders Committed by Firing from Vehicles are Punishable by Death \(1996\)](https://ballotpedia.org/California_Proposition_196,_Murders_Committed_by_Firing_from_Vehicles_are_Punishable_by_Death_(1996)); *California Proposition 21, Treatment of Juvenile Offenders* (2000), Ballotpedia. At: [https://ballotpedia.org/California Proposition 21, Treatment of Juvenile Offenders \(2000\)](https://ballotpedia.org/California_Proposition_21,_Treatment_of_Juvenile_Offenders_(2000)).

<sup>26</sup> In 2012, California voters rejected Proposition 34, with 52 percent opposed and 48 percent in support. Four years later, voters rejected Proposition 62, with 53 percent opposed and 47 percent 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 percent of voters. (*California Proposition 34, Abolition of the Death Penalty Initiative* (2012), Ballotpedia. At: [https://ballotpedia.org/California Proposition 34, Abolition of the Death Penalty Initiative \(2012\)](https://ballotpedia.org/California_Proposition_34,_Abolition_of_the_Death_Penalty_Initiative_(2012)); *California Proposition 62, Repeal of the Death Penalty* (2016), Ballotpedia. At: [https://ballotpedia.org/California Proposition 62, Repeal of the Death Penalty \(2016\)#cite\\_ref-65](https://ballotpedia.org/California_Proposition_62,_Repeal_of_the_Death_Penalty_(2016)#cite_ref-65); *California Proposition 66, Death Penalty Procedures* (2016), Ballotpedia. At: [https://ballotpedia.org/California Proposition 66, Death Penalty Procedures \(2016\)](https://ballotpedia.org/California_Proposition_66,_Death_Penalty_Procedures_(2016)).)

<sup>27</sup> California Department of Corrections and Rehabilitation, *History of Capital Punishment in California*, At: <https://www.cdcr.ca.gov/capital-punishment/history/>.

<sup>28</sup> Death Penalty Information Center, *Execution Database*, <https://deathpenaltyinfo.org/executions/execution-database?filters%5Bstate%5D=California>.

<sup>29</sup> *Fierro v. Gomez* (9th Cir. 1996) 77 F.3d 301.

<sup>30</sup> *Supra* note 28.

unnecessary risk that an inmate will suffer pain so extreme that it offends the Eighth Amendment.”<sup>31</sup> 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 by the parties, active litigation continues as discussed further below.

As noted above, 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.”<sup>32</sup> 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.”<sup>33</sup> 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.<sup>34</sup> The Governor stopped short of initiating a clemency process for everyone on death row.

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.<sup>35</sup>

However, three elected prosecutors have attempted to intervene in the case, in an effort to set aside the settlement and to advocate that the state’s lethal injection protocol is constitutional.<sup>36</sup> District Attorneys Michael Hestrin of Riverside County, Jason Anderson of San Bernardino County, and Steve Wagstaffe of San Mateo County, alleged that the California Department of Corrections and Attorney General have failed to effectively advocate for the execution of death sentences and that they should be allowed to intervene in the litigation to advance this perspective.<sup>37</sup>

### **C. Potential legal infirmities with California’s death penalty system**

California’s death penalty system has been criticized for several legal infirmities unique to California.

#### **1) Failure to narrow**

As discussed above, in order for a state’s death penalty statute to be constitutional and consistent with the U.S. Supreme Court mandate in *Furman*, the statute must meaningfully narrow death eligibility to those most culpable for committing the gravest offenses. Many scholars have criticized California’s death penalty statute for failing to meaningfully narrow death eligibility, noting that nearly all homicides fit under one or

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<sup>31</sup> *Supra* note 27.

<sup>32</sup> Governor’s Exec. Order N-09-19 (Mar. 13, 2019) <<https://www.gov.ca.gov/wp-content/uploads/2019/03/3.13.19-EO-N-09-19.pdf>> (as of Feb. 3, 2021).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Morales v. Diaz*, 3:06-cv-00219-RS (N.D. Cal. Jul. 24, 2020), ECF No. 755.

<sup>36</sup> See Brief of Appellants - Proposed Intervenors filed in case of *Cooper v. Brown*, No. 18-16547, Nov. 21, 2018, 2018 WL 6200616 (9th Cir. 2018).

<sup>37</sup> *Id.*

more special circumstance.<sup>38</sup> This issue has yet to be addressed by the California Supreme Court on a factual record.

Recently, the current District Attorneys of Contra Costa, Los Angeles, Santa Clara, San Francisco, and San Joaquin counties, and former District Attorney Gil Garcetti filed an amicus brief in the California Supreme Court asserting this view.<sup>39</sup> The prosecutors stated, “[n]either California’s list of the “special circumstances” that make murderers eligible for the death penalty nor its penalty phase list of “aggravating factors” fulfills [the narrowing] function. As a result, the selection of defendants that receive the death penalty is influenced both by irrelevant factors, such as geography and whether the defendant is represented by a public defender or a court-appointed lawyer, and impermissible factors, such as the race and ethnicity of the defendant and the victim.”<sup>40</sup>

## **2) Failure to instruct on reasonable doubt and unanimity in penalty phase**

Currently, California juries are not required to unanimously agree on aggravating factors during penalty phase deliberations of a death penalty trial and are not required to find beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors or that death is the appropriate punishment.<sup>41</sup> 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 requested briefing on whether this practice contravenes the state constitution, asking: “Do Penal Code section 1042 and article I, section 16 of the California Constitution require that the jury unanimously determine beyond a reasonable doubt factually disputed aggravating evidence and the ultimate penalty verdict?”<sup>42</sup> Governor Newsom took the unprecedented step of filing an amicus brief urging the Supreme Court to answer this question in the affirmative.<sup>43</sup> The Governor noted that “[n]ationally and in California, non-unanimous verdicts have been intended to entrench White jurors’ control of deliberations.”<sup>44</sup> The District Attorneys’ amicus brief discussed above was filed in the same case, arguing that the failure to

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<sup>38</sup> See Baldus, et al., *Furman at 45: Constitutional Challenges from California’s Failure to (Again) Narrow Death Eligibility* 16(4) J. Emp. Legal Studies 693 (2019); Grosso et al., *Death by Stereotype: Race, Ethnicity, and California’s Failure to Implement Furman’s Narrowing Requirement*, 66 UCLA L.Rev. 1394 (2019); Shatz, et al., *The California Death Penalty Scheme: Requiem for Furman?* 72 N.Y.U. L.Rev. 1283 (1997); Note, *The “Most Deserving” of Death: The Narrowing Requirement and the Proliferation of Aggravating Factors in Capital Sentencing Statutes* 46 Harv. C.R.-C.L. L.Rev. 223 (2011).

<sup>39</sup> Amicus brief filed in the case of *People v. McDaniels*, No. S171393, filed October 26, 2020.

<sup>40</sup> *Id.* at 20-21.

<sup>41</sup> See briefing documents in *People v. McDaniels*, No. S171393, available here: <https://www.ospd.ca.gov/legal-developments/>

<sup>42</sup> *Id.*

<sup>43</sup> Amicus brief in the case of *People v. McDaniels*, No. S171393, filed October 26, 2020.

<sup>44</sup> *Id.* at 22.

instruct on unanimity and beyond a reasonable doubt amplify the arbitrariness in application of California's death penalty.

### **3)Overall dysfunction**

In 2014, the overall dysfunction of California's death penalty led a Federal District Court Judge in Santa Ana, Cormac Carney, to conclude that the death penalty as administered in California is unconstitutional. Judge Carney stated, "systemic delay 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."<sup>45</sup> This ruling was later reversed by the Ninth Circuit on the procedural grounds of failure to exhaust in state court.<sup>46</sup> The issue has yet to be addressed by the California Supreme Court on a record that includes the evidence presented to Judge Carney.

### **4)Lack of proportionality review**

Proportionality review – that is, comparing the facts and circumstances across defendants 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.<sup>47</sup>

While California law generally requires intra-case proportionality review of the sentences of co-defendants in the same event, the California Supreme Court has said, "the sentence an accomplice receives has little bearing on the individualized consideration of a capital defendant's penalty."<sup>48</sup> In practice, no California death sentence has been found invalid despite 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 received a lesser sentence.<sup>49</sup>

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<sup>45</sup> *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).

<sup>46</sup> *Jones v. Davis*, 806 F.3d 538, 543 (9th Cir. 2015).

<sup>47</sup> 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).

<sup>48</sup> *People v. McDermott*, 28 Cal.4th 946, 1005 (2002).

<sup>49</sup> 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*



Although this legal issue has been rejected by the California Supreme Court in the past<sup>50</sup>, the Court has not recently been presented with the growing evidence of stark disparities in California death sentences. For example, 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.<sup>51</sup> In some cases, the accomplice who did not kill remains on death row while the actual killer has already been released on parole.<sup>52</sup>

### III. Evidence That Application of California's Death Penalty is Racially and Geographically Biased

#### A. Racial bias

In many ways, capital punishment concentrates racial bias that pervades the entire criminal legal system.

When discussing capital punishment today, America's history of racial violence against people of color, particularly through the practice of lynching cannot be ignored.<sup>53</sup>

While lynching was more prominent in the southern states, the practice also existed in western states, including California. Lynchings in California mirrored that of southern states in that ethnic minorities were disproportionately targeted for violence.<sup>54</sup> 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.<sup>55</sup>

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*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).

<sup>50</sup> See cases cited in notes 48 and 49.

<sup>51</sup> Compare Wamsley, *Golden State Killer Sentenced To Life In Prison Without Possibility Of Parole*, National Public Radio (Aug. 21, 2020), at: <https://www.npr.org/2020/08/21/904744564/golden-state-killer-sentenced-to-life-in-prison> 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), at: <https://theappeal.org/ive-made-my-share-of-wrongs-but-i-havent-killed-no-one/>.

<sup>52</sup> *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.)

<sup>53</sup> According to a study by the Equal Justice Initiative, 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*).

<sup>54</sup> 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)).

<sup>55</sup> Equal Justice Initiative, *Lynching in America: Confronting the Legacy of Racial Terror*, 56 (2017) (hereinafter *Lynching in America*).

Although lynching was an extra-judicial process, the practice was closely tied to the criminal legal system in that it regularly occurred in response to an allegation of serious crime.<sup>56</sup> Black people who were accused of committing a crime were often executed without receiving any trial or process.<sup>57</sup> The targeting of Black people for lynching served to reinforce “a view that African Americans were dangerous criminals who posed a threat to innocent white citizens.”<sup>58</sup>

As the country shifted away from the practice of lynching in the mid-twentieth century, the promise of swift, officially sanctioned executions were offered as a compromise.<sup>59</sup> 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.”<sup>60</sup> However, the legal process considered by Justice Stewart was often markedly different for people of color charged with capital offenses.<sup>61</sup> Death sentences imposed against people of color after expedited criminal processes have been dubbed “legal lynching” by some experts.<sup>62</sup>

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.<sup>63</sup> The constitutional challenges often explicitly alleged some form of racism as their basis.<sup>64</sup> Although notable decisions amended capital laws and procedures, the Court, “fail[ed] to address forthrightly the death penalty’s racialized history.”<sup>65</sup>

## **1) The California data**

### **a. Data shows racial disparities in California based on race of defendant**

Data indicates that the race of the defendant may impact whether the death penalty will be imposed in California. Specifically, Black and Latinx defendants are disproportionately sentenced to death. Despite accounting for only 6.5 percent of

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<sup>56</sup> Garland, *Penal Excess and Surplus Meaning: Public Torture Lynchings in Twentieth-Century America*, 39 L. and Soc. Rev. 793, 810-820 (2005).

<sup>57</sup> *Reconstruction in America, supra*, at 67.

<sup>58</sup> *Lynching in America, supra*, at 61.

<sup>59</sup> Death Penalty Information Center, *Enduring Justice: The Persistence of Racial Discrimination in the U.S. Death Penalty*, 12 (2020).

<sup>60</sup> *Gregg*, 428 U.S. at 183.

<sup>61</sup> Steiker, et al., *The American Death Penalty and the (In)visibility of Race*, 82 Univ. Chicago L.Rev. 243, 251-252 (2015).

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 244.

<sup>64</sup> *Id.*

<sup>65</sup> Steiker, et al., *Courting Death*, 78-115 (2016).

California's population,<sup>66</sup> over one third of people on death row in the state are Black.<sup>67</sup> While Latinx people accounted for less than half of homicide arrests in the state between 2005 and 2019,<sup>68</sup> all eight of the people sentenced to death in the state in 2018 and 2019 were Latinx.<sup>69</sup> In 2020, three of the five people sentenced to death in California were Latinx.<sup>70</sup>

The data from individual counties is also concerning. In Los Angeles County from 2012 to 2019, none of the 22 people sentenced to death were white.<sup>71</sup> Indeed, of the 222 people currently on death row who were convicted in Los Angeles County, nearly 50 percent are Black, nearly 29 percent are Latinx and less than 15 percent are white.<sup>72</sup>

In San Bernardino County, although Black people accounted for less than 10 percent of the county's population, they accounted for 43 percent of the 14 death sentences pronounced between 2006-2015.<sup>73</sup> Of the 39 people currently on death row who were sentenced in San Bernardino County, 49 percent are people of color.<sup>74</sup>

Between 2010-2015 Orange County's capital sentencing rate was 5.4 times the rest of the state per 100 homicides.<sup>75</sup> During the same time period, 89 percent of the individuals sentenced to death in the county were people of color.<sup>76</sup> Of the 60 individuals currently on death row who were sentenced in Orange County, nearly 62 percent are people of color.<sup>77</sup>

In Riverside County, 76 percent of people sentenced to death between 2010-2015 were people of color.<sup>78</sup> While only 7 percent of the county's population is Black, Black people accounted for 24 percent of those sentenced to death in that time frame.<sup>79</sup> Of the

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<sup>66</sup> U.S. Census Bureau, Quick Facts California (2019).

<sup>67</sup> Data provided by CDCR Office of Research.

<sup>68</sup> Cal. Dept. of Justice, *Homicide in California* 36 (2014); Cal. Dept. of Justice, *Homicide in California* 38 (2019).

<sup>69</sup> Cal. Dept. of Justice, *Homicide in California*, 2 (2019); Cal. Dept. of Justice, *Homicide in California*, 2 (2018).

<sup>70</sup> Data provided by CDCR Office of Research.

<sup>71</sup> ACLU, *The California Death Penalty Is Discriminatory, Unfair, and Officially Suspended: So Why Does Los Angeles District Attorney Jackie Lacey Seek to Use It*, 2 (2019).

<sup>72</sup> Data provided by CDCR Office of Research; According to 2019 U.S. Census estimates, Los Angeles County's population is 48.6% Hispanic or Latinx, 26.1% non-Hispanic white, 15.4% Asian, 9% Black.

<sup>73</sup> Fair Punishment Project, *Too Broken to Fix Part II: An In-depth Look at America's Outlier Death Penalty Counties*, 18-19 (2016) (hereinafter *FPP II*).

<sup>74</sup> Data provided by CDCR Office of Research.

<sup>75</sup> *FPP II*, *supra*, at 39.

<sup>76</sup> *Id.* at 43.

<sup>77</sup> Data provided by CDCR Office of Research; According to 2019 U.S. Census estimates, Orange County's population is 39.8% non-Hispanic white, 34% Hispanic or Latinx 21.7% Asian, 2.1% Black.

<sup>78</sup> Fair Punishment Project, *Too Broken to Fix: Part I: An In-depth Look at America's Outlier Death Penalty Counties*, 35 (2016) (hereinafter *FPP I*).

<sup>79</sup> *Id.*

92 people currently on death row who were sentenced in Riverside County, 76 percent are people of color.<sup>80</sup>

**b. Data shows racial disparities in California based on race of victim**

Available data indicates that the race of the victim also impacts who is sentenced to death in California. 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.<sup>81</sup> They determined that people convicted of killing white victims receive the death penalty at a rate of 1.75 per 100 victims, while those convicted of killing Black or Latinx victims are sentenced to death at a rate of .47 per 100 victims and .369 per 100 victims, respectively.<sup>82</sup>

Studies of the use of capital punishment in specific California counties have resulted in similar findings. In a study of the effects of race on the application of the death penalty in San Diego County, researchers found that race of the victims and defendants impacted capital charging decisions.<sup>83</sup> While controlling for a number of variables, researchers determined that the District Attorney was over seven times more likely to seek the death penalty in cases with a Latinx defendant and a white victim than in cases with a Black or Latinx victim.<sup>84</sup> Similarly, the District Attorney was over six and a half times more likely to seek the death penalty in cases with a Black defendant and a white victim as in cases with a Black or Latinx victim.<sup>85</sup>

In a study of capital cases in Los Angeles County, 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.”<sup>86</sup> An earlier Los Angeles Times report examined 9,442 willful homicides in Los Angeles county and found that 15 percent of cases with white victims were charged capitally, while only 7 percent of Black victim cases and 6 percent of Latinx victim cases were.<sup>87</sup> A study of charging practices in San Joaquin County found that the likelihood of being charged with a special circumstance for defendants in cases with a Black victim was one-fifth the

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<sup>80</sup> Data provided by CDCR Office of Research; According to 2019 U.S. Census estimates, Riverside County’s population is 50% Hispanic or Latinx, 34.1% non-Hispanic white, 7.3% Black and 7.2% Asian.

<sup>81</sup> 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).

<sup>82</sup> *Id.*

<sup>83</sup> 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, 1096 (2020).

<sup>84</sup> *Id.* at 1095.

<sup>85</sup> *Id.*

<sup>86</sup> 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).

<sup>87</sup> Rohrlich, et al., *Not All L.A. Murder Cases Are Equal*, Los Angeles Times (Dec. 3, 1996).

likelihood in cases with a white victim.<sup>88</sup> In cases with Latinx victims, the likelihood was one-twentieth of that for cases with white victims.<sup>89</sup>

Despite the many studies suggesting that the race of the victim impacts the likelihood of a death sentence, some scholars suggest that evidence of racial bias in capital sentencing is exaggerated.<sup>90</sup> According to this view, charging decisions can never be fully explained through a reliance on mathematical models and any statistical differences in charging or conviction rates do not prove discrimination or racial animus, but can be explained by other variables which the studies failed to account for.<sup>91</sup> Indeed, in *McCleskey v. Kemp* (1987) 481 U.S. 279, one of the most prominent studies alleging disproportionate sentencing based on the race of the victim was rejected by the trial court (the U.S. Supreme Court accepted the findings of the study as true for the purposes of its constitutional analysis but nonetheless accepted the state's practice of executions despite its biased application).<sup>92</sup>

According to University of California, Los Angeles professor Sherod Thaxton, the criticisms of statistical models are often misplaced and courts have “inappropriately reject[ed] extremely probative statistical evidence of intentional discrimination.”<sup>93</sup> Professor Thaxton asserts that “[n]early all social scientists acknowledge, at the outset, that omitted variable bias is possible,” but also acknowledge that “[r]esearchers need not control for every conceivable variable possibly influencing the outcome of interest.”<sup>94</sup>

### **c. Data shows pronounced racial disparities for particular special circumstances**

Recent research shows marked racial disparities in application of six of the 22 special circumstances that make a person eligible for the death penalty in California.<sup>95</sup>

In 2019, a team of researchers that included professors Catherine Grosso and David Baldus, found that the special circumstances of multiple victims, lying in wait, robbery / burglary felony murder, torture, drive by shooting, and gang membership

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<sup>88</sup> Lee, *Hispanics and the death penalty: Discriminatory charging practices in San Joaquin County, California*, 35 J. Crim. Justice 17, 21 (2007).

<sup>89</sup> *Id.*

<sup>90</sup> See e.g., Scheidegger, *Rebutting the Myths About Race and the Death Penalty*, 10 Ohio St. J. Crim. L. 147, 150 (2012). Mr. Scheidegger also asserts that, “[t]he days of racial exclusion from voting and jury service are long behind us.” (*Id.* at 164.)

<sup>91</sup> *Id.* at 150.

<sup>92</sup> *McCleskey v. Kemp*, 481 U.S. 279, 290 (1987) (The “Baldus study” was offered by the defendant at trial to show that the odds of receiving a death sentence were greater for those whose victims were white than for those whose victims were Black.)

<sup>93</sup> Thaxton, *Disentangling Disparity: Exploring Racially Disparate Effect and Treatment in Capital Charging*, 45 Am.J.Crim.L. 95, 115 (2018).

<sup>94</sup> *Id.* at 117.

<sup>95</sup> Grosso, et al., *Death by Stereotype: Race, Ethnicity, and California's Failure to Implement Furman's Narrowing Requirement*, 66 UCLA L.Rev. 1394 (2019).

were not applied evenly across all races and ethnicities.<sup>96</sup> White defendants had a higher representation in cases with the multiple murder and torture special circumstances compared to Black and Latinx defendants.<sup>97</sup> Black defendants were disproportionately impacted by the robbery/burglary felony murder special circumstance.<sup>98</sup> Latinx defendants were substantially overrepresented among those impacted by the drive-by and gang-related special circumstance, representing more than half of the individuals sentenced to death with those special circumstances.<sup>99</sup> Latinx defendants were also overrepresented in cases with the lying in wait special circumstance, though to a lesser extent.<sup>100</sup>

The researchers further analyzed the data controlling for level of culpability and offense year and found evidence of significantly disparate application for five of the special circumstances.<sup>101</sup> “A model of the likelihood that the gang member special circumstance would be found or present reported that Latinx defendants faced 7.8 higher odds than other similarly situated defendants and Black defendants face 4.8 higher odds than other similarly situated defendants even after controlling for culpability and year.”<sup>102</sup> For the drive-by special circumstance, researchers found “Black and Latinx defendants faced odds 3.5 higher than the odds faced by similarly situated defendants of other race or ethnicities.”<sup>103</sup> For the robbery/burglary special circumstance, “Black defendants face odds 2.2 times higher than the odds faced by other defendants.”<sup>104</sup> For torture murder, “white defendants face odds 2.3 times higher than other similarly situated defendants.”<sup>105</sup> Finally, “Latinx defendants face odds of having the special circumstance for lying in wait found or present that are 1.6 the odds of similarly situated defendants of other race or ethnicities.”<sup>106</sup>

## 2) Sources of bias

Like other areas of the criminal legal system, many sources contribute to racially biased practices and outcomes.

### a. Policing

Racial disparities in policing may contribute to disproportionate capital sentencing. In California, between 2010-2019, only 59-65 percent of homicides were solved each

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<sup>96</sup> *Id.* at 1426.

<sup>97</sup> *Id.* at 1429.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 1435.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

year.<sup>107</sup> According to researchers, homicides involving minority victims are less likely to be solved.<sup>108</sup> In 2018, the Washington Post analyzed homicide arrest data from 52 large cities across the U.S. and found that in more than 18,600 of the approximately 26,000 unsolved cases, the victim was black.<sup>109</sup> The lower arrest rate in cases involving minority victims means that people who kill minority victims are less likely to face the death penalty.<sup>110</sup>

#### **b. Broad discretion given to prosecutors**

The broad discretion afforded prosecutors in determining when to seek the death penalty is another explanation for the disproportionate sentencing patterns in the state. Research has shown that “the narrower the category of those eligible for the death penalty, the less the risk of error, and the lower the rate of racial or geographic variation.”<sup>111</sup>

In California, 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.<sup>112</sup> The sweeping list of enumerated circumstances was created with the intention of giving Californians the toughest death penalty law in the country and to apply the death penalty to every murderer.<sup>113</sup> The circumstances encompass a wide range of factual scenarios, including when a death occurs in the course of a robbery, when a murder was committed after “lying in wait”, and when a murder is committed to further the activities of a criminal street gang.<sup>114</sup>

Though state laws allow prosecutors broad discretion to decide when to seek the death penalty, very little is known about how they make that decision. In 2008, the California Commission on the Fair Administration of Justice sent surveys to the District Attorneys of all 58 counties seeking information on the process each office uses to decide whether to charge a case capitally.<sup>115</sup> Despite numerous follow-up attempts,

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<sup>107</sup> State of California Department of Justice, *Homicide in California*, Table 28 (2019).

<sup>108</sup> 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, *Neighbourhood context and unsolved murders: the social ecology of homicide investigations*, *Policing and Society* 27:4, 372-392 (2015).

<sup>109</sup> Lowery, et al., *Murder with Impunity: An Unequal Justice*, *The Washington Post* (Jul. 25, 2018).

<sup>110</sup> Petersen, *Examining Sources of Racial Bias in Potentially Capital Cases*, 7(1) *Race & Justice* 7 (2016).

<sup>111</sup> Cal. Comm. on the Fair Administration of Justice, *Final Report, Death Penalty*, 138 (2008) (citing Liebman, et al., *Less Is Better: Justice Stevens and the Narrowed Death Penalty*, 74 *Fordham L.Rev.* 1607 (2006)).

<sup>112</sup> Penal Code § 190.2.

<sup>113</sup> 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)).

<sup>114</sup> Penal Code §§ 190.2(14), 190.2(17)(A), 190.2(22).

<sup>115</sup> Cal. Comm. on the Fair Administration of Justice, *Final Report, Death Penalty*, 152 (2008).

twenty counties never responded and fourteen declined to participate.<sup>116</sup> Of the counties that did complete the survey, very few indicated they had written policies in place and only one agreed to provide a copy.<sup>117</sup> After reviewing data from other sources, the Commission concluded that there was, “great variation in the practices for charging special circumstances....” and recommended that the Legislature require “courts, prosecutors and defense counsel to collect and report all data needed to determine the extent to which the race of the defendant, the race of the victim, geographic location and other factors affect decisions to implement the death penalty ....”<sup>118</sup> This recommendation has not been acted upon.

Committee staff have been unable to find published practices or policies from any District Attorney office throughout the state.

### **c. Racially discriminatory jury selection practices**

The jury selection process for capital offenses may also contribute to the disproportionate sentencing of people of color. Though both the California and United States Supreme Courts have adopted rules to prevent racial bias from impacting who serves on a jury,<sup>119</sup> juries in California continue to be disproportionately white.<sup>120</sup> This is especially true in capital cases where the process of “death qualification” and the use of peremptory challenges work to “whitewash the jury box”.<sup>121</sup>

In capital cases, jurors are allowed to be questioned about their attitudes toward the death penalty and if a juror expresses an opinion against the death penalty so strong that it can “substantially impair” their ability to consider all the sentencing options in the case, they are excluded from serving.<sup>122</sup> 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.<sup>123</sup> Even when potential jurors survive the death qualification process, prosecutors can use peremptory challenges to excuse those who were indecisive about the penalty.<sup>124</sup> Furthermore, research has shown that prosecutors use peremptory challenges disproportionately against people of color and in many

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<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 154-155.

<sup>119</sup> *People v. Wheeler*, 22 Cal. 3d 258 (1978); *Batson v. Kentucky*, 476 U.S. 79 (1986).

<sup>120</sup> Berkeley Law Death Penalty Clinic, *Whitewashing the Jury Box: How California Perpetuates the Discriminatory Exclusion of Black and Latinx Jurors*, 3-5 (2020).

<sup>121</sup> *Id.*

<sup>122</sup> 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)).

<sup>123</sup> 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).

<sup>124</sup> Lynch, et al., *Death Qualification in Black and White: Racialized Decision Making and Death-Qualified Jurors*, 40 *Law & Pol’y* 148, 166 (2018).



instances, their “race-neutral” reasons for excusing jurors of color correlate with racial stereotypes.<sup>125</sup>

#### **d. Confusing jury instructions and implicit bias of jurors**

Confusing jury instructions and implicit racial bias of jurors may also play a role in disproportionate capital sentencing. According to some scholars, penalty phase instructions are “notoriously difficult for jurors to understand and apply,”<sup>126</sup> and research has shown that most jurors do not understand the instructions.<sup>127</sup> When jurors do not fully comprehend the instructions, they are more likely to allow bias to impact their decisions.<sup>128</sup> Indeed, researchers have found that jurors with the poorest comprehension of the instructions were the most prone to deciding based on racial bias.<sup>129</sup>

In addition, California prosecutors have been allowed to use racially coded language in court, exacerbating implicit bias of jurors. As noted in the Legislative intent of the Racial Justice Act of 2020, “courts have upheld convictions in cases where prosecutors have compared defendants who are people of color to Bengal tigers and other animals, even while acknowledging that such statements are ‘highly offensive and inappropriate.’”<sup>130</sup> Research has shown that animal imagery effectively triggers implicit bias and have observed the likely impact this has on jurors deciding capital cases.<sup>131</sup>

Other research has found that the more “stereotypically black” a defendant looked to independent raters, the more likely it was that the person had received a death sentence.<sup>132</sup>

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<sup>125</sup> Berkeley Law Death Penalty Clinic, *Whitewashing the Jury Box: How California Perpetuates the Discriminatory Exclusion of Black and Latinx Jurors*, 14 (2020).

<sup>126</sup> 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*).

<sup>127</sup> Lynch, et al., *Capital Jury Deliberation: Effects on Death Sentencing, Comprehension, and Discrimination*, 33 Law & Hum. Behav. 481, 482 (2009).

<sup>128</sup> *White Male Capital Juror*, *supra*, at 74.

<sup>129</sup> Lynch, et al., *Discrimination and Instructional Comprehension: Guided Discretion, Racial Bias, and the Death Penalty*, 24 Law & Hum. Behav. 337, 344-45 (2000).

<sup>130</sup> Assem. Bill. No. 2542 (2019-2020 Reg. Sess.) citing *Duncan v. Ornoski*, 286 Fed. Appx. 361, 363 (9th Cir. 2008) and *People v. Powell*, 6 Cal.5th 136, 182-83 (2018).

<sup>131</sup> Goff, et al., *Not Yet Human: Implicit Knowledge, Historical Dehumanization, and Contemporary Consequences*, *Journal of Personality and Social Psychology* Vol. 94, No. 2, 292-293 (2008); Prasad, *Implicit Racial Biases in Prosecutorial Summations: Proposing an Integrated Response*, 86 *Fordham Law Review* 3091, 3105-06 (2018).

<sup>132</sup> *White Male Capital Juror*, *supra*, at 74, citing Eberhardt et al. *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital Sentencing Outcomes*, 17 *Psychological Science* 383-6 (2000).

### 3) Impact of the Racial Justice Act of 2020

In 2020, the Legislature enacted the Racial Justice Act, which aims to eliminate racial bias and racially discriminatory practices in the criminal justice system.<sup>133</sup> Its provisions prohibit racial animus, racially discriminatory language, and disparate charging and sentencing based on race.<sup>134</sup> If the defendant can make a prima facie showing that the law has been violated, the court is required to hold an evidentiary hearing.<sup>135</sup> At the hearing, the defendant has the burden of proving a violation by a preponderance of the evidence.<sup>136</sup> If the defendant meets this burden in a capital case, the “defendant shall not be eligible for the death penalty.”<sup>137</sup> Currently, the Racial Justice Act only applies prospectively, to cases that were not final on January 1, 2021, though a bill has been introduced to make the Act retroactive.<sup>138</sup>

The Racial Justice Act also applies to all criminal prosecutions, not just death penalty cases.

#### B. Geographic bias

Data indicates that geographic bias also impacts who is sentenced to death in California.

According to a report by the ACLU of Northern California, whether someone is sentenced to death in California, “depends largely on where in the state the crime occurred, not on the facts or other common criteria.”<sup>139</sup> Research has shown that the differences in sentencing rates between counties can be explained by factors such as the racial composition of the county, the predilection of particular prosecutors and political pressures.<sup>140</sup>

According to data provided to the Committee by CDCR, the majority of death judgments in California are imposed by a select few counties. Between 2015 and 2019, a total of six counties imposed 89 percent of the death sentences in the state. Moreover, a total of six counties account for approximately 70 percent of all people currently on death row.<sup>141</sup>

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<sup>133</sup> Assem. Bill. No. 2542 (2019-2020 Reg. Sess.).

<sup>134</sup> Penal Code § 745(a)(1)-(4).

<sup>135</sup> Penal Code § 745(c)(1).

<sup>136</sup> Penal Code § 745(c)(2).

<sup>137</sup> Penal Code § 745(e)(3).

<sup>138</sup> See Penal Code § 745(j). Assembly Bill 256 (Kalra), (introduced Jan. 14, 2021).

<sup>139</sup> ACLU of Northern California, *Death by Geography: A County by County Analysis of the Road to Execution in California*, 3 (2009).

<sup>140</sup> *Glossip v. Gross*, 576 U.S. 863, 918-920 (2015) (dis. opn. of Breyer, J.).

<sup>141</sup> Data provided by CDCR Office of Research. The counties are Los Angeles, Riverside, Orange, Alameda, San Bernardino and San Diego; Data provided by CDCR Office of Research.

At least one California county sentences people to death so frequently that it has become a national outlier. According to the Death Penalty Information Center, 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.<sup>142</sup> According to a 2016 report by the Fair Punishment Project, “Riverside county has become the nation’s leading producer of death penalty cases.” In fact, in 2015, Riverside County sentenced more people to death than every other state in the country, except for Florida and all of California.<sup>143</sup> In 2020, Riverside County was responsible for three of the five death sentences pronounced in the state.<sup>144</sup>

#### IV. Mitigating Factors Have Not Effectively Narrowed the Scope of Defendants Eligible for Death

In theory, a critical feature of the modern death penalty is that it is both narrowly targeted to “the worst of crimes,”<sup>145</sup> and applied specifically to individuals who possess “a consciousness materially more depraved” than that of the “typical” individual who commits homicide.<sup>146</sup> In other words, as commonly phrased, the modern death penalty is only to be imposed on “the worst of the worst.”<sup>147</sup>

Modern death penalty statutes thus require individualized sentencing to ensure that only those with extreme culpability face execution, with courts and jurors evaluating mitigating factors that could demonstrate diminished culpability, including intellectual disabilities, youth, severe mental illness, and chronic childhood trauma.<sup>148</sup> The United States Supreme Court has also categorically excluded people with intellectual disability and people who committed their crimes before the age of 18 from death eligibility,<sup>149</sup> 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.<sup>150</sup>

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<sup>142</sup> Death Penalty Information Center, *DPIC Year End Report: New Death Sentences Demonstrate Increasing Geographic Isolation* (Dec. 15, 2017).

<sup>143</sup> FPP I, *supra*, at 31.

<sup>144</sup> Data provided by CDCR Office of Research.

<sup>145</sup> *Kennedy v. Louisiana*, 554 U.S. 407, 2661 (2008).

<sup>146</sup> *Godfrey v. Georgia*, 446 U.S. 420, 433 (1980) (reversing a death sentence because “The petitioner’s crimes cannot be said to have reflected a consciousness materially more “depraved” than that of any person guilty of murder”); *Atkins v. Virginia*, 536 U.S. 304, 319 (2002) (“the culpability of the average murderer is insufficient to justify the most extreme sanction available to the State.”)

<sup>147</sup> *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’”).

<sup>148</sup> Penal Code § 190.3 subd. (d), (h), & (i). Sentencing factors include whether defendant is “under the influence of extreme mental or emotional disturbance,” and whether the “capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect, or the effects of intoxication,” and “[t]he age of the defendant at the time of the crime.” (*Id.*)

<sup>149</sup> *Atkins v. Virginia*, 536 U.S. 304 (2002) (intellectual disability); *Roper v. Simmons*, 543 U.S. 551 (2005) (youth).

<sup>150</sup> *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.”).

These categorical exemptions, combined with the individualized consideration of mitigating factors for death-eligible defendants, are designed to narrow the death penalty's application to only those with "extreme culpability."<sup>151</sup>

However, 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. These issues raise the question of whether California's death penalty scheme effectively identifies people with extreme culpability for execution.

### **A. California has sentenced people with intellectual disabilities to death**

In *Atkins v. Virginia* (2002) 536 U.S. 304, the U.S. Supreme Court held that the execution of people with intellectual disabilities was unconstitutional, as their "diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others" reduced their culpability such that they did not fit in the narrow category of "only the most deserving of execution."<sup>152</sup> Furthermore, they are not capable of the kind of "premeditation," "deliberation, or "cold calculus that precedes the decision of other potential murderers" that would make them deterred by the death penalty.<sup>153</sup>

Yet, people diagnosed with intellectual disability remain on California's death row. Of the currently 175 petitions for writ of habeas corpus pending in the California Supreme Court or the Superior Courts, at least 40 percent and potentially as many as 50 percent raise *Atkins* claims.<sup>154</sup> Additional claims are pending in federal court, including one individual whose adjusted IQ score was below 70 on four of five tests, indicating that he had "significant intellectual deficits that meet the criteria for mild mental retardation."<sup>155</sup> Described as "childlike" and having "garbled, unintelligible, and bizarre speech," his behaviors prior to his offense included hoarding and eating garbage.<sup>156</sup> Neurological reports showed evidence of brain damage, which doctors believe could have resulted from his extremely premature birth and also from the severe beatings he received from his father.<sup>157</sup> He has been on death row since 1986, where he "rolls his feces into little balls, hoards food in the toilet, rarely bathes and speaks in a low, rambling, incoherent string of mumbles."<sup>158</sup>

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<sup>151</sup> *Kennedy*, 554 U.S. at 420.

<sup>152</sup> *Atkins*, 536 U.S. at 319.

<sup>153</sup> *Id* at 319, citing *Enmund v. Florida*, 458 U.S. 782, 799 (1982) and *Gregg*, 428 U.S. at 186.

<sup>154</sup> Habeas Corpus Resource Center, *Annual Report 2020* (2020), at 11; communication with Federal Public Defender.

<sup>155</sup> *In re Horace Edwards Kelly*, Riverside Superior Court Case No. RIC 438403, Post-Hearing Brief (April 3, 2006), at 17.

<sup>156</sup> *Id* at 40, 5.

<sup>157</sup> *Id* at 40.

<sup>158</sup> Terry, *Killer of 3 Is Mentally Fit to Be Executed, a California Jury Finds*, *New York Times* (May 15, 1998). At: <https://www.nytimes.com/1998/05/15/us/killer-of-3-is-mentally-fit-to-be-executed-a-california-jury-finds.html>

Still more intellectually disabled people are likely awaiting appointment of qualified habeas counsel to file their own petitions: currently 85 people on death row have been waiting for appointment of habeas counsel for more than 20 years.<sup>159</sup>

Furthermore, California continues to allow people with severely low intellectual functioning to be sentenced to death because the clinical definition of intellectual disability is limited to onset during a young age, thereby excluding people who have suffered traumatic brain injury (TBI) or dementia.<sup>160</sup> TBI is strongly associated with “perpetration of domestic and other kinds of violence,” “uninhibited or impulsive behavior, including problems controlling anger,” and for incarcerated people, connected to “significantly higher levels of alcohol and/or drug use during the year preceding their current incarceration.”<sup>161</sup> The 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 TBI and dementia.<sup>162</sup>

For those charged with the death penalty, juries are directed to consider a person’s capacity to “appreciate the criminality of his conduct or to conform his conduct to the requirements of law” as a mitigating factor.<sup>163</sup> Studies show this may not be effective in practice.<sup>164</sup> Indeed, in *Atkins* the Court found that the categorical exemption of people with intellectual disabilities was necessary to guard against juries failing to properly consider intellectual functioning in mitigation, due to defendants’ behavior in the courtroom, their challenges cooperating with defense counsel, and the risk of juries finding that their intellectual disability actually renders them more dangerous.<sup>165</sup> These factors are likely to also impact the outcomes of cases involving defendants with TBI, dementia, and levels of intellectual impairment that may not reach the clinical standard for intellectual disability.

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<sup>159</sup> Habeas Corpus Resource Center, *Annual Report 2020* (2020), at 9.

<sup>160</sup> “Intellectual disability means the condition of significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested before the end of the developmental period, as defined by clinical standards.” Cal. Pen. Code § 1076, subd. (a)(1).

<sup>161</sup> Centers for Disease Control, Department of Health & Human Services, (2013) *Traumatic Brain Injury in Prisons and Jails: An Unrecognized Problem*.

<sup>162</sup> ABA Task Force on Mental Disability and the Death Penalty, *Recommendation and Report on the Death Penalty and Persons with Mental Disabilities*, *supra*, 30 Mental & Physical Disability L.Rep. at p. 669.

<sup>163</sup> Penal Code § 190.3 subd (h).

<sup>164</sup> Sundby, *The True Legacy of Atkins and Roper: The Unreliability Principle, Mentally Ill Defendants, and the Death Penalty’s Unraveling*, 23 Wm. & Mary Bill Rts. J. 487, 518-519 (2014).

<sup>165</sup> *Atkins*, 536 U.S. at 320–21, citing *Penry v. Lynaugh*, 492 U.S. 302, 323–25 (1989) (people with intellectual disabilities “face a special risk of wrongful execution” due not only to “the possibility of false confessions, but also by the lesser ability of mentally retarded defendants to make a persuasive showing of mitigation in the face of prosecutorial evidence of one or more aggravating factors. Mentally retarded defendants may be less able to give meaningful assistance to their counsel and are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes... [M]oreover, reliance on mental retardation as a mitigating factor can be a two-edged sword that may enhance the likelihood that the aggravating factor of future dangerousness will be found by the jury.”)

A related issue concerns people on death row who are “permanently incompetent” – that is, those whose intellectual functioning or psychological conditions have deteriorated so dramatically during their incarceration that they have become gravely disabled and have little likelihood of regaining competency. In *Ford v. Wainwright* (1986) 477 U.S. 399, the Supreme Court found that it is cruel and unusual punishment to execute people who do not understand their impending punishment or the reason for it.<sup>166</sup> California’s Attorney General has recognized seven people on death row as “permanently incompetent;”<sup>167</sup> six remain on death row, while the seventh died in 2019.<sup>168</sup> Many of these people suffer from age-related dementia. Another case, involving an individual with advanced dementia due to Parkinson’s disease, is pending in Los Angeles County Superior Court.<sup>169</sup> California courts have yet to recognize permanent incompetence as a basis for removing someone from death row.

## **B. California has sentenced people who committed crimes as young adults to death**

In *Roper v. Simmons* (2005) 543 U.S. 551, the Supreme Court extended the findings in *Atkins* to people who were under the age of 18 at the time of their crimes, finding that because of juveniles’ “impetuous and ill-considered actions and decisions,” their vulnerability or susceptibility to “negative influences and outside pressures, including peer pressure,” and their “underdeveloped sense of responsibility,” they “cannot reliability be classified among the worst offenders,” and that “[t]he likelihood that the teenage offender has made the kind of cost-benefit analysis that attaches any weight to the possibility of execution is so remote as to be virtually nonexistent.”<sup>170</sup>

Although *Roper* set the line at age 18, research shows that these same qualities also characterize young adults; in fact, risky decision-making may actually peak in young adults, not juveniles.<sup>171</sup> Technological advances in neuroscience have found correlates for this 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.<sup>172</sup> Sentencing young adults to the death penalty,

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<sup>166</sup> *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.”)

<sup>167</sup> *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 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.

<sup>168</sup> California Department of Corrections and Rehabilitation, *News Release: Condemned Inmate Ronald Bell Dies*. March 11, 2019. At: <https://www.cdcr.ca.gov/news/2019/03/11/condemned-inmate-ronald-bell-dies/>

<sup>169</sup> *In Re Robert Carrasco*, Los Angeles Superior Court Case No. LA BA109453.

<sup>170</sup> *Roper*, 543 U.S. at 569, 589, 572.

<sup>171</sup> Shulman, et al., *Deciding in the Dark: Age Differences in Intuitive Risk Judgment*, 50 *Developmental Psychology* 167, 172-173 (2014).

<sup>172</sup> 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*

then, may similarly violate the idea that only defendants with “extreme culpability” are to be executed.<sup>173</sup>

Yet forty-five percent of the people currently sentenced to death in California – or 318 people — were 25 or under at the time of their offense, according to data provided to the Committee by CDCR.<sup>174</sup> 167 of them were 21 or younger.<sup>175</sup> Twenty-four were only 18 years old.<sup>176</sup>

The racial disparities pervasive throughout the state’s capital punishment system are especially pronounced with young people: while 68 percent of all people on death row are people of color, the figure jumps to 80 percent for people who were 21 or younger.<sup>177</sup>

The California legislature has recognized that the extended cognitive maturation process confers diminished culpability and deterrability and greater capacity for change on young adults, passing legislation to require that anyone who was 25 or younger at the time of their offense, with limited exceptions, must be given an opportunity for parole after 15 to 25 years of incarceration, depending on the original term.<sup>178</sup> This reform excludes young adults sentenced to death or life without parole.

Although age is a factor that can be used in mitigation in determining whether to sentence someone to death in California,<sup>179</sup> it often fails to protect many young defendants and worse yet, can also be used as a factor in aggravation. The California Supreme Court has ruled that “age” may legally be used either as a mitigating or as an aggravating factor in a death penalty case.<sup>180</sup> When advanced as mitigation, there is “an unacceptable likelihood” that the nature of the crime “would overpower mitigating arguments based on youth.... Even where the juvenile offender’s objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than

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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).

<sup>173</sup> 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.”).

<sup>174</sup> Data provided by CDCR Office of Research.

<sup>175</sup> *Id.*

<sup>176</sup> California Department of Corrections and Rehabilitation, *Condemned Inmate List*. At: <https://www.cdcr.ca.gov/capital-punishment/condemned-inmate-list-secure-request/>

<sup>177</sup> Data provided by CDCR Office of Research.

<sup>178</sup> Penal Code § 3551, amended by AB 1308 (2018).

<sup>179</sup> Penal Code § 190.3 subd (i).

<sup>180</sup> *People v. Hawthorne*, 4 Cal. 4th 43, 77-79 (1992); *People v. Lucky*, 45 Cal.3d 259, 302 (1988); *People v. Rodriguez*, 42 Cal.3d 789 (1986); see also *Roper* 543 US, 573, noting that age can be “counted against” a young person facing a death sentence.

death.”<sup>181</sup> Young people also have difficulties working with defense counsel that can put them at a significant disadvantage during the trial.<sup>182</sup>

### C. California has sentenced people with severe mental illness to death

Currently on California’s death row, there are at least 242 individuals being treated for severe mental illness, just over one-third of the death row population. 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.”<sup>183</sup>

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, determining that, as with juveniles and people with intellectual disabilities, “this population simply does not have the requisite moral culpability.”<sup>184</sup> Further, while noting that “the theory that the death penalty can deter potential murderers is controversial and unsupported by conclusive evidence,” they also found that “any possible deterrent effects are further diminished among people who suffer from impairments that affect their cognition, emotion regulation, or behavior.”<sup>185</sup> Ohio recently adopted a statute based on these recommendations, excluding individuals with severe mental illness from being sentenced to death,<sup>186</sup> and Kentucky appears poised to do the same.<sup>187</sup>

As with intellectual disability and youth, the symptoms of serious mental illness can also interfere with an individual’s ability to receive a fair trial. People with mental

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<sup>181</sup> *Roper* 543 US, 573.

<sup>182</sup> *Graham v. Florida* (2010) 130 U.S. 2011, 2032 (“[T]he features that distinguish juveniles from adults also put them at a significant disadvantage in criminal proceedings. Juveniles mistrust adults and have limited understandings of the criminal justice system and the roles of the institutional actors within it. They are less likely than adults to work effectively with their lawyers to aid in their defense. Difficulty in weighing long-term consequences; a corresponding impulsiveness; and reluctance to trust defense counsel seen as part of the adult world a rebellious youth rejects, all can lead to poor decisions by one charged with a juvenile offense. These factors are likely to impair the quality of a juvenile defendant’s representation.”)

<sup>183</sup> 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).

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> Death Penalty Information Center, *Ohio Bars Death Penalty for People with Severe Mental Illness*, Jan 11, 2021. At: <https://deathpenaltyinfo.org/news/ohio-passes-bill-to-bar-death-penalty-for-people-with-severe-mental-illness>.

<sup>187</sup> Death Penalty Information Center, *With Overwhelming Bipartisan Support, Kentucky House Passes Bill to Ban Death Penalty for Defendants with Serious Mental Illness*, Mar 3, 2021. At: <https://deathpenaltyinfo.org/news/with-overwhelming-bipartisan-support-kentucky-house-passes-bill-to-ban-death-penalty-for-defendants-with-serious-mental-illness>.



illness may not be able to cooperate with or assist their attorneys; some may resist being labeled as “mentally ill,” impeding the ability of their attorney to present the condition as a mitigating factor, and still others with deep psychosis or depression may actually want to be killed.<sup>188</sup> Defendants may have outbursts in the courtroom and make inappropriate comments or gestures, or, conversely, be placed on antipsychotic medication that controls overt symptoms but also deadens their affect – in either case, jurors may interpret their behavior as demonstrating a dangerous lack of remorse.<sup>189</sup> These challenges, combined with the sometimes bizarre and gruesome nature of the crimes committed by people with severe mental illness, often result in their illness serving improperly as an aggravating factor, despite being constitutionally mitigating.<sup>190</sup>

Individuals with severe mental illness have also represented themselves in death penalty trials with predictable results. According to the Office of the State Public Defender, the number of individuals representing themselves at trial in death penalty cases has grown each decade to more than 5 percent of cases.<sup>191</sup> More than a dozen individuals represented themselves at death penalty trials despite serious doubts about their competency, including some previously found incompetent for criminal proceedings, or other evidence that the defendant suffered from severe mental illness.<sup>192</sup>

#### **D. California has sentenced people with chronic childhood trauma to death**

The majority of people sentenced to death in the United States have experienced chronic violence and trauma as children, including extreme levels of physical and sexual abuse, according to researchers.<sup>193</sup> A recent report from the California Surgeon General shows that “Adverse Childhood Experiences” (ACEs), including physical and sexual abuse as well as childhood poverty and the experience of having close family members who were incarcerated or who experienced mental illness, substance dependence, and intimate partner violence, can cause neurological, psychological, and hormonal changes that can, like youth and mental illness, link to lawbreaking and violent behaviors. Traumatic life experiences thus raise similar questions about culpability and deterrability for these populations.<sup>194</sup>

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<sup>188</sup> Sundby, *supra*. discussing *United States v. Kaczynski* (9th Cir. 2001) 239 F.3d 1108, 1111–13 (defendant repeatedly tried to dismiss his attorneys because they wanted to present his mental illness as mitigation); *Godinez v. Moran* (1993) 509 U.S. 389, 410, 416–17 (Blackmun, J., dissenting) (explaining how the defendant’s depression caused him to fire his lawyers and seek the death penalty).

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> Communication from the Office of the State Public Defender.

<sup>192</sup> See appellate briefing and opinions on file with California Supreme Court in of the cases of James Robert Acrement, S110804; James Nelson Blair, S011636; Robert Maurice Bloom, S095223, Bill Bradford, S005707; William John Clark, S004662; Jonathan Daniel D’Arcy; S060500; Melvin Earl Forte, S193769; Gerald Armond Gallego, S004561; Jonathan Sampson George, S047868; Herbert Harris Koontz, S036450; Christopher Charles Lightsey, S048440; Kurt Michaels, S016924; Keith Desmond Taylor, S054774; Billy Ray Waldon, S025520; Edward Mathew Wycoff, S178669.

<sup>193</sup> Channah, 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.

<sup>194</sup> Office of the Surgeon General (2020) Roadmap for Resilience: The California Surgeon General’s Report on Adverse Childhood Experiences, Toxic Stress, and Health. (“High doses of adversity, occurring early

Specifically, the Surgeon General’s report found that responses to these ACEs include impairment of impulse control and increased risk of cognitive impairment, mental illness, and substance use disorders.<sup>195</sup> Data show that incarcerated people have nearly four times as many ACEs in childhood as non-incarcerated people, and that people with most severe ACE profiles experience the highest risk of incarceration.<sup>196</sup>

When competently investigated and presented, adverse childhood experiences can provide effective mitigation in a death penalty trial. This level of legal representation, however, is far from a given, as detailed below, and individuals with histories of severe child abuse and trauma who have been sentenced to death and ultimately do obtain legal relief generally only do so after years or even decades of appeals.<sup>197</sup>

Further, as with intellectual disability, youth, and severe mental illness, even when childhood violence is extreme it may not be understood as sufficiently mitigating. For example, Robert Alton Harris, who in 1992 became the first person executed after California reinstated the death penalty, suffered extreme physical abuse as a child. For Harris, the abuse started in utero: he was born with severe Fetal Alcohol Syndrome.<sup>198</sup> When he was two years old, his father hit him so hard he fell out of his highchair, began to convulse, and bled profusely from his nose, mouth, and ears; Harris’s father then tried to choke him with a tablecloth. Harris’s father beat Harris into unconsciousness several times.<sup>199</sup> Yet Governor Pete Wilson denied his clemency request, stating “as great as is my compassion for Robert Harris the child, I cannot excuse nor forgive the choice made by Robert Harris the man.”<sup>200</sup>

## V. Innocence

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in life, without adequate buffering protections of trusted caregivers and safe, stable environments, may lead to prolonged activation of the biological stress response and changes in brain structure and function, how genes are read and transcribed, functioning of the immune, metabolic, and endocrine systems, and growth and development. These changes comprise what is now known as the toxic stress response.”)

<sup>195</sup> *Id.* at 210.

<sup>196</sup> Reavis, et al., *Adverse Childhood Experiences and Adult Criminality: How Long Must We Live Before We Possess Our Own Lives?*, 17 *The Permanente J.* 44, 44-48 (2013); Roos, et al., *Linking Typologies of Childhood Adversity to Adult Incarceration: Findings from a Nationally Representative Sample*, 86 *American Journal of Orthopsychiatry* 584, 591 (2016).

<sup>197</sup> See, e.g., *Stankewitz v. Wong*, 698 F.3d 1163, 1168, 1174 (9th Cir. 2012) (defendant was sentenced to death in 1978 and was granted relief in 2012, after the court found that his attorney “failed to conduct even the most basic investigation of Stankewitz’s background,” including: being born into a “poverty-stricken home described by police and probation reports as dirty, covered in cockroaches and fleas, and without electricity or running water”; a mother who “had been an alcoholic since she was a child,” was “severely intellectually impaired,” shot and killed a man, and who “would regularly drink three to four six packs of beer or two fifths of a gallon of whiskey in a night, including while she was pregnant with Stankewitz”; a father who severely beat his mother while she was pregnant with Stankewitz, kicking her stomach several times, and who, in Stankewitz’s presence, beat, shot at, and attempted to kill their mother by driving over her with a car. Both parents “regularly beat all of their children.”)

<sup>198</sup> *Harris v. Vasquez*, 961 F.2d 1449, 1550 (9th Cir. 1990).

<sup>199</sup> *Id.* at 939; Smith, et al., *The Failure of Mitigation?*, 65 *Hastings L.J.* 1221 (2014).

<sup>200</sup> Morain, et al., *Wilson Rejects Plea of Mercy for Harris*, *Los Angeles Times* (Apr. 17, 1992). At: <https://www.latimes.com/archives/la-xpm-1992-04-17-mn-706-story.html>.

## A. Innocent people have been sentenced to death in California

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.<sup>201</sup> All five are people of color. The first to be exonerated in 1981 was Shujaa Ernest Graham.<sup>202</sup> While in prison as a young man, he became a leader in the Black Panther Party and an activist for prisoner's rights.<sup>203</sup> In 1973, Graham was accused of murdering a prison guard.<sup>204</sup> His conviction was ultimately overturned by the California Supreme Court because the prosecutor had systematically excluded all African American jurors from his trial.<sup>205</sup> After a second retrial, a jury exonerated Graham in 1981.<sup>206</sup>

Troy Jones and Oscar Morris were both wrongly convicted of murder and sentenced to death in 1982 and 1983 respectively.<sup>207</sup> A critical witness later recanted her false testimony against Jones, stating that it had been coerced by the police, and another man confessed to the murder.<sup>208</sup> In Morris's case, the prosecution's star witness, who had received undisclosed benefits from the prosecution, ultimately recanted his false testimony on his deathbed.<sup>209</sup> Jones was freed after fourteen years on death row in 1996,<sup>210</sup> and Morris was freed after seventeen years in 2000.<sup>211</sup>

Most recently, Vincente Benavides Figueroa was exonerated in 2018.<sup>212</sup> He had been sentenced to death in 1993 for the sexual assault and murder of his girlfriend's 21-month-old daughter.<sup>213</sup> After 25 years, the California Supreme Court overturned his conviction after the prosecution agreed that the convictions were based on false

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<sup>201</sup> 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. *See, e.g.,* The National Registry of Exonerations, University of Michigan School of Law (2021).

<sup>202</sup> Witschge, *After Death Row: An Unlikely Love Story*, Al Jazeera (Mar. 7, 2017).

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

<sup>205</sup> *Id.*; Death Penalty Information Center, Innocence Database (2021).

<sup>206</sup> *Id.*

<sup>207</sup> *Troy Lee Jones*, The National Registry of Exonerations, University of Michigan School of Law.

<sup>208</sup> *Id.*

<sup>209</sup> *A Matter of Life and Death*, Pasadena Weekly (Oct. 13, 2016).

<sup>210</sup> *Id.*

<sup>211</sup> *Id.* Patrick Croy was also acquitted of murder and removed from death row, and then later acquitted for related conspiracy and assault charges in 2005 after having spent 26 years incarcerated. Death Penalty Information Center, Innocence Database (2021); *Patrick Croy*, The National Registry of Exonerations, University of Michigan School of Law (2021).

<sup>212</sup> *In re Figueroa*, 4 Cal.5th 576, 579 (2018).

<sup>213</sup> *Id.*

evidence of sexual assault and strong evidence that the child's death was an accident that did not involve Benavides at all.<sup>214</sup> Prosecutors subsequently dropped all charges.<sup>215</sup>

Finally, serious questions have been raised about the innocence of people currently on California's death row.<sup>216</sup>

## B. Common causes of wrongful convictions

Since 1973, 156 people sentenced to death have been exonerated nationwide.<sup>217</sup> In 2014, a team of researchers and statisticians led by University of Michigan law professor Samuel Gross estimated that at minimum, 4 percent of people who have been sentenced to death were innocent, after studying 7,482 death-sentenced cases.<sup>218</sup> Gross's team surmised that "it was all but certain" that innocent people had already been wrongfully executed since the early 1970s.<sup>219</sup> If Gross's analysis holds in California, 28 people currently on California's death row may be innocent.

When examining 325 wrongful convictions later exonerated by DNA testing, criminologists found that the leading cause of false convictions was eyewitness misidentification (occurring in 72 percent of DNA exoneration cases).<sup>220</sup> The procedures that most commonly elicited eyewitness misidentification included photo arrays, in-court identifications, and live line-ups.<sup>221</sup> Cross-racial eyewitness misidentification accounted for 41 percent of these cases, 15 percent involved misidentifications of people

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<sup>214</sup> *Id.* at 588-589.

<sup>215</sup> Vicente Benavides, *Sentenced to Death by False Forensics, to Be Freed after 26 Years on Death Row*, Death Penalty Information Center (Apr. 18, 2018).

<sup>216</sup> 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) at <https://slate.com/news-and-politics/2020/07/california-death-row-covid-misconduct-becerra.html>. 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), at <https://www.nytimes.com/2021/01/23/opinion/sunday/kevin-cooper-dna.html>. 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).

<sup>217</sup> National Coalition to End the Death Penalty, *Exonerations of Innocent Men and Women* (last visited Mar. 1, 2021); Dina Fine Maron, *Many Prisoners on Death Row Are Wrongfully Convicted*, Scientific American (Apr. 28, 2014).

<sup>218</sup> 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*); see also West, et al. *Innocence Project: DNA Exonerations, 1989-2014: Review of Data and Findings From the First 25 Years*, 79 Alb. L.Rev. 717, 720, 732 (2016) (hereinafter *DNA Exonerations*) (noting that there were 325 DNA exonerations in the United States between 1989-2014).

<sup>219</sup> *Rate of False Conviction, supra*.

<sup>220</sup> *DNA Exonerations, supra*, 720, 732-735.

<sup>221</sup> *Id.* at 739.

known to the victim, and 33 percent involved multiple witnesses misidentifying the same person.<sup>222</sup>

Misapplication of forensic science (47 percent of false convictions) was the second highest cause of wrongful convictions, including those falsely convicted due to errors predominantly in the disciplines of serology, hair microscopy, bite-mark, DNA, dog scent, and fingerprint analysis.<sup>223</sup> Some of these disciplines (i.e., DNA and serology) are well validated but were misapplied due to “scientific error, overstatement, gross negligence, or other misconduct,” while other disciplines are disputed or lack scientific foundation (i.e., bite mark analysis).<sup>224</sup>

False confessions (27 percent of false convictions) and use of informants who received rewards or incentives in exchange for their testimony (15 percent of false convictions) were the third and fourth highest causes of wrongful convictions.<sup>225</sup> Indeed, the use of informants was found to be the leading cause of wrongful capital convictions (the cause of 51 out of 111 wrongful capital convictions) by the Northwestern University School of Law’s Center on Wrongful Convictions.<sup>226</sup> Finally, as described below, more than half of the 70 reversed California death sentences in federal court were overturned due to ineffective assistance of trial counsel.<sup>227</sup>

## VI. Costs and Dysfunction

### A. Data on costs

The Legislative Analyst’s Office estimated in 2016 that eliminating the death penalty in California would save the state over \$150 million per year.<sup>228</sup>

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<sup>222</sup> *Id.* at 737.

<sup>223</sup> *Id.* at 745.

<sup>224</sup> *Id.* at 744.

<sup>225</sup> *See id.* at 733. The percentages among eyewitness misidentification (72%), misapplication of forensic science (47%), false confessions (27%), and use of informants (15%) add up to more than 100% because some wrongful convictions were caused by more than one of these factors. *See id.*

<sup>226</sup> *The Snitch System: How Snitch Testimony Sent Randy Steidl and other Innocent Americans to Death Row*, Northwestern University School of Law Center on Wrongful Convictions, 3 (Winter 2004-05) (discussing that 51 of 111 death row exonerations nationally since capital punishment was resumed in the 1970s “were based in whole or part on the testimony of witnesses with incentives to lie”). Erroneous eyewitness identification (25.5% of cases), false confessions (14.4%), and false or misleading scientific evidence (9.9%) comprised the second, third, and fourth leading causes of wrongful capital convictions nationwide. *Id.*

<sup>227</sup> Data provided by the Office of the State Public Defender. This data further breaks down as follows: of 25 capital murder convictions reversed by federal courts, state misconduct accounted for 32% of reversals (eight reversals), trial court error - 28% (seven reversals), ineffective assistance of counsel - 24% (six reversals), and other reasons - 16% (four reversals). Of 45 federal reversals of death judgments only, ineffective assistance of counsel accounted for 68% of reversals (31 reversals), trial court error - 13.3% (six reversals), state misconduct - 11.1% (five reversals), and other reasons - 6.6% (three reversals).

<sup>228</sup> Legislative Analyst’s Office, *Proposition 62: Death Penalty. Initiative Statute* (Nov. 8, 2016).

Professor Paula Mitchell and Ninth Circuit Judge Arthur Alarcon similarly calculated in 2011 that death penalty costs totaled billions more tax dollars than life without possibility of parole (LWOP) cases since the late 1970s, and concluded that capital punishment is “a multibillion-dollar fraud on California taxpayers.”<sup>229</sup> According to Professor Mitchell and Judge Alarcon, California spent a total of \$4 billion exclusively on the death penalty from 1978 through 2011, but executed only 13 people.<sup>230</sup> Professor Mitchell and Judge Alarcon forecasted that continuing the current death penalty system from 2013 through 2050 would cost taxpayers “an additional \$5 billion to \$7 billion over the cost of LWOP,”<sup>231</sup> while nearly all inmate deaths on death row would result from natural causes or suicide rather than by state execution.<sup>232</sup>

Proponents of the death penalty argue that executions can save the state money. The backers of Proposition 66 pledged that it would bring costs down by executing people convicted of capital offenses more quickly, “after five to ten years” of time to appeal.<sup>233</sup> They argue that swift executions would save California taxpayers money on death row inmates’ “meals, healthcare, privileges and endless legal appeals” under the current system.<sup>234</sup>

In reality little has changed since the passage of Proposition 66. As explained below, costs are significantly greater at every stage of death penalty litigation compared to LWOP cases, as are prison expenditures to house people on death row.

*Trial costs.* Researchers have calculated a death penalty trial alone adds between \$500,000<sup>235</sup> and \$1.2 million<sup>236</sup> to the costs of a murder trial for a number of reasons, which haven’t changed since the passage of Proposition 66: Two court-appointed lawyers typically represent individuals facing the death penalty,<sup>237</sup> the juror selection

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<sup>229</sup> 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*).

<sup>230</sup> *Id.* at S41.

<sup>231</sup> Alarcon, et al., *Costs of Capital Punishment in California: Will Voters Choose Reform This November?*, 46 Loy. L.A. L. Rev. S1, S4 (2012) (hereinafter *Costs of Capital Punishment*).

<sup>232</sup> *See id.*

<sup>233</sup> *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 . . .”).

<sup>234</sup> *Id.*

<sup>235</sup> CCFJA Report, *supra*, at 145 (finding this to be a conservative estimate).

<sup>236</sup> *Death Penalty Debacle, supra*, 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).

<sup>237</sup> 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. The American Bar Association guidelines require “no fewer than two [qualified] attorneys . . . an investigator, and a mitigation specialist.” *See* ABA Guidelines, Guideline 4.1.A.1.

process takes longer and requires a greater number of people in the initial pool to find “death qualified” jurors who are open to all potential punishments, the trial lasts longer and thus judiciary and jail costs are higher, and the separate “penalty phase” trial requires supplemental experts and extensive investigation generally unrelated to the “guilt phase” of a death penalty trial.<sup>238</sup> Clerical expenditures are also greater since California law mandates that transcripts be created for all death penalty trials – which average over 9,000 pages in length.<sup>239</sup> On the other hand, death penalty advocates argue that cost savings may be partially offset if elimination of the death penalty leads some defendants to choose trial who otherwise would have pled guilty to LWOP.<sup>240</sup>

*Appellate costs.* The subsequent direct appeals and habeas corpus proceedings in death penalty cases are also time consuming and costly. In 2008, the California Commission on the Fair Administration of Justice estimated that at least \$54 million per year was spent on “post-trial review of death cases in California.” Current budget totals for *solely defense expenditures* on these appellate cases is now \$43.2 million annually.<sup>241</sup> This amount does not include the costs to prosecute these cases, nor does it include any appellate court expenditures. Thus, current costs likely exceeded those in 2008, despite Proposition 66’s cost-cutting promises.

*Federal habeas costs.* Additionally, because federal law requires that attorneys be appointed to represent people sentenced to death in their federal habeas proceedings, millions of federal taxpayer dollars are also spent on investigating and litigating California death penalty cases in federal court. Federal expenditures for California death penalty cases averaged a total of \$635,000 per case in the 194 federal cases closed before 2010 – not including costs associated with the Capital Habeas Units of the Federal Defender in the Eastern and Central Districts of California which were estimated to be around \$1.58 million per case.<sup>242</sup> In total, federal expenditures for California death penalty cases were estimated to exceed \$775 million from the 1970s through 2010.<sup>243</sup>

*Prison costs.* It costs around \$40,000 more each year to house an inmate on death row than to house an LWOP inmate, primarily because California death row includes

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<sup>238</sup> Legislative Analyst’s Office, *Proposition 62: Death Penalty. Initiative Statute* (Nov. 8, 2016)

<sup>239</sup> Penal Code § 190.9 (mandating transcripts for all death penalty cases); *Death Penalty Debacle, supra*, at S78.

<sup>240</sup> Legislative Analyst’s Office, *Proposition 62: Death Penalty. Initiative Statute* (Nov. 8, 2016).

<sup>241</sup> The current annual budgets for (1) the Habeas Corpus Resource Center (a publicly funded California 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).)

<sup>242</sup> *Death Penalty Debacle, supra*, at S94, S97.

<sup>243</sup> *Id.* at S98-S99.

additional security measures and personnel.<sup>244</sup> The backers of Proposition 66 asserted they would reduce death row housing costs by giving the California Department of Corrections and Rehabilitation authority to move individuals into other housing. Four years since passage of the initiative, only 44 individuals on death row are housed outside of San Quentin – and half of them (22 people) appear to be housed in medical facilities<sup>245</sup> where infirm people on death row had been previously housed before the passage of Proposition 66.<sup>246</sup>

## **B. Length of post-conviction review and sources of delay**

In total, 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.<sup>247</sup> In reality, most people die before their appeals are concluded: Since 1978, a total of 149 people on death row have died from natural causes, suicide, COVID-19, or other non-execution related reasons.<sup>248</sup>

While Proposition 66 promised to speed up cases through the 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,<sup>249</sup> up from 17 years in 2015,<sup>250</sup> and 12 years in 2008.<sup>251</sup> The timeframe to complete 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.<sup>252</sup>

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<sup>244</sup> *Costs of Capital Punishment, supra*, 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*.

<sup>245</sup> Those facilities are California Medical Facility (4 people), and California State Prison, Corcoran (18 people).

<sup>246</sup> Data provided by CDCR Office of Research.

<sup>247</sup> Data compiled by the Office of the State Public Defender.

<sup>248</sup> *Condemned Inmates Who Have Died Since 1978*, California Department of Corrections and Rehabilitation (Mar. 10, 2021).

<sup>249</sup> HCRC Report, *supra*, at 11.

<sup>250</sup> *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.”).

<sup>251</sup> CCFAJ Report, *supra*, at 123.

<sup>252</sup> HCRC Report, *supra*, at 12-13.



To date, just 118 out of more than 1,000 Californians sentenced to death since 1978 have concluded the process of postconviction review in state and federal court.<sup>253</sup> Thirty one of the 118 people who have exhausted all appeals are eligible for execution, an additional 11 were executed, and six died of natural causes after their appeals were complete.<sup>254</sup> The other 70 obtained relief from their death sentences.<sup>255</sup> The 31 people who have exhausted all appeals have spent an average of roughly 34 years awaiting execution on death row.<sup>256</sup>

According to the Habeas Corpus Resource Center (“HCRC”), the principal reason for the extraordinary long timetable is the “acute shortage of qualified, competent attorneys willing and able to accept appointments in habeas corpus proceedings.”<sup>257</sup> On average, it takes eight to ten years after being sentenced to death for habeas counsel to be appointed.<sup>258</sup> Currently, there are 363 death-sentenced people awaiting appointment of counsel, more than half of all people sentenced to death in California.<sup>259</sup>

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 percent.<sup>260</sup> This recommendation has never been adopted, and HCRC continues to employ the same number of attorneys 13 years later.<sup>261</sup>

Despite arguments by proponents of Proposition 66 that the measure would “speed up” death penalty appeals,<sup>262</sup> the new law has made post-conviction proceedings slower.

Under Proposition 66, superior courts are now in charge of appointing capital habeas counsel, but so far only three additional attorneys have been included in the pool of prospective capital habeas counsel under the new system, and no new

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<sup>253</sup> *Id.* at 12-13 (stating that 116 people sentenced to death since 1978 had concluded the habeas appeals process by December 2020). Since December 2020, two additional people have exhausted their appeals. *Dean P. Carter v. Broomfield*, Case No. 20-6310 (cert. denied Feb. 22, 2021); *Deondre Arthur Staten v. Ronald Davis*, Case No. 20-6210 (cert. denied Mar. 1, 2021).

<sup>254</sup> This data was compiled by the Office of the State Public Defender.

<sup>255</sup> HCRC Report, *supra*, at 13.

<sup>256</sup> *Id.*

<sup>257</sup> As of December 2020, the average time on death row for the 29 people who have exhausted their appeals was 33.8 years. (*Id.* at 14.) 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.

<sup>258</sup> CCFAJ Report, *supra*, at 145.

<sup>259</sup> See HCRC Report, *supra*, at 10.

<sup>260</sup> CCFAJ Report, *supra*, at 135.

<sup>261</sup> HCRC Report, *supra*, at 15.

<sup>262</sup> See *Voter Information Guide: Argument in Favor of Proposition 66*, Cal. Secretary of State, Elections Division, 108 (Nov. 8, 2016).

appointments of habeas counsel have been made.<sup>263</sup> In addition, by requiring that superior courts process habeas cases, Proposition 66 created an additional level of review. Now 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 contemplated by Proposition 66, the cases of 19 petitioners are currently stayed in the California Court of Appeal, waiting to have habeas counsel appointed.<sup>264</sup>

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.<sup>265</sup>

### C. Poor quality defense at trial leads to death sentences

When he initiated a death penalty moratorium in 2019, Governor Newsom highlighted that capital sentences in California are “unjustly and unfairly applied to people who cannot afford legal representation.”<sup>266</sup> Professor Mitchell and Judge Alarcon agreed that “[i]t is universally acknowledged that ineffective counsel is the primary reason so many defendants are sentenced to death.”<sup>267</sup>

Indeed, over half (37) of the 70 California death sentences overturned by federal courts occurred on grounds that trial counsel provided prejudicially ineffective assistance.<sup>268</sup> In most of those 37 cases, the death judgment was reversed because defense counsel failed to investigate or present potential mitigating evidence during the penalty phase of the trial.<sup>269</sup> This is also one of the leading reasons why most death verdicts have been overturned in California overall, in both state and federal court.<sup>270</sup> It is likely that the death sentences of many more individuals will eventually be overturned due to ineffective trial counsel once post-conviction counsel has been appointed in the cases awaiting appointment.<sup>271</sup>

Nearly all people on death row were appointed defense counsel funded by the county or state because they did not have the financial resources to retain private counsel.<sup>272</sup> Attorneys with histories of ineptitude have repeatedly been appointed to

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<sup>263</sup> HCRC Report, *supra*, at 10 n. 3, 25.

<sup>264</sup> *Id.* at 10-11.

<sup>265</sup> *Id.* at 9.

<sup>266</sup> Governor’s Executive Order N-09-19 (Mar. 13, 2019).

<sup>267</sup> 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).

<sup>268</sup> This data, compiled by the Office of the State Public Defender, is on file with Committee staff.

<sup>269</sup> *Id.* In total, ineffective assistance of counsel is the reason federal courts have overturned 31 death judgments and reversed 6 capital murder convictions.

<sup>270</sup> CCFAJ Report, *supra*, at 129; updated data compiled by the Office of the State Public Defender.

<sup>271</sup> See HCRC Report, *supra*, at 10 (noting that 363 people on death row do not yet have habeas counsel).

<sup>272</sup> Data compiled by the California Appellate Project.

represent indigent people facing death.<sup>273</sup> For example, one lawyer who has represented four men sentenced to death in San Bernardino County told the jury in one case that “execution would help his client,” and failed to speak with another client – an individual ultimately executed despite the failures of his counsel – outside of trial.<sup>274</sup> In LA County, attorneys with “prior or subsequent misconduct charges” represented over one-third of the 22 cases where individuals received death sentences sought by District Attorney Jackie Lacey’s office.<sup>275</sup>

Many counties also do not provide adequate pay or resources to indigent capital counsel. For example, the funding provided for capital counsel by many counties fails to meet the requirements of the American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases – well-recognized as establishing the required norms for competent death penalty counsel.<sup>276</sup>

Additionally, many counties employ a flat-fee contract structure for indigent (non-public defender) capital defense counsel, which can provide incentives contrary to the best interests of the accused.<sup>277</sup> For example, in Riverside County, the compensation structure discourages trial counsel from attempting to negotiate a less severe sentence or conduct early investigation into penalty phase mitigation (known as the best tool to negotiate a more favorable non-death plea).<sup>278</sup> Instead, trial counsel are financially incentivized to take every death eligible case to trial.<sup>279</sup> Unsurprisingly, in most death sentenced cases arising out of Riverside, trial counsel elected to present only one day of mitigation evidence, and some presented no mitigation evidence whatsoever.<sup>280</sup> In comparison, seven days of mitigation evidence was presented on behalf of the single death row defendant represented by the Los Angeles County Public Defender’s Office in 2020.<sup>281</sup>

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<sup>273</sup> FPP II, *supra*, at 17-18, 42; FPP I, *supra*, at 34, 38-39.

<sup>274</sup> FPP II, *supra*, at 17-18.

<sup>275</sup> 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) (hereinafter ACLU LA Report).

<sup>276</sup> CCFAJ Report, *supra*, at 130; see *Wiggins v. Smith*, 539 U.S. 510, 524 (2003) (finding that the ABA Guidelines establish “standards to which we long have referred as ‘guides to determining what is reasonable.’”); *In re Lucas*, 33 Cal.4th at 725 (same).

<sup>277</sup> See CCFAJ Report, *supra*, at 125-26.

<sup>278</sup> FPP I, *supra*, at 33.

<sup>279</sup> *Id.* (explaining that trial counsel’s fees are reduced by half if the prosecution decides not to seek the death penalty before trial and reduced by 70-75% of the client agrees to take a plea).

<sup>280</sup> *Id.* at 33-34.

<sup>281</sup> FPP, Part II, *supra*, at 30.

## D. Most judgments do not survive review

At bottom, most sentences of death ultimately are reversed in California<sup>282</sup> and throughout the United States.<sup>283</sup> In California, a total of 83 percent of capital cases have been reversed in state or federal court.<sup>284</sup> Although the California Supreme Court has one of the highest rates of affirming death penalty cases in the nation,<sup>285</sup> California death sentences are frequently reversed in federal court after decades of litigation expenditures in the state courts.<sup>286</sup> Federal courts have granted relief in 70 of the 118 California capital cases that have final federal judgments – a reversal rate of 60.3 percent.<sup>287</sup> In total, most of the people who obtained relief in state or federal court were resentenced to LWOP or less.<sup>288</sup>

## VII. Other Jurisdictions

At its height, the death penalty was law in the United States in all but 12 states.<sup>289</sup> Since 2004, the death penalty has been eliminated in law – either through legislative repeal or through decisions of the state’s highest court – in ten additional states.<sup>290</sup> Virginia is now poised to become the 23<sup>rd</sup> state without the death penalty and the first southern state to repeal the death penalty since the founding of the nation.<sup>291</sup> In addition, beyond California, the Governors of Oregon and Pennsylvania have placed a

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<sup>282</sup> Data compiled by the Office of the State Public Defender (data includes cases with final federal judgments, since the death judgments that are affirmed in the state system move on to the federal court habeas process).

<sup>283</sup> 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).

<sup>284</sup> Data compiled by the Office of the State Public Defender (a total of 230 out of 278 final judgments have been reversed).

<sup>285</sup> CCFAJ Report, *supra*, at 120-121, n. 21; data compiled by the Office of the State Public Defender and the Habeas Corpus Resource Center.

<sup>286</sup> *Deadly Justice*, *supra*, at 151; CCFAJ Report, *supra*, 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 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, *supra*, at 120-121, n. 21.

<sup>287</sup> Data compiled by the Office of the State Public Defender and the Habeas Corpus Resource Center.

<sup>288</sup> *Id.*

<sup>289</sup> Death Penalty Information Center, “State by State.” At: <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state>

<sup>290</sup> *Id.*

<sup>291</sup> Pilkington, *Virginia all but certain to become first southern state to abolish death penalty*, The Guardian (Feb. 5, 2021) At: <https://www.theguardian.com/us-news/2021/feb/05/virginia-first-southern-state-abolish-death-penalty>; Death Penalty Information Center, “Virginia Death Penalty Repeal Bill Gains Final Legislative Approval, Moves to Governor’s Desk.” (Feb. 4, 2021). At: <https://deathpenaltyinfo.org/news/virginia-repeal-bill-gains-final-legislative-approval-moves-to-governors-desk>.

moratorium on executions, bringing to 26 the total number of states that do not have the death penalty in law or effect.<sup>292</sup>

In total, 39 states have not carried out an execution for five years or do not have the death penalty in law.<sup>293</sup> The jurisdictions of Puerto Rico, the District of Columbia, and all other U.S. territories also do not have the death penalty.<sup>294</sup>

For 17 years, from 2003 until July 2020, the federal government did not carry out any executions.<sup>295</sup> However, in the final months of the Trump administration, the federal government carried out 13 executions between July 2020 and January 2021.<sup>296</sup> President Biden has halted federal executions<sup>297</sup> and stated that he is opposed to the death penalty.<sup>298</sup> There are currently 49 people on the federal death row.<sup>299</sup> In addition, five servicemembers are on the Military death row, which operates separately from the federal death penalty.<sup>300</sup>

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.<sup>301</sup> The vast majority of executions are carried out by China, Iran, Saudi Arabia, Iraq, and Egypt.<sup>302</sup> Several international treaties and covenants either restrict or prohibit use of the death penalty, most notably the European Convention on Human Rights.<sup>303</sup>

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<sup>292</sup> *Supra* note 271.

<sup>293</sup> Death Penalty Information Center, *Executions Overview: States with No Recent Executions*. At: <https://deathpenaltyinfo.org/executions/executions-overview/states-with-no-recent-executions>

<sup>294</sup> Death Penalty Information Center, *State and Federal Info: Puerto Rico*. At: <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/puerto-rico>; Constitution of the Commonwealth of Puerto Rico, Art. II, Section 7 (1952) (“The right to life, liberty and the enjoyment of property is recognized as a fundamental right of man. The death penalty shall not exist.”).

<sup>295</sup> Pilkington, *Civil and human rights groups urge Biden to end federal death penalty*, *The Guardian* (Feb 9, 2021). At: <https://www.theguardian.com/us-news/2021/feb/09/joe-biden-death-penalty-coalition-civil-human-rights-groups>

<sup>296</sup> *Id.*

<sup>297</sup> *Id.*

<sup>298</sup> *Id.*

<sup>299</sup> *Id.*

<sup>300</sup> Death Penalty Information Center, *Military: Facts and Figures*. At: <https://deathpenaltyinfo.org/state-and-federal-info/military/facts-and-figures>

<sup>301</sup> Amnesty International, *Death Penalty*. At: <https://www.amnesty.org/en/what-we-do/death-penalty/>

<sup>302</sup> *Id.*

<sup>303</sup> *Id.*