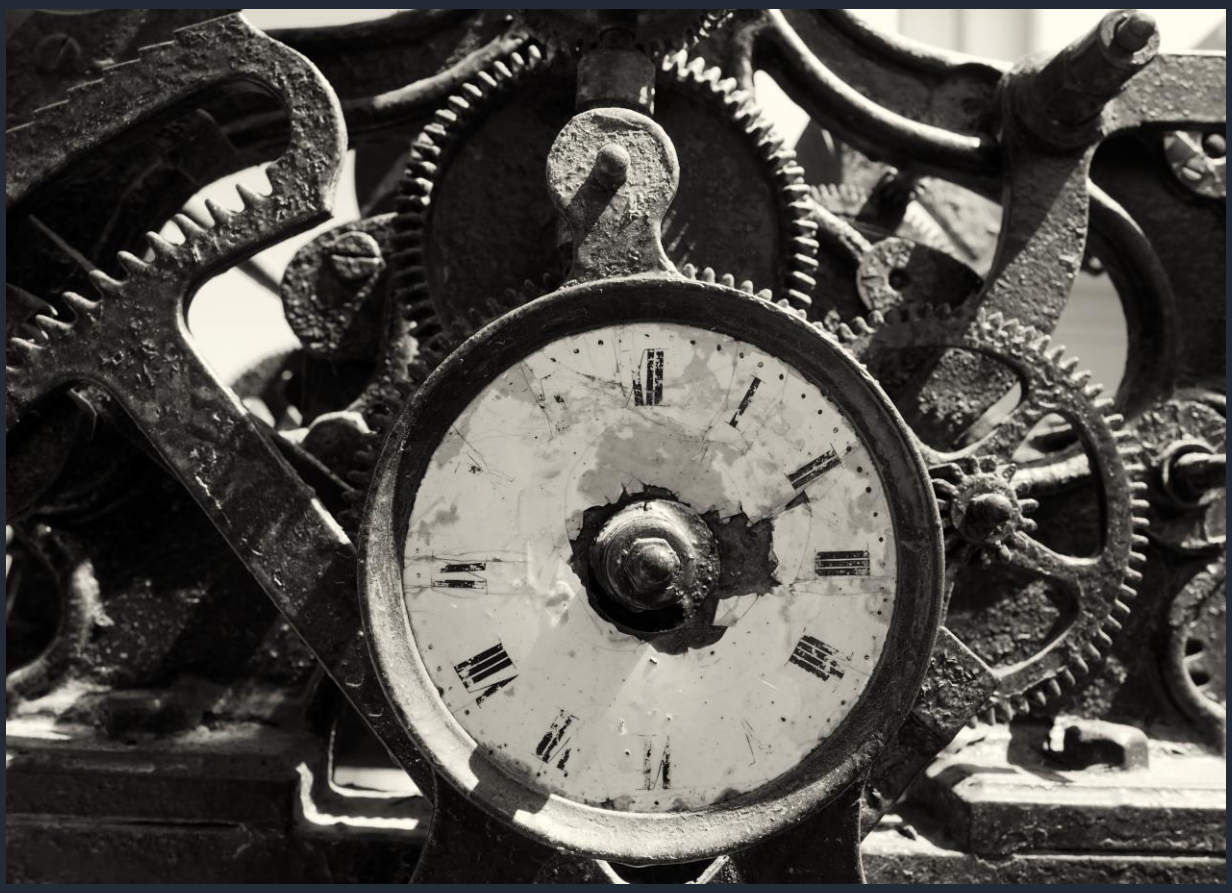
CALIFORNIA'S BROKEN DEATH PENALTY:

It's Time to Stop Tinkering with the Machinery of Death



A White Paper Report
by the Office of the State Public Defender

Submitted to the Committee on Revision of the Penal Code
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ABOUT OSPD

The Office of the State Public Defender (OSPD) has been an eyewitness to California's modern death penalty since it was reinstated in 1976. OSPD was created in 1975 by then Governor Brown to provide indigent defendants their constitutional right to counsel in any case where the defendant was entitled to counsel appointed at public expense. The intent of the statute was to raise the standards of the defense appellate bar overall, but as death penalty conviction rates rose during the 1980's and 1990's, death penalty cases quickly swamped OSPD's caseload. Beginning in 1997, OSPD's statutory mission was altered to focus primarily on death penalty appeals. Since then, OSPD has represented hundreds of individuals on appeal of their capital convictions and has extensive expertise in all aspects of capital litigation. That work has often been deeply frustrating. As this report discusses, reversal rates on direct appeal have been very low in California for the last thirty years, and our clients have often had to wait decades to win relief on meritorious claims. Many others are in limbo, still awaiting the appointment of habeas counsel. Nevertheless, OSPD's attorneys persisted.

Recently, as the nation grappled yet again with racism in policing and the criminal legal system, OSPD devoted additional resources to its amicus program and to developing systemic legal claims, with a focus on racism and other inequities in the death penalty and in other aspects of criminal law. In 2020, OSPD assumed additional responsibilities to assist the State in meeting its obligation to provide counsel to indigent defendants at the trial level by providing training and technical assistance and otherwise engaging in efforts to improve public defense. As part of this mandate, OSPD has partnered with trial counsel charged with the immense task of representing individuals charged with death eligible crimes.

OSPD's decades of experience on the frontlines of death penalty litigation in California are reflected in this report and its conclusion that the death penalty is broken beyond repair.

Mary K. McComb
State Public Defender
March 16, 2021

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INTRODUCTION

Over twelve years ago, the California Commission on the Fair Administration of Justice ("the Commission") issued a report concluding that California's death penalty was "dysfunctional" and could be fixed only by either (a) dramatically increasing funding for all stages of the capital process; (b) narrowing the scope of the death penalty; or (c) abolishing the death penalty.[1] The State of California has done none of these things.

Eleven years after the Commission's report, Governor Newsom declared a moratorium on executions, stating "California's death penalty system is unfair, unjust, wasteful, protracted and does not make our state safer."[2] The moratorium does not solve any of these problems, though. Since the moratorium was announced in March 2019, prosecutors have obtained 8 death sentences[3] and dozens of other capital cases are pending in trial courts throughout the state, many delayed because of the COVID-19 pandemic. The moratorium also has not halted post-conviction proceedings in the hundreds of cases where a death sentence has already been imposed.

The current situation demonstrates that there is no political will, and no reasonable path, to "fix" California's death penalty. As the state struggles to emerge from a pandemic that has stretched resources thin, doubling down on the death penalty is not a defensible priority. Legislative measures could remedy some of the problems identified in this Paper, but they would only further jerry-rig California's expensive and ineffective "machinery of death."[4] The only solution is to dismantle it altogether.

Ending capital punishment in California is a difficult proposition because our current death penalty law was enacted by initiative and can therefore be eliminated only by the same means (or by a court decision finding the law unconstitutional). Two initiatives to abolish the death penalty failed narrowly in recent years, one in 2012

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[1] Cal. Com. on the Fair Administration of Justice, Final Report, Death Penalty (2008), pp. 112-182 (hereafter CCFAJ Report).

[2] 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).

[3] Habeas Corpus Resource Center, Annual Report 2020 (2020) p. 8 (hereafter HCRC Report).

[4] *Callins v. Collins* (1994) 510 U.S. 1141, 1145 (conc. opn. of Blackmun, J.) ("From this day forward, I no longer shall tinker with the machinery of death.").

and one in 2016.[5] In both instances, a high percentage of voters were undecided going into the election.[6] In 2016, many voters were confused by a competing initiative – Proposition 66 – which falsely promised to reform California's death penalty by shortening time limits and changing procedures for the appointment of counsel.[7] Californians, confronting these initiative measures in a vacuum of information, voted by slim margins to retain the death penalty.[8]

Justice Thurgood Marshall believed that if people were informed about the flaws in the death penalty—including that it is imposed in a discriminatory manner, that the innocent are sentenced to death, and that it "wreaks havoc with our entire criminal justice system"—they would support abolition.[9] The flaws Justice Marshall identified nearly 50 years ago are all evident today in California.

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[5] In 2012, Proposition 34 failed by just 48 to 52 percent < https://ballotpedia.org/California_Proposition_34,_Abolition_of_the_Death_Penalty_Initiative_(2012)> (as of Feb. 22, 2021). In 2016, Proposition 62 failed by 47 to 53 percent. < https://ballotpedia.org/California_Proposition_62,_Repeal_of_the_Death_Penalty_(2016)#cite_ref-65> (as of Feb. 22, 2021).

[6] For example, in a USC Dornsife/LA Times poll conducted between October 22 and 30, 2016, voters were narrowly divided with 43 percent in favor of the repeal measure, Proposition 62, 46 percent against, and 11 percent undecided. < https://ballotpedia.org/California_Proposition_62,_Repeal_of_the_Death_Penalty_(2016)#cite_ref-65> (as of Feb. 22, 2021). The same USC Dornsife/LA Times poll conducted in mid-October 2012 found 42 percent in favor of the abolition measure and 45 percent of voters opposed, with 13 percent undecided. < https://ballotpedia.org/California_Proposition_34,_Abolition_of_the_Death_Penalty_Initiative_(2012) > (as of Feb. 22, 2021).

[7] See *Briggs v. Brown* (2017) 3 Cal.5th 808, 854 (the judicial deadlines in the new statutes are not binding but only "aspirational"). As Justice Liu noted in his concurring opinion in *People v. Potts* (2019) 6 Cal.5th 1012, 1066:

> Proposition 66 thus did not enact or put to the voters the key reforms that leading authorities consider fundamental to a workable death penalty system. Proposition 66 did not reduce the bottlenecking of direct appeals in this court. It did not provide additional resources to enable this court, the courts of appeal, or the trial courts to expedite capital cases. And it did not provide additional resources for appointment of qualified counsel.

[8] See note 4, *supra*. Proposition 66 passed narrowly, 51 to 49 percent. < https://ballotpedia.org/California_Proposition_66,_Death_Penalty_Procedures_(2016)> (as of Feb. 22, 2021).

[9] *Furman v. Georgia* (1972) 408 U.S. 238, 363-364 (conc. opn. of Marshall, J.).

If Justice Marshall was right, then Californians once fully informed about the dysfunction of the death penalty, its inequities, and its human and monetary costs, will decide finally to abandon it.

Indeed, since the Commission's report in 2008, eight other states – Colorado, Connecticut, Delaware, Illinois, Maryland, New Hampshire, New Mexico, and Washington – have abolished the death penalty, bringing the number of states without the death penalty to 22.[10] Virginia is poised to bring the number of abolitionist states to 23.[11]

I. A BRIEF HISTORY OF CALIFORNIA'S MODERN DEATH PENALTY

The failure of the modern death penalty experiment in California and nationally is rooted in a series of court decisions and the responses to them.

In February 1972, the California Supreme Court ruled that the death penalty violated the state constitutional prohibition of cruel or unusual punishments.[12] In June of the same year, the United States Supreme Court held in *Furman v. Georgia* that the death penalty violated the Eighth Amendment's prohibition of cruel and unusual punishment because it was imposed arbitrarily on only a handful of defendants convicted of murder. As Justice Potter Stewart explained, the death penalty is "cruel and unusual in the same way that being struck by lightning is cruel and unusual."[13] Laws that "permit this unique penalty to be so wantonly and so freakishly imposed," he wrote, violate the Eighth and Fourteenth Amendments.[14] Other justices stressed that "untrammeled discretion" in the imposition of capital

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[10] Death Penalty Information Center (DPIC), *State by State* <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state> (as of Feb. 22, 2021).

[11] Pilkington, *Virginia All But Certain To Become First Southern State To Abolish Death Penalty,* The Guardian (Feb. 5, 2021) <https://www.theguardian.com/us-news/2021/feb/05/virginia-first-southern-state-abolish-death-penalty> (as of Feb. 22, 2021).

[12] *People v. Anderson* (1972) 6 Cal.3d 628. The *Anderson* court broadly condemned the death penalty as "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." *Id.* at p. 656

[13] *Furman v. Georgia, supra,* 408 U.S. at p. 309 (conc. opn. of Stewart, J.).

[14] *Id.* at p. 310 (conc. opn. of Stewart, J.).

punishment "was an open invitation to discrimination."[15] The *Furman* Court left open the possibility that the constitutional flaws it identified could be cured if death penalty laws were rewritten to limit discretion and to apply more narrowly.

California, anticipating a national trend, promptly reinstated capital punishment. In November 1972, over two-thirds of California voters approved Proposition 17, which superseded *Anderson* by amending the California Constitution to expressly authorize the death penalty.[16] In 1973, California responded to *Furman* by adopting a mandatory death penalty law that eliminated all sentencing discretion.[17] Other states also swiftly enacted new capital sentencing laws intended to address *Furman*'s concerns.[18]

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[15] *Id.* at p. 365 (conc. opn. of Marshall, J.); accord *id.* at p. 255 (conc. opn. of Douglas, J.). See Baumgartner et al., Deadly Justice: A Statistical Portrait of the Death Penalty (2018) p. 6 (noting justices condemned two contrary aspects of arbitrariness – randomness and discrimination) (hereafter Deadly Justice); Meltsner, Cruel and Unusual: The Supreme Court and Capital Punishment (2011 ed.) pp. 215-218 (same).

[16] <https://ballotpedia.org/California_Proposition_17,_Death_Penalty_in_the_California_Constitution_(1972)> (as of Feb. 22, 2021) (Proposition 17 was approved by 67.5 percent of voters in 1972). Article I, section 27 provides in full:

> All statutes of this State in effect on February 17, 1972, requiring, authorizing, imposing, or relating to the death penalty are in full force and effect, subject to legislative amendment or repeal by statute, initiative, or referendum.
>
> The death penalty provided for under those statutes 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.

[17] Stats. 1973, ch. 719, p. 1297. Seventeen other states also adopted mandatory sentencing provisions in response to *Furman*. Covey, *Exorcizing Wechsler's Ghost: The Influence of the Model Penal Code on Death Penalty Sentencing Jurisprudence* (2004) 31 Hastings Const. L.Q. 189, 207.

[18] Deadly Justice, *supra*, at pp. 10-11 (by the end of 1974, 28 states had reenacted death penalty laws; 6 more followed in 1975).

In 1976, the Supreme Court struck down mandatory death penalty laws, holding that capital sentencing must be individualized.[19] Another type of revised death penalty statute fared better, however – those based on the American Law Institute's Model Penal Code. Just four years after *Furman*, the high court expressed hope that this new generation of capital sentencing statutes would "ensure that the penalty would be applied reliably and not arbitrarily."[20] These "statutes, and the decisions upholding them, provided the blueprint for the modern American death penalty."[21]

California's next death penalty law, enacted in 1977, drew on the Model Penal Code paradigm.[22] Once the jury found true the existence of a special circumstance,

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[19] *Woodson v. North Carolina* (1976) 428 U.S. 280; *Roberts v. Louisiana* (1976) 428 U.S. 325. The California Supreme Court found the 1973 mandatory death penalty law unconstitutional in light of *Woodson* and *Roberts*. *Rockwell v. Superior Court* (1976) 18 Cal.3d 420.

[20] *Glossip v. Gross* (2015) 576 U.S. 863, 908-909 (dis. opn. of Breyer, J.); *Gregg v. Georgia* (1976) 428 U.S. 153, 193-195 (joint op. of Stewart, Powell, and Stevens, JJ.), citing Model Pen. Code & Commentaries, com. 3 to § 201.6, p. 71 (Tent. Draft No. 9, 1959); *Jurek v. Texas* (1976) 428 U.S. 262, 270 (comparing Texas law to MPC); *Proffitt v. Florida* (1976) 428 U.S. 242, 247-248 (Florida statute based on MPC); Steiker & Steiker, *Part II: Report to the ALI Concerning Capital Punishment* (2010) 89 Tex. L.Rev. 367, 368-369 (prepared at the request of ALI Director Lance Liebman) (noting that, prior to 1972, states had largely ignored section 210.6 of the Model Penal Code but turned to it after *Furman* "as a template for their revised statutes, hoping in part that the prestige of the Institute would help to validate these new efforts") (hereafter Steiker & Steiker, ALI Report).

[21] Steiker & Steiker, ALI Report, *supra*, 89 Tex. L.Rev. at p. 369; see also Covey, *supra,* 31 Hastings Const. L.Q. at p. 208 ("[v]irtually every death penalty jurisdiction now follows the MPC model with greater or lesser variations"); accord, *Davis v. Mitchell* (6th Cir. 2003) 318 F.3d 682, 686 ("After *Furman* was decided in 1972, many states incorporated aspects of the Model Penal Code in their statutes reinstating the death penalty."); Koosed, *Averting Mistaken Executions by Adopting the Model Penal Code's Exclusion of Death in the Presence of Lingering Doubt* (2001) 21 N. Ill. U. L.Rev. 41, 50 ("True to its name, the Model Penal Code serves as the model for our present procedures of capital sentencing.").

[22] California's statute, like the Model Penal Code provision, requires that "aggravating" and "mitigating" factors be weighed against each other to arrive at the sentencing decision. Cal. Pen. Code, § 190.3; Covey, *supra*, 31 Hastings Const. L.Q. at p. 222. Several of the sentencing factors are also phrased similarly to the Model Penal Code provisions. Compare Model Pen. Code, § 210.6(4)(b)-(g) (withdrawn 2009) with

rendering the defendant eligible for the death penalty, "a further hearing was held – the penalty phase – at which a wide range of evidence in 'aggravation' or 'mitigation' could be introduced, including the nature and circumstances of the offense, prior criminal activity by the defendant involving force or violence, and 'the defendant's character, background, history, mental condition and physical condition.'"[23]

California again presaged a national trend by almost immediately broadening the scope of its death penalty. In 1978, voters passed another proposition, known as the Briggs Initiative, which "was intended to 'give Californians the toughest death-penalty law in the country,'" one that would "apply to every murderer."[24] The initiative "more than doubled the number of special circumstances" in the statute, greatly expanding death eligibility in California.[25] The Briggs Initiative ushered in a long period of tough-on-crime policies that would expand the death penalty and increase the length of noncapital sentences.[26] After 1978, California continued to expand the number of special circumstances that determine eligibility for the death penalty.[27] Other states did the same,[28] but California's statute is exceptionally broad:

Cal. Pen. Code, § 190.3, factors (d), (e), (f), (j), (g) & (h). Unlike the Model Penal Code, however, section 190.3 does not designate the sentencing factors as either aggravating or mitigating, a feature that has generated confusion. Compare Model Pen. Code, § 210.6(3) & (4) with Cal. Pen. Code, § 190.3.

[23] *People v. Green* (1980) 27 Cal.3d 1, 49 n. 34 (describing former Cal. Pen. Code, § 190.3), abrogated by *People v. Martinez* (1999) 20 Cal.4th 225.

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

[25] *Id.* at pp.1312-1313.

[26] See Simon, Governing Through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear (2007) pp. 62, 157-158.

[27] Shatz & Rivkind, *supra*, 72 N.Y.U. L.Rev. at pp. 1314-1315 (describing expansion of death eligibility after Briggs Initiative); Grosso et al., *Death by Stereotype: Race, Ethnicity, and California's Failure to Implement Furman's Narrowing Requirement* (2019) 66 UCLA L.Rev. 1394, 1406 (describing expansion of special circumstances by the legislature and by initiative in the mid-1990s to 2000).

[28] Note, *The "Most Deserving" of Death: The Narrowing Requirement and the Proliferation of Aggravating Factors in Capital Sentencing Statutes* (2011) 46 Harv. C.R.-C.L. L.Rev. 223; Simon & Spaulding, *Tokens of Our Esteem: Aggravating Factors in the Era of Deregulated Death Penalties* in The Killing State: Capital Punishment in Law, Politics, and Culture (Austin Sarat 1999) pp. 81-83.

Studies have found that as many as "95 percent of all first-degree murder convictions" are eligible for a death sentence under the 2008 California statute.[29]

The modern death penalty envisioned in *Gregg* – a narrowly targeted law that would result in only the "worst of the worst" being sentenced to death – did not materialize.[30] While the Supreme Court set some constitutional guidelines – requiring mitigating evidence, excluding some categories of offenders (juveniles and the intellectually disabled) – it largely abdicated constitutional oversight of other issues, including race discrimination.[31]

Most of all, because so many states, like California, expanded their death penalty statutes, giving prosecutors broad discretion whether to pursue a death sentence in any given case, the arbitrariness that *Furman* identified as the death penalty's fatal constitutional flaw is as bad or worse now than when *Furman* was decided.[32]

As Justice Breyer observed, the experience of the last forty years has only made it "increasingly clear that the death penalty is imposed arbitrarily, i.e., without the 'reasonable consistency' legally necessary to reconcile its use with the Constitution's commands."[33]

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[29] Grosso et al., *supra*, 66 UCLA L.Rev. at p.1409; see also CCFAJ Report, *supra*, at p. 120 ("Under the death penalty statute now in effect, 87% of California's first degree murders are 'death eligible' and could be prosecuted as death cases,"citing Shatz & Rivkind, *supra,* 72 N.Y.U. L.Rev. at p. 1331).

[30] *Gregg v. Georgia, supra*, 428 U.S. at pp. 206-207 (plur. opn. of Stewart J.); *Kansas v. Marsh* (2006) 548 U.S. 163, 206 (dis. opn. of Souter, J.) ("within the category of capital crimes, the death penalty must be reserved for 'the worst of the worst'"); Note, *supra,* 46 Harv. C.R.-C.L. L.Rev. at p. 230 ("*Gregg* envisioned a death penalty scheme in which aggravating factors genuinely narrowed the scope of jurors' discretion to a smaller, more culpable subset of offenders for whom death sentences would be more consistently imposed.").

[31] Steiker and Steiker, Courting Death (2016) pp. 78-115 (discussing the Supreme Court's "failure to address forthrightly the death penalty's racialized history") (hereafter Courting Death); *id.* at pp. 154-192 (discussing failures of constitutional regulation of the death penalty generally, including the "missed opportunity" of *McCleskey v. Kemp* (1987) 481 U.S. 279).

[32] Courting Death, *supra*, at pp. 151-153.

[33] *Glossip v. Gross, supra,* 576 U.S. at p. 917 (dis. opn. of Breyer, J.), quoting *Eddings v. Oklahoma* (1982) 455 U.S. 104, 112.

The persistence of these problems led the American Law Institute itself to conclude in 2009 that the effort to regulate capital punishment was an abject failure. The Institute withdrew its model code provisions on the death penalty.[34] The breadth of capital sentencing statutes and the corresponding discretion accorded to actors administering them creates a medium where "arbitrary factors (such as geography and quality of representation) and invidious factors (most prominently race)" continue to determine who is sentenced to death.[35]

As discussed below, California's death penalty law suffers from all these flaws:

- It is applied in a racially discriminatory manner;
- A handful of counties impose the vast majority of death sentences, without regard to underlying crime rates;
- The death penalty is not imposed on the worst of the worst but disproportionately on young offenders, especially youth of color, on people who are seriously mentally ill or intellectually disabled, on people who have suffered extreme childhood trauma, and even on those who are innocent;
- The arbitrary application of the law is exacerbated by
    - the uneven quality of indigent defense, and
    - the failure to limit the prosecution to one penalty trial;
- Taxpayers pay billions to defend death judgments that are most often reversed after decades of litigation; and
- The system is characterized by delay and dysfunction because there are simply not enough lawyers to represent the hundreds of people who have been sentenced to death – a problem made worse by the passage of Proposition 66.

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[34] Liptak, *Group Gives Up Death Penalty Work*, N.Y. Times (Jan. 4, 2009) <https://www.nytimes.com/2010/01/05/us/05bar.html> (as of Feb. 22, 2021); *Leading Law Group Withdraws Model Death Penalty Laws Because System is Unfixable*, Death Penalty Information Center (Oct. 26, 2009) <https://deathpenaltyinfo.org/news/leading-law-group-withdraws-model-death-penalty-laws-because-system-is-unfixable> (as of Feb. 4, 2021). The authors of the report that led to the repeal stressed that while the constitutionality of the death penalty was premised on narrowing the scope of its application, "the scope of most capital statutes remains extraordinarily broad." Steiker & Steiker, ALI Report, *supra*, 89 Tex. L.Rev. at p. 379.

[35] Steiker & Steiker, ALI Report, *supra*, 89 Tex. L.Rev. at p. 369; see also *Glossip, supra*, 576 U.S. at pp. 917-919 (dis. opn. of Breyer, J.).

II. CALIFORNIA'S DEATH PENALTY STATUTE IS APPLIED IN A RACIALLY DISCRIMINATORY MANNER.

As the California legislature recently acknowledged, it is a stark reality that "racism . . . pervades the criminal justice system."[36] California's death penalty system is no exception. A robust body of empirical evidence demonstrates that California's death penalty statute is applied in a disparate manner based on race.

The racial disparities that permeate California's death penalty are the predictable result of a system that is vulnerable to racial bias at nearly every stage. The overbreadth of California's statute gives prosecutors vast discretion to decide who will be charged with death-eligible homicides; jury selection procedures systematically produce whiter, more racially biased juries; and the statute's poorly defined aggravating and mitigating factors encourage jurors to resort to racial stereotypes in deciding who lives and who dies.

A. Racism Permeates California's Death Penalty System

The overwhelming majority of studies that have analyzed the death penalty in the United States have found that racial disparities are pervasive, and that the race of the victim and race of the defendant impact whether the death penalty will be imposed.[37] In particular, Black defendants who kill White victims are more likely to

[36] Assem. Bill. No. 2542 (2019-2020 Reg. Sess.) §2(h).

[37] See, e.g., U.S. Gen. Acct. Off., GAO/GGD 90-57, Death Penalty Sentencing: Research Indicates Pattern of Racial Disparities, pp. 1-2, 5 (1990) (conducting an "evaluation synthesis" of the published research on race and the death penalty, and finding, consistently, that the race of the victim influenced the likelihood of capital charging and sentencing).

be sentenced to death than those who kill Black victims.[38] These findings have been exhaustively replicated in both the state[39] and federal systems.[40]

This evidence of discriminatory application is partially responsible for the death penalty "fall[ing] out of favor in most of the country. . . ."[41] Indeed, a group of nearly 100 current and former elected prosecutors, Attorneys General, law enforcement leaders, former United States Attorneys, and Department of Justice officials, including the District Attorneys of Contra Costa, San Francisco, Santa Clara, and Los Angeles Counties, recently issued a statement opposing the federal death penalty and calling for clemency for those scheduled for federal execution in part because "[r]ace . . . plays a deeply disturbing and unacceptable role in the application of the death penalty."[42]

California is not immune to the invidious influence of racial bias in its application of the death penalty. There are substantial disparities in sentencing in California based on both the race of the victim and the race of the defendant.

Race of victim. In the only statewide study of the effect of race in California capital cases from start to finish, social scientists Glenn Pierce and Michael Radelet found that cases with White victims were much more likely to end in a death sentence

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[38] See Am. Bar Assoc., ABA Death Penalty Due Process Review Project, The State of the Modern Death Penalty in America: Key Findings of State Death Penalty Assessments (2006-2013) (Nov. 2013) p. 8.

[39] See, e.g., DPIC, Enduring Injustice: The Persistence of Racial Discrimination in the U.S. Death Penalty (Sep. 2020) pp. 30-34 (summarizing the consistent findings of studies in "multiple jurisdictions over a broad range of years . . . [and] accounting for hundreds of confounding variables" that conclude that the race of the victim affects whether a defendant is charged with a capital crime or sentenced to death).

[40] See, e.g., U.S. Dept. of Justice, The Federal Death Penalty System: A Statistical Survey (1988-2000) (2000) at p. 6 (finding that U.S. Attorneys were almost twice as likely to recommend seeking the death penalty for a Black defendant when the victim was not Black as when the victim was Black).

[41] Fair Punishment Project, Too Broken to Fix: Part I: An In-depth Look at America's Outlier Death Penalty Counties (2016) p. 3 (hereafter FPP I).

[42] Fair and Just Prosecution, Joint Statement By Criminal Justice and Law Enforcement Leaders in Opposition to Application of the Federal Death Penalty (Dec. 2020) p. 1 < https://fairandjustprosecution.org/wp-content/uploads/2020/12/FJP-Federal-Death-Penalty-Joint-Statement.pdf> (as of Feb. 22, 2021), citing ACLU, Race and the Death Penalty <https://www.aclu.org/other/race-and-death-penalty> (as of Feb. 22, 2021).

than cases with Black and Latinx victims.[43] Overall, people charged with killing White victims were more than three times as likely to receive a death sentence as were killers of Black victims and more than four times as likely as were killers of Latinx victims.[44] Even after controlling for geography and the heinousness of the crimes, killers of Black victims were 59.3 percent less likely to receive the death penalty as were killers of White victims, and killers of Latinx victims were 67.1 percent less likely to receive a death sentence.[45]

Pierce and Radelet's statewide findings are consistent with findings from individual California counties. In the largest and most comprehensive single-county study of the effects of race on application of the death penalty, researchers found that in San Diego County "a substantial factor in prosecutors' decision whether to charge special circumstances and in the District Attorney's decision whether to seek the death penalty was the race/ethnicity of the victims and defendants."[46] Even after controlling for a variety of variables, the study showed that the odds of the District Attorney seeking a death sentence were over seven times as high in cases with a Latinx defendant and a White victim and over six and a half times as high in cases with a Black defendant and a White victim as in cases with a Black or Latinx victim.[47] Studies from other large counties in California have found similar effects related to

[43] See Pierce & Radelet, *The Impact of Legally Inappropriate Factors on Death Sentencing for California Homicides, 1990-1999* (2005) 46 Santa Clara L.Rev. 1, 19-20.

[44] *Id.* at pp. 19, 21-22.

[45] *Id.* at p. 34.

[46] Shatz et al., *Race, Ethnicity, and the Death Penalty in San Diego County: The Predictable Consequences of Excessive Discretion* (2020) 51 Colum. Hum. Rts. L.Rev. 1070, 1096.

[47] *Id.* at p. 1095.

the race of the victim,[48] and unadjusted data from other California counties also show substantial disparities based on the race of the victim.[49]

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[48] See, e.g., Petersen, *Examining the Sources of Racial Bias in Potentially Capital Cases: A Case Study of Police and Prosecutorial Discretion* (2016) 7(1) Race & Justice 7, 23 (finding, after controlling for a wide variety of relevant factors, that in Los Angeles County "defendants accused of killing White victims are more likely to be charged with a death-eligible offense than those accused of killing minority victims"); Petersen, *Cumulative Racial and Ethnic Inequalities in Potentially Capital Cases: A Multistage Analysis of Pretrial Disparities* (2020) 45 Crim. Justice Rev. 225, 239 (determining, after controlling for a host of variables, that in Los Angeles County, cases with minority victims were treated more leniently compared to cases with White victims, and that cases with White victims and minority defendants were treated more punitively than cases with White defendants); Rohrlich & Tulsky, *Not All L.A. Murder Cases Are Equal,* L.A. Times (Dec. 3, 1996) (examining 9,442 willful homicides in Los Angeles County and finding that while 15 percent of White victim cases were charged capitally, only 7 percent of Black victim and 6 percent of Latinx victim cases, respectively, were similarly charged); Weiss et al., *Death Penalty Charging in Los Angeles County: An Illustrative Data Analysis Using Skeptical Priors* (1998) 28 Soc. Methods & Research 91, 114 (finding that, in Los Angeles County, defendants who killed White or Asian victims were more likely to be charged with a special circumstance and that Black defendants were more likely to be charged with special circumstances than other defendants, unless the victim was Black); Lee, *Hispanics and the Death Penalty: Discriminatory Charging Practices in San Joaquin County, California* (2007) 35 J. Crim. Justice 17, 21 (finding that after controlling for other variables, in San Joaquin County the likelihood of being charged with a special circumstance "for defendants in African American victim cases was one-fifth the likelihood for defendants in White . . .victim cases" and in Latinx victim cases the odds were one-twentieth those of cases with White victims); Shatz & Dalton, *Challenging the Death Penalty with Statistics: Furman, McCleskey, and a Single Case Study* (2013) 34 Cardozo L.Rev. 1227, 1229-1230 (finding "statistically significant geographic disparities in the administration of the death penalty in the two halves of Alameda County . . .which correlate with racial differences in the population makeup of the county"); Weiss et al., *Assessing the Capriciousness of Death Penalty Charging* (1996) 30 Law & Soc'y Rev. 607, 619 (finding that in San Francisco County "there is some evidence . . .that if the victim is white or Asian (compared to African American or Latino), the odds of a capital charge are about four times larger").

[49] In Riverside County, an expert declaration submitted by a capital defendant indicated that from 1992-1994, 81 percent of the capital prosecutions there involved White victims, although Whites were only 39 percent of the willful homicide victims during that period. (*People v. Montes* (2014) 58 Cal.4th 809, 827-828.) In Fresno County, a defendant presented a study showing that *all* of Fresno's sentences of death and life without parole at that point had been issued in cases with White victims, although only

Race of Defendant. Death sentences in California are also disproportionately imposed on Black and Latinx defendants. The raw numbers are stark. As of July 1, 2020, over a third of the state's death row was Black,[50] while only 6.5 percent of the state's population is Black.[51] The overrepresentation of Latinx defendants in recent years is similarly disturbing. In the last three years (2018-2020), 85 percent of people sentenced to death in California were Latinx,[52] while Latinx people comprise just 39.4 percent of the state population and fewer than half of homicide arrests from 2005 to 2019.[53]

The racial disparities in death sentences are also apparent in individual counties. California is home to five "outlier" counties that continue to impose death sentences at high rates while "the vast majority" of the country has abandoned capital punishment.[54] Kern, Los Angeles, Orange, Riverside, and San Bernardino Counties are among the just 16 of 3,143 counties or county equivalents in the United States that imposed five or more death sentences between 2010 and 2015.[55] Death sentences from those counties are disproportionately meted out against Black and Latinx defendants:

For example, over 70 percent of the people Los Angeles County has sentenced to death in the modern era are Black or Latinx.[56] During the tenure of former Los

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a third of all willful homicides in that county involved White victims. (*People v. McPeters* (1992) 2 Cal.4th 1148, 1170.) In Kern County, 50 percent of the victims in death penalty cases from 2010-2015 were White while just 20 percent of homicide victims in the state in that time period were White. (FPP I, *supra*, at p. 40.)

[50] NAACP Legal Def. & Educ. Fund, Inc., Death Row USA 36 (2020).

[51] U.S. Census Bureau, Quick Facts California (2019) <https://www.census.gov/quickfacts/CA> (as of Feb. 22, 2021).

[52] Cal. Dept. of Justice, Homicide in California (2019) p. 2; Cal. Dept. of Justice, Homicide in California (2018) p. 2; DPIC, 2020 Death Sentences by Name, Race, County, and Year <https://deathpenaltyinfo.org/facts-and-research/sentencing-data/2020-death-sentences-by-name-race-county-and-year> (as of Mar. 11, 2018).

[53] Cal. Dept. of Justice, Homicide in California (2014) p. 36 (showing homicide arrests by race from 2005 to 2014); Cal. Dept. of Justice, Homicide in California (2019) p. 38 (showing the same data from 2010 to 2019).

[54] Fair Punishment Project, Too Broken to Fix Part II: An In-depth Look at America's Outlier Death Penalty Counties (2016) p. 2-3 (hereafter FPP II).

[55] *Ibid.*

[56] Data maintained by HCRC, on file with OSPD.

Angeles District Attorney Jackie Lacey from 2012 to 2019, none of the 22 individuals sentenced to death in Los Angeles was White.[57]

In Orange County, 89 percent of the defendants sentenced to death between 2010 and 2015 were nonwhite. Forty-four percent of those sentenced to death were Black, although only two percent of the county's population was Black.[58]

San Bernardino County produced 14 death sentences between 2006-2015; 43 percent of the defendants were Black. Less than 10 percent of the county's population was Black.[59]

In Riverside County, 76 percent of defendants sentenced to death between 2010 and 2015 were people of color and 24 percent of those sentenced to death were Black, though Black people made up just seven percent of the county's population.[60]

In Kern County, 17 percent of defendants sentenced to death between 2010 and 2015 were Black although just six percent of the county's population is Black.[61]

Even if these profound disparities in the raw numbers could somehow be accounted for by non-racial factors, as one researcher has observed:

> Many consider it insensitive and unseemly, if not immoral, for a country with our historical record on slavery and racial discrimination to persist in using a punishment that whites almost exclusively administer and control, that serves no demonstrated penological function, and has a profound adverse impact – physically, psychologically, and symbolically – on its black citizens.[62]

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[57] ACLU, The California Death Penalty Is Discriminatory, Unfair, and Officially Suspended: So Why Does Los Angeles District Attorney Jackie Lacey Seek to Use It, at p. 2 <https://www.aclu.org/sites/default/files/field_document/061819-dp-whitepaper.pdf > (as of Feb. 22, 2021); see also FPP II, *supra*, at p. 32.

[58] FPP II, *supra*, at p. 43.

[59] FPP II, *supra*, at pp. 18-19.

[60] FPP I, *supra*, at p. 35.

[61] FPP I, *supra*, at p. 40.

[62] Baldus et al., *Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia* (1998) 83 Cornell L.Rev. 1638, 1651.

B. California's System is Vulnerable to Racial Bias

These racially disparate outcomes are an unsurprising result of a capital punishment system vulnerable to racial bias at nearly every stage. Among other things, California's death penalty scheme affords unusually broad discretion to prosecutors in deciding whether to charge the death penalty, systematically selects whiter and more racially biased juries, and relies on poorly written instructions that fail to clearly define aggravating and mitigating factors.

Overbroad statute and prosecutorial discretion. Studies have 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."[63] California's broad definition of special circumstances, by contrast, grants prosecutors extraordinary discretion to decide whether a homicide will be prosecuted as a capital case. California's death penalty statute separately enumerates 22 "special circumstances" that may make a first-degree murder eligible for the death penalty.[64] As noted above, as many as "95 percent of all first-degree murder convictions" in California under the 2008 statute "were death eligible."[65]

The discretion granted to prosecutors by California's broad statute is coupled with a lack of uniform criteria for determining whether to seek death. In 2008, the Commission attempted to determine how prosecutors in California's 58 counties decided when to charge a case capitally. Of the few counties that cooperated with the Commission's efforts, very few had any written policies or guidelines; only one was willing to provide a copy of its written policy for seeking death.[66] Data the Commission was able to cull from other sources, however, raised important concerns. Among other things, it "demonstrated great variation in the practices for charging special circumstances . . . ."[67]

Indeed, the unbridled discretion of prosecutors may partly explain the dramatic disparities based on the race of the defendant in the application of some of the broadest and most common special circumstances. The relatively recently added

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[63] CCFAJ Report, *supra*, at p. 138, citing Liebman & Marshall, *Less Is Better: Justice Stevens and the Narrowed Death Penalty* (2006) 74 Fordham L.Rev. 1607.

[64] Cal. Pen. Code, § 190.2.

[65] Baldus et al., *Furman at 45: Constitutional Challenges from California's Failure to (Again) Narrow Death Eligibility* (2019) 16(4) J. Emp. Legal Studies 693, 693.

[66] CCFAJ Report, *supra*, at pp. 152-53.

[67] *Id.* at p. 155.

gang-murder special circumstance was the most disparately applied: Latinx defendants were 7.8 times more likely than other similarly situated defendants to be found to have that special circumstance present and Black defendants were 4.8 times more likely.[68]

The Commission also expressed concern about the "lack of racial diversity among the individuals who [make] the decision" whether to bring capital charges.[69] This concern was well-founded. A 2015 study documenting the race of prosecutors in 52 of California's 58 counties found that 85 percent of District Attorneys and 70 percent of deputy district attorneys were White, compared to less than 40 percent of the state's population.[70] The exceedingly broad discretion afforded by California's statute is thus wielded by a disproportionately White class of prosecutors.

Capital jury selection process. California juries also do not fully reflect the racial and ethnic diversity of the state,[71] and they are even less representative in capital cases. In most counties, the rolls from which prospective jurors are summoned are not representative of the population.[72] The process of "death qualification"[73] in

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[68] Grosso et al., *supra*, 66 UCLA L.Rev. at pp. 1435-1436 (finding further that Black and Latinx defendants together faced odds 3.5 times higher of having the drive-by shooting circumstance found to be present, and Latinx defendants also faced higher odds (1.6 times) of lying-in-wait special circumstance being found; and, as to the robbery or burglary murder special circumstances, Black defendants faced odds that were 2.2 times higher that robbery or burglary special circumstances would be found than those faced by similar nonblack defendants).

[69] CCFAJ Report, *supra*, at p. 155.

[70] Bies et al., Stuck in the '70's: The Demographics of California Prosecutors (2015), pp. 7-8, 10, 12. < https://law.stanford.edu/wp-content/uploads/2015/08/Stuck-in-the-70s-Final-Report.pdf > (as of Feb. 22, 2021).

[71] According to 2019 U.S. Census estimates, California's population is: 39.4 percent Hispanic or Latinx, 36.5 percent non-Hispanic White, 15.5 percent Asian, 6.5 percent Black, and 4 percent mixed race <https://www.census.gov/quickfacts/fact/table/CA/RHI725219)> (as of Feb. 22, 2021).

[72] See Berkeley Law Death Penalty Clinic, Whitewashing the Jury Box: How California Perpetuates the Discriminatory Exclusion of Black and Latinx Jurors (2020) pp. 3-5 (hereafter Whitewashing the Jury Box) (eligible African Americans substantially underrepresented on jury rolls).

[73] In capital cases, the prosecution is permitted to question jurors "about their attitudes toward the death penalty, and if those attitudes are so strong as to 'prevent or substantially impair' a potential juror from following the law and from considering all of

capital cases, and the use of peremptory challenges, serve to further "whitewash the jury box," resulting in whiter, more racially biased jury panels.[74]

Black Americans have consistently opposed capital punishment in greater percentages than White Americans. Surveys beginning in the 1970s have repeatedly found that approximately 70 percent of White people but only 40 percent of Black people support the death penalty.[75] It is thus unsurprising that death qualification disproportionately removes Black jurors from jury pools.[76]

Moreover, the whiter pool of potential jurors that remains after death qualification is more likely to be racially biased. Empirical research has demonstrated that racial animus is "one of the most consistent and robust predictors of support for the death penalty . . . ."[77] Death-qualified jurors hold both more implicit and explicit racial biases than those who are excludable due to their opposition to the death penalty.[78]

After a jury is death-qualified, the prosecution's use of peremptory challenges tends further to reduce the number of Black jurors. Studies of both capital and non-

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the sentencing options in the case (including imposition of the death penalty), they are excluded from serving." Lynch and Haney, *Death Qualification in Black and White: Racialized Decision Making and Death-Qualified Jurors* (2018) 40 Law & Pol'y 148, 148 (hereafter Death Qualification), citing *Morgan v. Illinois* (1992) 504 U.S. 719, 738; *Wainwright v. Witt* (1985) 469 U.S. 412, 424.

[74] Whitewashing the Jury Box, *supra*, at pp. 40-41.

[75] Unnever et al., *Race, Racism, and Support for Capital Punishment* (2008) 37 Crime & Justice 45, 54.

[76] Death Qualification, *supra*, at pp.148, 153, 157-159 (citing earlier studies finding that death-qualified jurors are more likely to be White and male, and reporting results of a study using surveys from 2014 and 2016 in Solano County that found that death-qualification is likely to remove more than half of Black jurors from the jury pool due to their opposition to the death penalty).

[77] Unnever et al., *supra*, at p. 66; see also Lynch & Haney, *Looking Across the Empathic Divide: Racialized Decision Making on the Capital Jury* (2011) Mich. St. L.Rev. 573, 589 (hereafter Looking Across the Empathic Divide), citing Hurwitz & Peffley, *And Justice for Some: Race, Crime, and Punishment in the US Criminal Justice System* (2010) 43 Can. J. Pol. Sci. 457, 470 (study found that when White respondents were informed that the death penalty was racially discriminatory, support for it increased, rather than decreased).

[78] Levinson et al., *Devaluing Death: An Empirical Study of Implicit Racial Bias on Jury-Eligible Citizens in Six Death Penalty States* (2014) 89 NYU L.Rev. 513, 559.

capital trials have shown that prosecutors are significantly more likely to use peremptory challenges to exclude Black jurors than White jurors.[79] Jurors of color who survive death qualification but have some reservations or ambivalence about the death penalty may still be excused via peremptory challenge.[80] Their qualms can be proffered as a race-neutral justification for removal, thereby insulating the prosecutor from a successful challenge under *Batson v. Kentucky* (1986) 476 U.S. 79.[81] Thus, "[w]hen they operate in tandem, the process of death qualification and the targeted use of peremptory challenges to eliminate potential jurors with reservations about the death penalty greatly increase the odds that capital juries will be disproportionately (if not entirely) white."[82]

Incomprehensible jury instructions. California's confusing jury instructions compound the racial bias in capital juries. Penalty phase jury instructions "are notoriously difficult for jurors to understand and apply," increasing "the likelihood that [jurors'] judgments will be shaped by pre-existing biases."[83] Researchers Craig Haney and Mona Lynch have repeatedly found that most jurors have low comprehension of California penalty phase instructions.[84] Studies with

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[79] See *People v. Harris* (2013) 57 Cal.4th 805, 887-889 (conc. opn. of Liu, J.) and studies cited; Whitewashing the Jury Box, *supra*, at pp. 13-14.

[80] Death Qualificatio*n, supra,* at p. 166.

[81] In *Batson*, the Supreme Court established a three-step procedure to determine if the prosecution is discriminating in its exercise of peremptory challenges: if the defendant establishes a prima facie case that the prosecutor is striking prospective jurors based on their race, the prosecutor must offer a race-neutral reason for the strikes, and the judge must then decide if the prosecutor engaged in purposeful discrimination. 476 U.S. at pp. 96-98; see also Whitewashing the Jury Box, *supra*, at pp. 7-8.

[82] Death Qualification, *supra*, at p. 166.

[83] Lynch & Haney, *Mapping the Racial Bias of the White Male Capital Juror: Jury Composition and the "Empathic Divide,"* 45 Law & Soc. Rev. 69, 74; see also Lynch & Haney, *Discrimination and Instructional Comprehension: Guided Discretion, Racial Bias, and the Death Penalty* (2000) 24 Law & Hum. Behav. 337, 339.

[84] Lynch & Haney, *Capital Jury Deliberation: Effects on Death Sentencing, Comprehension, and Discrimination* (2009) 33 Law & Hum. Behav. 481, 482 (hereafter Capital Jury Deliberation) (describing prior studies documenting "widespread instructional incomprehension of capital penalty phase instructions . . . in California"); see also Lynch & Haney, *Discrimination and Instructional Comprehension: Guided Discretion, Racial Bias, and the Death Penalty* (2000) 24 Law & Hum. Behav. 337, 346-

mock jurors using California's penalty phase instructions on aggravating and mitigating factors showed that low-comprehension jurors were more likely to sentence Black defendants to death, while comprehension did not influence the rate of death-sentencing for White defendants.[85]

The predictable result of the removal of non-White jurors and the use of difficult to comprehend jury instructions is greater racial discrimination in capital sentencing. In a study with mock jurors who were death-qualified and using California's jury instructions, 77 percent of the juries shown videos with a Black defendant either unanimously voted for or favored a death sentence, while only 62 percent of the juries shown otherwise identical videos with a White defendant voted similarly.[86] This difference was even greater when juries viewed cross-racial videos: "79% of the 24 juries who viewed the Black defendant/White victim trial tape . . . leaned toward or unanimously voted for death, but only 56% of the 23 juries in the White defendant/Black victim condition . . . favored death."[87] The proportion of Whites on a jury was a "significant predictor of death verdicts," with more death verdicts for Black defendants coming from juries with more White mock jurors on them.[88] This may be in part because, as another study of mock jurors showed, White jurors are "significantly more likely to improperly use mitigating evidence in favor of a death sentence for [a] Black defendant in comparison to [a] White defendant," a result that was "exacerbated by the jurors' lack of comprehension of the penalty phase instructions."[89]

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347 (hereafter Discrimination and Instructional Comprehension) (detailing study finding poor comprehension of California penalty phase jury instructions).

[85] Discrimination and Instructional Comprehension*, supra,* at pp. 347, 349, 354; Capital Jury Deliberation, *supra*, at pp. 489-490. Although California's jury instructions have since been revised, the revised instructions did little to mitigate the confusion. Specifically, both the new and the old instructions leave jurors in the dark as to which listed factors can be used as aggravation and which can only be mitigating. Compare CALJIC 8.85 and 8.88 with CALCRIM 763 and 766.

[86] See Capital Jury Deliberation, *supra*, at p. 485.

[87] *Ibid.*

[88] *Ibid.*

[89] Looking Across the Empathic Divide, *supra*, at pp. 583-584, citing Discrimination and Instructional Comprehension*, supra.*

C. The Available Remedies for These Racial Disparities Have Been Inadequate

The available means for remedying racial disparities in capital sentencing have proved to be inadequate.

Post-conviction review has been ineffective in rooting out racially biased capital sentencing. The California Supreme Court has been unwilling to use the appellate process to reshape the features of California's capital system that facilitate the introduction of bias or to provide relief to individual defendants whose sentences were likely impacted by race-based decision making.[90] While prosecutors' broad discretion contributes to racially discriminatory sentencing, the Court's jurisprudence makes it nearly impossible to prevail on a selective prosecution claim.[91] Despite the overwhelming evidence of racial bias in the use of peremptory challenges, the Court has almost never found a violation of *Batson*.[92] Although studies have repeatedly showed that California's confusing penalty phase instructions contribute to racially discriminatory decision making, the Court has routinely found the instructions adequate.[93] Finally, while intercase proportionality review – a comparison of cases in which the death penalty is imposed – might identify cases in which racial bias influenced the penalty verdict, the Court has held that such review is not required.[94]

Previous efforts to investigate and address the source of racial disparities have also been stymied. For its 2008 report, the Commission reviewed data on racial disparities in death sentencing in California.[95] Finding that more data was needed to

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[90] California Racial Justice Act (Stats. 2020, ch. 317, § 2(c).) ("More and more judges in California and across the country are recognizing that current law, as interpreted by the high courts, is insufficient to address discrimination in our justice system.").

[91] *People v. Montes*, *supra*, 58 Cal.4th at p. 828 (explaining that a discriminatory prosecution claim requires a showing of "*deliberate* invidious discrimination by prosecutorial authorities").

[92] *People v. Johnson* (2019) 8 Cal.5th 475, 528 (dis. opn. of Liu, J.) (observing that the California Supreme Court has not found *Batson* error involving removal of a Black juror in 30 years).

[93] See, e.g., *People v. Turner*, 2020 WL 7018926, *24.

[94] See, e.g., *People v. Sanders* (1990) 51 Cal.3d 471, 529.

[95] CCFAJ Report, *supra*, at pp. 149-152.

determine the causes of racial disparity before recommendations could be made, the Commission called for more study and analysis of "racial variation":

> Evidence of disparities in the administration of the death penalty undermines public confidence in our criminal justice system generally. California is the most diverse state in the country. It is our duty to ensure that every aspect of the criminal justice system is administered fairly and evenly, and that all residents of the state are accorded equal treatment under the law. This is especially true when the state chooses to take a life in the name of the people.[96]

The Commission acknowledged that California District Attorneys had largely failed to cooperate with its efforts to determine the process by which the decision is made to seek a death sentence in a homicide prosecution.[97] It 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 . . . ."[98] In the twelve years since the report, this recommendation has not been implemented, and the manner in which district attorneys choose to pursue death sentences is no more transparent.

The recently adopted California Racial Justice Act of 2020 (RJA) is intended to "eliminate racially discriminatory practices in the criminal justice system."[99] Some of its provisions may serve to reduce or ameliorate racial discrimination in the implementation of the death penalty. For example, it provides that if a court finds that the state has sought, obtained, or imposed a sentence "on the basis of race, ethnicity or national origin," in addition to any other remedies available under the act, the "defendant shall not be eligible for the death penalty."[100] The provisions of the RJA are, however, only prospective, and do not address racial discrimination in the convictions and sentences of the hundreds of individuals already on California's death row.

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[96] *Id.* at p. 152.

[97] *Ibid.*

[98] *Id.* at p. 154.

[99] Assem. Bill. No. 2542 (2019-2020 Reg. Sess.) §2(j).

[100] *Id.* at §§ 3(a), (e)(3).

III. CALIFORNIA'S DEATH PENALTY IS APPLIED ARBITRARILY BASED ON GEOGRAPHY

The overbreadth of California's statute and the broad discretion it affords prosecutors also permits drastically uneven and arbitrary imposition of death sentences across the state. Research shows that differences in death sentencing rates between counties is based not on comparative crime rates or the egregiousness of the cases but on factors such as the predilection of particular prosecutors, the racial composition of the county, or differences in defense resources.[101]

Only a handful of California's 58 counties account for the majority of death judgments imposed in the state. From 2015-2019, 44 death sentences were imposed state-wide, with only six counties accounting for 89 percent of those sentences.[102] Local decisions to pursue the death penalty impose tremendous costs that are borne by the state as a whole, including the cost of appeal, habeas, and confinement on death row.[103] Governor Newsom's executive order halting executions in 2019 cited the high cost, $5 billion since capital punishment's reinstatement in 1978, as an important factor in his decision.[104] As the ACLU observed in its 2009 report Death by Geography, "California's death penalty has become so arbitrary that the county border, not the facts of the case, determines who is sentenced to execution and who is simply sentenced to die in prison. Pursuing executions provides no identifiable benefit to these counties but costs millions."[105]

Geographic disparities have grown on the national level, even as support for the death penalty has diminished, and are now higher than in any other period in

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[101] *Glossip v. Gross, supra*, 576 U.S. at pp. 918-920 (dis. opn. of Breyer, J.) (collecting studies); see also ACLU of Northern California, Death by Geography: A County by County Analysis of the Road to Execution in California (Jan. 2009) pp. 4-6 (hereafter Death by Geography) (finding no correlation between county homicide rates and death sentencing rates). <https://www.aclunc.org/sites/default/files/death_by_geography.pdf> (as of Feb. 22, 2021). Underfunding of defense services is addressed in section V.A. below.

[102] Los Angeles, Riverside, Orange, Kern, San Bernardino, and Tulare Counties. HCRC Data on file with OSPD.

[103] CCFAJ Report, *supra*, at pp. 144-147.

[104] 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. 22, 2021).

[105] Death by Geography, *supra*, at p. 7.

U.S. history since colonial times.[106] In 2015, Justice Breyer noted that "[b]etween 2004 and 2009 . . . just 29 counties (fewer than 1 percent of counties in the country) accounted for approximately half of all death sentences imposed nationwide."[107] According to the Death Penalty Information Center (DPIC), nearly one-third (31 percent) of the 39 new death sentences imposed in the United States in 2017 came from just three counties, Riverside, California; Clark, Nevada; and Maricopa, Arizona.[108] Geographic disparities within the state were cited as a reason for Colorado's recent abolition of the death penalty.[109]

Disparities within California are equally striking.[110] From 2010-2019, 143 death sentences were imposed in California (including 11 re-sentencings); 81 percent of those death sentences were imposed by just six counties: Los Angeles, Riverside, Orange, Kern, San Bernardino, and Alameda. 68 percent of those sentences were imposed by only *three* counties: Los Angeles, Riverside, and Orange.

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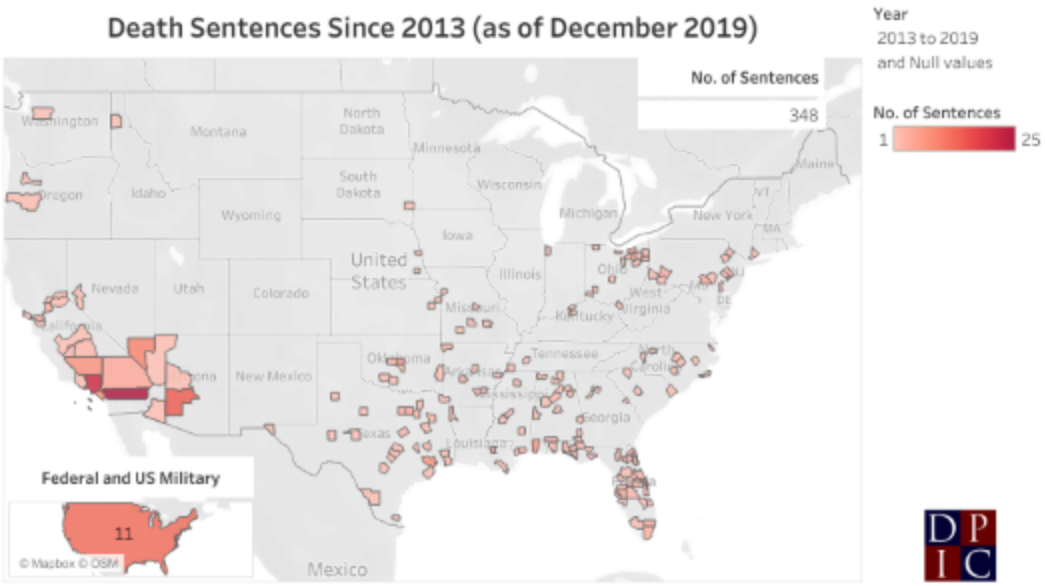
[106] Baumgartner et. al, *The Geographic Distribution of US Executions* (2016) 11 Duke J. Const. L. & Pub. Pol'y. 1, 2 <http://fbaum.unc.edu/articles/Duke-GeographyOfDeath-2016.pdf> (as of Feb. 22, 2021).

[107] *Glossip v. Gross, supra,* 576 U.S. at p. 918 (dis. opn. of Breyer, J.), citing Smith, *The Geography of the Death Penalty and its Ramifications* (2012) 92 B. U. L.Rev. 227, 231-232.

[108] DPIC, *DPIC Year End Report: New Death Sentences Demonstrate Increasing Geographic Isolation* (Dec. 15, 2017) <https://deathpenaltyinfo.org/news/dpic-year-end-report-new-death-sentences-demonstrate-increasing-geographic-isolation> (as of Feb. 22, 2021).

[109] Representative Adrienne Benavidez, a sponsor of the bill repealing the death penalty in Colorado, explained, "It's important that we end that I think it has been a very discriminatory practice, not just towards people of color, but people within geographic areas [of] the state." DPIC, *Colorado Becomes 22nd State to Abolish Death Penalty* (Mar. 24, 2020) <https://deathpenaltyinfo.org/news/colorado-becomes-22nd-state-to-abolish-death-penalty> (as of Feb. 22, 2021); see also ACLU of Colorado, Ending A Broken System: Colorado's Expensive, Ineffective and Unjust Death Penalty (Jan. 2020), citing Beardsley et al., *Disquieting Discretion: Race, Geography & the Colorado Death Penalty in the First Decade of the Twenty-First Century* (2014) 92 Denver U. L.Rev. 431 <https://aclu-co.org/wp-content/uploads/2020/01/DeathPenaltyWhitePaper_Finalv2.pdf >(as of Feb. 22, 2021).

[110] DPIC, *The 2% Death Penalty: How a Minority of Counties Produce Most Death Cases At Enormous Costs to All* (2013) p. 12-13 (discussing California cases) <https://files.deathpenaltyinfo.org/legacy/documents/TwoPercentReport.pdf> (as of Feb. 22, 2021).



Counties with the Most Death Sentences Since 2013

County	State	
Riverside	CA	25
Los Angeles	CA	21
Maricopa	AZ	14
Clark	NV	9
Orange	CA	8
Harris	TX	7
Kern	CA	7
Mobile	AL	7
Cuyahoga	OH	6

Riverside County has become "the nation's leading producer of death sentences."[111] In 2015 alone, Riverside County meted out eight new capital sentences.[112] This comprised more than half of California's total death judgments that year, and more than any other county in the country.[113] In fact, it was more than every other *state*, except for Florida (with nine) and California as a whole.[114] For reference, from 2015-2019, Riverside County accounted for about 6 percent of the state's population but imposed 37 percent of the state's death judgments (16).

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[111] FPP I, *supra*, at p. 31.

[112] *Ibid.*

[113] DPIC, *Outlier Counties: Riverside County, "The Buckle of a New Death Belt"* (Oct. 3, 2016) < https://deathpenaltyinfo.org/news/outlier-counties-riverside-county-the-buckle-of-a-new-death-belt> (as of Feb 22, 2021).

[114] *Ibid.*

Prosecutors in Riverside and a handful of counties have continued aggressively to pursue death sentences despite the moratorium.[115] In 2020, three of the five death verdicts statewide were from Riverside County.[116] Despite the pandemic, dozens of capital cases are currently pending in California trial courts, most of them in Riverside County.[117] Although the decision to seek death is local, the ultimate costs of the death penalty are not. Until the death penalty is abolished, the panoply of post-conviction litigation continues, with the costs borne by *all* of California's taxpayers, not just by the counties where death sentences are imposed.[118]

IV. CALIFORNIA'S DEATH PENALTY IS NOT IMPOSED ON THE WORST OF THE WORST

As discussed above, California's death penalty law invites bias and arbitrary application at every step: the pool of death eligible defendants is extraordinarily broad, and prosecutors have unfettered discretion to decide which of these defendants to charge with death; the death qualification process allows prosecutors to select jurors who are more punitive and more racially biased than ordinary criminal jurors; and these jurors are charged with applying the flawed and confusing language of

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[115] See Damien, *The Death Penalty Question: Riverside County And Gov. Newsom's Execution Moratorium*, The Palm Springs Desert Sun (Mar. 1, 2020) (Riverside DA says moratorium "has zero effect on my decision to seek the death penalty") <https://www.desertsun.com/story/news/crime_courts/2020/03/02/death-penalty-question-riverside-county-and-gov-newsoms-execution-moratorium-california/2850096001/> (as of Feb. 22, 2021); Schubert et al., *California Gov. Gavin Newsom's Death Penalty Moratorium Is A Disgrace*, CNN (Apr. 23, 2019) (DAs of Sacramento, Riverside, Fresno, and Imperial Counties condemn moratorium) < https://www.cnn.com/2019/04/23/opinions/newsom-california-district-attorneys/index.html> (as of Feb. 22, 2021); Bollag, *Gavin Newsom's Death Penalty Moratorium Isn't Saving California Money,* The Sacramento Bee (July 23, 2019) (noting prosecutors are continuing to pursue death sentences despite moratorium) < https://www.sacbee.com/news/politics-government/capitol-alert/article232894822.html> (as of Feb. 22, 2021).

[116] DPIC, The Death Penalty in 2020: Year End Report, Death Penalty Hits Historic Lows Despite Federal Execution Spree, Pandemic, Racial Justice Movement Fuel Continuing Death Penalty Decline (Dec. 16, 2020) < https://deathpenaltyinfo.org/facts-and-research/dpic-reports/dpic-year-end-reports/the-death-penalty-in-2020-year-end-report> (as of Feb. 22, 2021).

[117] Data on file with OSPD.

[118] The 2% Death Penalty, supra.

California's sentencing law to decide who among the targeted defendants will live or die.

Not surprisingly, a death penalty statute administered in this manner does not single out the worst of the worst for the ultimate punishment. To the contrary, as Governor Newsom stated in his executive order, the punishment too often falls on the young, especially youth of color, on the mentally ill and intellectually disabled, and on those raised in abusive environments and extreme poverty.

A. California Sentences More Young People, Especially Young People of Color, to Death than Any Other State

In the last 15 years, scientific research has transformed our understanding of the culpability of young offenders – those 25 or younger at the time of their offense. But while California's legislature has sought to ameliorate harsh sentences for many youthful offenders in the state, nearly 40 percent of the people sentenced to death in California were 25 or under at the time of their crime, and a disproportionate share of them were youth of color. Moreover, California prosecutors have continued to seek the death penalty against people who were only 18 at the time of their offense.

The Supreme Court in *Roper v. Simmons* (2005) 543 U.S. 551, set a bright-line minimum age of 18 for imposition of the death penalty and subsequently extended its rationale to also prohibit life without parole sentences for individuals who were under 18 at the time of their crimes.[119] These decisions were based on research demonstrating that those under 18 have (1) a lack of maturity and an underdeveloped sense of responsibility; (2) an increased susceptibility to negative influences and outside pressures; and (3) an unformed or underdeveloped character that is capable of change.[120] "These differences," the Court held, "render suspect any conclusion that a juvenile falls among the worst offenders."[121]

In the 15 years since *Roper* was decided, it has become clear that this reasoning applies to emerging adults as well. Research shows that brain development does not stop at 18 but continues to the mid-twenties. Late adolescents and emerging adults, 18 to 25 years old, are characterized by impulsivity, a propensity for engaging in risky behavior, diminished ability to evaluate situations before acting, and an over

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[119] *Ibid.; Miller v. Alabama* (2012) 567 U.S. 460, 489 (prohibiting life without parole sentences for children convicted of homicide).

[120] *Roper*, *supra*, 543 U.S. at pp. 569-570.

[121] *Id.* at p. 570.

emphasis on the pursuit of potential rewards and arousing activities.[122] These deficits are exacerbated when decisions are made in the kind of emotionally arousing situations common in crimes – those that involve negative emotions, such as fear, threat, anger, or anxiety.[123] The peak age of risky decision-making is not for children under the age of 18, but for late adolescents between the ages of 19 and 21.[124] Older adolescents are also more vulnerable to coercive pressure and the influence of peers.[125]

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[122] House of Commons Justice Committee, The Treatment of Young Adults in the Criminal Justice System, Seventh Report of Session 2016-17 <https://publications.parliament.uk/pa/cm201617/cmselect/cmjust/169/169.pdf> (as of Feb. 12, 2021); Steinberg, *A Social Neuroscience Perspective on Adolescent Risk-Taking* (2008) 28 Developmental Rev. 78, 79, 83; Grisso et al., *Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants* (2003) 27(4) Law & Hum. Behav. 333, 357; Modecki, *Addressing Gaps in the Maturity of Judgment Literature: Age Differences and Delinquency* (2008) 32 Law & Hum. Behav. 78, 79, 85; Steinberg, *Adolescent Brain Science and Juvenile Justice Policymaking* (2017) 23(4) Psychology, Public Policy, and Law 410, 413-414; Casey et al., *The Adolescent Brain* (2008) 1124(1) Ann. N.Y. Acad. of Sci.the N.Y. Academy of Sciences 111, 121-122; Steinberg et al., *Age Differences in Future Orientation and Delay Discounting* (2009) 80 Child Development 28, 39; Steinberg et al., *Age Difference in Sensation Seeking and Impulsivity as Indexed by Behavior and Self-Report Evidence for a Dual Systems Model* (2008) 44 Developmental Psychology 1764, 1774-1776.

[123] Cohen et al., *When Is an Adolescent an Adult? Assessing Cognitive Control in Emotional and Nonemotional Contexts* (2016) 27(4) Psychological Science 549, 559-560.

[124] Braams et al., *Longitudinal Changes in Adolescent Risk-Taking: A Comprehensive Study of Neural Responses to Rewards, Pubertal Development and Risk Taking Behavior* (2015) 35 J. of Neuroscience 7226, 7235 (Figure 7); Shulman & Cauffman, *Deciding in the Dark: Age Differences in Intuitive Risk Judgment* (2014) 50 Developmental Psychology 167, 172-173.

[125] Albert & Steinberg, *Judgment and Decision Making in Adolescence* (2011) 21 J. of Research on Adolescence 211, 218-219; O'Brien et al., *Adolescents Prefer More Immediate Rewards When in the Presence of Their Peers* (2011) 21 J. of Research on Adolescence 747, 747, 751; Smith et al., *Peers Increase Adolescent Risk Taking Even When the Probabilities of Negative Outcomes Are Known* (2014) 50 Developmental Psychology 1564, 1564; Steinberg, *supra*, 28(1) Developmental Review at p. 83, 91; see *Miller*, *supra*, 567 U.S. at p. 472, fn. 5; Dosenbach et al., *Prediction of Individual Brain Maturity Using fMRI* (2010) 329(5997) Science 1358, 1358-1359; see also Michaels, *A Decent Proposal: Exempting Eighteen-To Twenty-Year-Olds From the Death Penalty*

The high court also recognized that juveniles have a greater capacity for change and thus for rehabilitation.[126] Like 16 and 17-year-olds, late adolescents and emerging adults between the ages of 18 and 25 have a great capacity for behavioral change and most will not continue to commit crime into adulthood.[127]

The Court further recognized that subjecting children to the death penalty would create an intolerable risk of unreliability because their immaturity inhibits their ability to engage with law enforcement, understand and decide whether to waive rights, and assist counsel.[128] Finally, the Court was concerned that "[a]n unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender's objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death."[129] Thus, a categorical exemption based on age was necessary.

All the considerations that animated *Roper, Miller*, and *Graham* apply to late adolescents and emerging adults from 18 to the early to mid-20s. The California legislature has recognized this in the noncapital context, finding that development of the brain region that is "very important for complex behavioral performance" is not complete until the mid-twenties.[130] California requires that anyone who was 25 or

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(2016) 40 N.Y.U. Rev. L. & Soc. Change 139, 165-167; Buchen, *Science in Court: Arrested Development* (2012) 484(7394) Nature 304, 306; Johnson et al., *Adolescent Maturity and the Brain: The Promise and Pitfalls of Neuroscience Research in Adolescent Health Policy* (2009) 45(3) J. of Adolescent Health 216, 217.

[126] *Roper*, *supra*, 543 U.S. at pp. 570, 572; *Graham v. Florida* (2010) 560 U.S. 48, 68, 75 (prohibiting life without parole sentences for children convicted of non-homicide offenses); *Miller, supra,* 567 U.S. at p. 489 (prohibiting life without parole sentences for children convicted of homicide).

[127] Monahan et al., *Psychosocial (Im)maturity from Adolescence to Early Adulthood: Distinguishing Between Adolescence-Limited and Persistent Antisocial Behavior* (2013) 25(4) Development & Psychopathology 1093, 1093-1105; Mulvey et al., *Trajectories of Desistance and Continuity in Antisocial Behavior Following Court Adjudication Among Serious Adolescent Offenders* (2010) 22(2) Development & Psychopathology 453, 468; Bonnie & Scott, *The Teenage Brain: Adolescent Brain Research and the Law* (2013) 22 Current Directions in Psychological Science 158, 160.

[128] *Roper*, *supra*, 543 U.S. at pp. 572-573.

[129] *Id.* at p. 573.

[130] See Assem. Com. on Pub. Safety, Bill Analysis on Assem. Bill No. 1308 (2017-2018 Reg. Sess.) Apr. 24, 2017, p. 4.

younger at the time of their offense, with very limited exceptions, most notably for those sentenced to life without parole or death for offenses committed after attaining the age of 18, be given the opportunity to be considered for parole.[131] California law requires that all incarcerated persons below age 22 be classified at lower security facilities whenever possible.[132] California extended juvenile court jurisdiction to 21.[133]

Recognizing the growing body of research on emerging adults, the American Bar Association has adopted a resolution urging "each jurisdiction that imposes capital punishment to prohibit the imposition of a death sentence on or execution of any individual who was 21 years or younger at the time of the offense."[134]

California's death row is nevertheless disproportionately populated by people who were 25 or younger at the time of their offense. Thirty-eight percent of people sentenced to death in California were 25 or under at the time of their offense.[135] A fifth of those sentenced to death were 21 or younger at the time of their offense. And, according to data compiled by the Habeas Corpus Resource Center, 45 people sentenced to death, or just under 5 percent of all those sentenced to death in California, were only 18 at the time of their offenses.

California leads all other jurisdictions in the post *Roper* era – outpacing even Texas and Florida – in imposing death sentences on people who were under 21 at the

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[131] Cal. Pen. Code, § 3051.

[132] Cal. Pen. Code, § 2905; see also Statement of Legislative Intent for Cal. Pen. Code, § 2905 (Stats. 2014, ch. 590 § 1 (4)(b)).

[133] See Cal. Welf. & Inst. Code, §§ 208.5, 607, 1731.5, 1769; see also Hayek, *Environmental Scan of Developmentally Appropriate Criminal Justice Responses to Justice-Involved Young Adults* (2016) U.S. Dept. of Justice, National Institute of Justice <https://www.ncjrs.gov/pdffiles1/nij/249902.pdf> (as of Feb. 22, 2021).

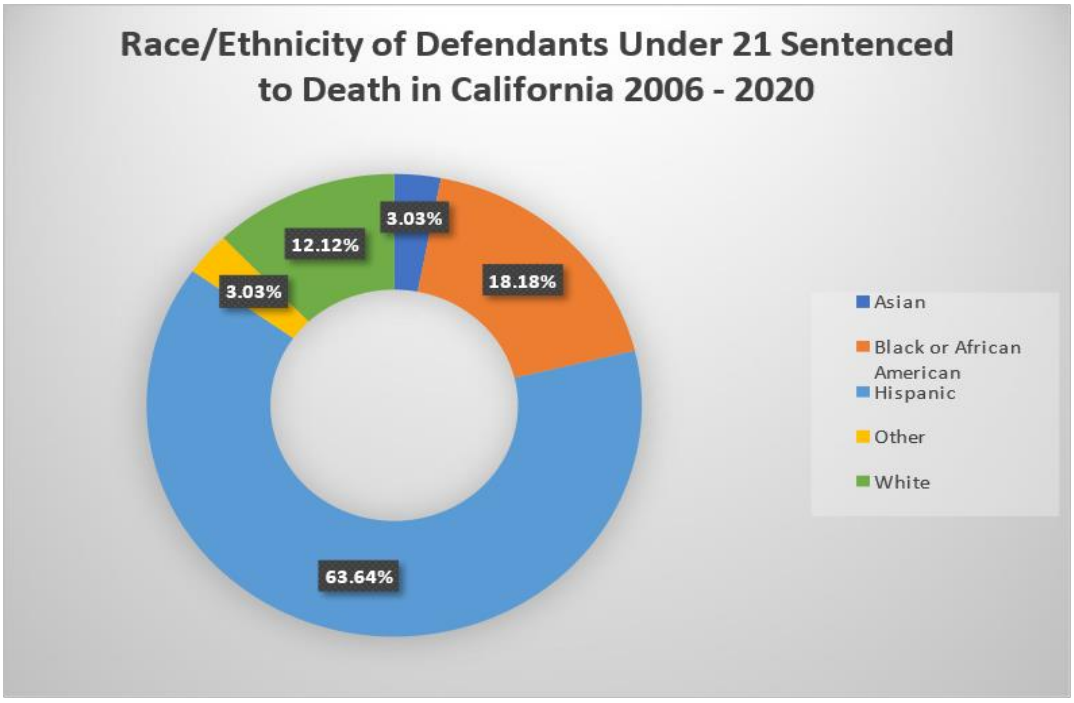
[134] Am. Bar Assoc., Resolution 111 and Report to the House of Delegates (adopted Feb. 5, 2018) <https://www.americanbar.org/content/dam/aba/administrative/death_penalty_representation/2018_my_111.pdf> (as of Feb. 22, 2021).

[135] According to HCRC data on file with OSPD, as of November 2020, 1003 people had been sentenced to death (some with multiple death verdicts or judgments) in California since the death penalty was reinstated in 1977. HCRC's annual report includes one additional death sentence for a total of 1004. HCRC Report, *supra*, at p. 8.

time of their offense.[136] Two California counties – Los Angeles and Riverside – account for 15 percent of all such death sentences, even though they account for only 4 percent of the nation's population.[137]

Most disturbing, data show that the death penalty is imposed disproportionately on youth of color. Nationally, 73 percent of youthful offenders (defined here as under 21) sentenced to death since *Roper* were Black or Latinx, as compared to 53 percent of adults sentenced to death in that time.[138]

The figures in California are even worse: 82 percent of the youthful offenders sentenced to death in California since *Roper* was decided were Black or Latinx (18 percent and 64 percent respectively).[139]



[136] Blume et. al., *Death by Numbers: Why Evolving Standards Compel Extending Roper's Categorical Ban Against Executing Juveniles from Eighteen to Twenty-One* (2020) 98 Tex. L.Rev. 921, 941.

[137] *Id.* at p. 942.

[138] *Id.* at p. 944.

[139] As noted above, the gang-murder special circumstances added in 2000 has been applied disproportionately to Latinx defendants. (See Grosso et al., *supra*, 66 UCLA L.Rev. at pp. 1435-1436.)

Among those 25 or under at the time of their offense, 64 percent were Black or Latinx (37 percent and 27 percent respectively) and 23 percent were White. Among adults over 25 at the time of their crime, 49 percent were people of color (29 percent Black, 20 percent Latinx) and 42 percent were White. Thus, racial disparities are most extreme among the youngest offenders.

Research shows that "[t]his disparity between the severity of punishment leveled against black and Latinx youth compared to white youth is best explained by the fact that legal decision makers perceive youth of color as dangerous predators likely to recidivate, while for young white men and boys, youth is mitigating."[140]

Not only has California's death penalty been imposed disproportionately on youthful offenders – who are in fact *less* morally culpable than adults – but that perverse result has been exacerbated by racism, singling out youth of color for the most extreme punishment.

B. People with Serious Mental Illness are Sentenced to Death

Although the Supreme Court has exempted those who are intellectually disabled or who were under the age of 18 at the time of the offense from the death penalty,[141] people who were seriously mentally ill at the time of the offense are still subject to the death penalty.

The principle that the mentally ill are not fully responsible for their actions is foundational to our criminal legal system,[142] but the law in practice affords few protections, because standards for incompetency to stand trial or for the insanity

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[140] Blume et. al., *supra*, 98 Tex. L.Rev. at pp. 944-945 & fn. 123 (collecting sources); see also Goff et al., *The Essence of Innocence: Consequences of Dehumanizing Black Children* (2014) 106 J. Personality & Soc. Psychol. 526-527.

[141] *Roper, supra,* 543 U.S. 551 (youth); *Atkins v. Virginia* (2002) 536 U.S. 304 (*Atkins*) (intellectual disability).

[142] 4 Blackstone, Commentaries 24; Hochstedler Steury, *Criminal Defendants with Psychiatric Impairment: Prevalence, Probabilities and Rates* (1993) 84 J. Crim. L. & Criminology 352, 353 (while "rarely applied, the insanity defense has been of profound theoretical importance in defining the limits of criminal responsibility, and its resulting community moral sanction").

defense are very difficult to meet.[143] Our jails and prisons have become the new asylums.[144]

California's capital sentencing statute, like most, lists factors relating to a defendant's mental state that are supposed to weigh in mitigation against the death penalty.[145] In reality, the opposite is often true.[146]

Many seriously mentally ill defendants are unable to cooperate with defense counsel or assist in the preparation of a defense.[147] Serious mental illnesses often

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[143] See Kachulis, *Insane in the Mens Rea: Why Insanity Defense Reform Is Long Overdue* (2017) 26 S. Cal. Interdisc. L.J. 357, 362 (despite public perception to the contrary, "[t]he reality is that the insanity defense is a device that is rarely used and even more rarely successful"); Sabelli & Leyton, *Train Wrecks and Freeway Crashes: An Argument for Fairness and Against Self Representation in the Criminal Justice System* (2000) 91 J. Crim. L. & Criminology 161, 170 (competency standard often criticized as "unreasonably low and allows individuals whose ability to reason is severely clouded by a mental illness or other disability to be found competent"); Goldbach, *Like Oil and Water: Medical and Legal Competency in Capital Appeal Waivers* (2000) 1 Cal. Crim. L.Rev. 2.

[144] It is estimated that severe mental illness among the incarcerated population is three to six times higher than in the general U.S. population. See Davis & Brekke, *Social Networks and Arrest Among Persons With Severe Mental Illness: An Exploratory Analysis* (2013) 64 Psychiatric Services 1274, 1274.

[145] Cal. Pen. Code, § 190.3 (d) & (h) (sentencing factors include whether defendant "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"); see also Berkman, *Mental Illness as an Aggravating Circumstance in Capital Sentencing* (1989) 89 Colum. L.Rev. 291, 297-298 & fns. 45-47 (citing other state statutes).

[146] Smith et al., *The Failure of Mitigation?* (2014) 65 Hastings L.J. 1221, 1245 ("Over half (fifty-four) of the last one hundred executed offenders had been diagnosed with or displayed symptoms of a severe mental illness."); Sundby, *The True Legacy of Atkins and Roper: The Unreliability Principle, Mentally Ill Defendants, and the Death Penalty's Unraveling* (2014) 23 Wm. & Mary Bill Rts. J. 487, 518-519 (hereafter *The Unreliability Principle*).

[147] The symptoms of serious mental illness often impede the attorney-client relationship. Davoli, *You Have the Right to an Attorney; If You Cannot Afford One, Then the Government Will Underpay an Overworked Attorney Who Must Also Be an Expert in Psychiatry and Immigration Law* (2012) 2012 Mich. St. L.Rev. 1149, 1171; see also Am.

distort decision-making. Mentally ill defendants may direct their attorneys not to present a mental health defense because of stigma or lack of insight.[148] Profoundly depressed defendants may try to prevent their attorney from presenting mitigating evidence to fulfill a wish to die.[149] Others may insist on testifying or representing themselves in pursuit of a death sentence.[150]

Self-representation compromises the reliability of a trial in the best of circumstances, since few people are equipped to represent themselves in a serious criminal trial, let alone a capital case.[151] The damage is even worse when the defendant is seriously mentally ill.

The California Supreme Court has held that a defendant must be allowed to represent himself even if he intends to present no defense or to ask for the death penalty.[152] The Court has rejected the argument that the state's interest in ensuring

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Bar Assoc., Diminished Culpability (2006) 30 Mental & Physical Disability L.Rep. 62 (describing case of capital murder defendant Jackson Daniels, Jr.).

[148] See Honberg, *The Injustice of Imposing Death Sentences on People with Severe Mental Illnesses* (2005) 54 Cath. U. L.Rev. 1153, 1164; *United States v. Kaczynski* (9th Cir. 2001) 239 F.3d 1108, 1111-1113.

[149] See, e.g., *Godinez v. Moran* (1993) 509 U.S. 389, 409-412 (dis. opn. of Blackmun, J.).

[150] See *Faretta v. California* (1975) 422 U.S. 806 (constitutional right to self-representation); *People v. Taylor* (2009) 47 Cal.4th 850, 865 (*Faretta* applies equally in capital cases); *People v. Mickel* (2016) 2 Cal.5th 181, 206-207, and cases cited therein (defendant may be mentally ill yet competent to waive their right to counsel).

[151] See *Faretta v. California*, *supra*, 422 U.S. at p. 832 (acknowledging that "the right of an accused to conduct his own defense seems to cut against the grain of this Court's decisions holding that the Constitution requires that no accused can be convicted and imprisoned unless he has been accorded the right to the assistance of counsel"); see also *id.* at p. 839 (dis. opn. of Burger, C.J.) (observing that the goal of justice "is ill-served, and the integrity of and public confidence in the system are undermined, when an easy conviction is obtained due to the defendant's ill-advised decision to waive counsel"); *id.* at p. 849 (dis. opn. of Blackmun, J.) (asserting that majority ignores the principle that the state's interest is that justice be done).

[152] *People v. Daniels* (2017) 3 Cal.5th 961, 980-981 (lead opn. of Cuéllar, J.); see *People v. Burgener* (2016) 1 Cal.5th 461, 471-472 (defendant permitted to represent himself though he expressed desire to present no mitigating evidence and not contest death sentence); *People v. Taylor*, *supra*, 47 Cal.4th 850, 865 ("A defendant convicted of a capital crime may legitimately choose a strategy aimed at obtaining a sentence of

the reliability of death judgments requires a more rigorous standard to waive counsel in such cases.[153] And, because California does not conduct proportionality review[154] -- comparing capital cases with each other to maintain some degree of consistency, there is no mechanism to evaluate the propriety of the death judgments returned in cases where a mentally ill defendant represents himself and presents no mitigating evidence.

Mentally ill defendants are often wrongly penalized even when represented by counsel. Studies have shown that, just as juries often fail to treat youth or intellectual disability as mitigating, they often treat mental illness as aggravating because they believe it means the defendant is dangerous.[155] Serious mental illness may manifest in front of the jury in outbursts or other inappropriate remarks or gestures that alarm jurors.[156] When defendants are placed on antipsychotic medications, they often present with a flat affect, which jurors may perceive as lack of remorse.[157]

The American Bar Association, the American Psychiatric Association, the American Psychological Association, the National Alliance on Mental Illness, and

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death"); *People v. Bradford* (1997) 15 Cal.4th 1229, 1366-1367 (trial court granted defendant's request to represent himself, though he made such request in order to ensure that no penalty phase evidence would be presented on his behalf and despite defense counsel's view that he was insane); *People v. Bloom* (1989) 48 Cal.3d 1194, 1220 (holding that a defendant's stated intention to incur the death penalty does not in and of itself establish an abuse of discretion in the granting of his self-representation motion).

[153] *People v. Daniels, supra,* 3 Cal.5th at pp. 985-986 (lead opn. of Cuéllar, J.); *People v. Mai* (2013) 57 Cal.4th 986, 1056; *People v. Bloom*, *supra*, 48 Cal.3d at pp. 1224-1226; *People v. Bradford, supra,* 15 Cal.4th at p. 1372.

[154] See, e.g., *People v. Gamache* (2010) 48 Cal.4th 347, 393.

[155] Sundby, *The Jury as Critic: An Empirical Look at How Capital Juries Perceive Expert and Lay Testimony* (1997) 83 Va. L.Rev. 1109, 1165-1167; Sarat, *Violence, Representation, and Responsibility in Capital Trials: The View from the Jury* (1995) 70 Ind. L.J. 1103, 1131-1133; Hoffmann, *Where's the Buck?–Juror Misperception of Sentencing Responsibility in Death Penalty Cases* (1995) 70 Ind. L.J. 1137, 1153; Bowers, *The Capital Jury Project: Rationale, Design, and Preview of Early Findings* (1995) 70 Ind. L.J. 1043, 1091.

[156] Sundby, *The Capital Jury and Absolution: The Intersection of Trial Strategy, Remorse, and the Death Penalty* (1998) 83 Cornell L.Rev. 1557, 1563.

[157] Deadly Justice, *supra*, at p. 235; The Unreliability Principle*, supra,* 23 Wm. & Mary Bill Rts. J. at p. 515 & fn. 154, citing *Riggins v. Nevada* (1992) 504 U.S. 127, 143-144 (con. opn. Kennedy, J.).

Mental Health America, have all recommended exempting those with severe mental illness from the death penalty.[158] Ohio recently banned the death penalty for defendants who were severely mentally ill at the time of the offense, and other states are considering similar exemptions.[159]

The California Supreme Court has rejected the argument that serious mental illness should be treated like intellectual disability as a matter of constitutional law, stating "we are not prepared to say that executing a mentally ill murderer would not serve societal goals of retribution and deterrence" and deferring to the legislature "to determine exactly the type and level of mental impairment that must be shown to warrant a categorical exemption from the death penalty."[160]

California's cases are replete with examples of defendants suffering from serious mental illness whose death sentences have nevertheless been upheld:

- *People v. Ghobrial* (2018) 5 Cal.5th 250, 275 (court upholds death sentence of defendant with record of severe psychotic illness, rejecting both competency issues and Eighth Amendment serious mental illness challenge).
- *People v. Mendoza* (2016) 62 Cal.4th 856, 908 (upholding death sentence of defendant suffering from psychotic depression, rejecting competency issues and finding no constitutional prohibition on the execution of mentally ill persons).
- *People v. Mickel* (2016) 2 Cal.5th 181, 193, 200-201 (upholding death sentence and findings of competency despite mental health expert's preliminary assessment that defendant suffered from a mental disturbance and may have been incompetent to stand trial and letters from defendant's friends and family describing him as mentally ill).

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[158] Winick, *The Supreme Court's Evolving Death Penalty Jurisprudence: Severe Mental Illness As the Next Frontier* (2009) 50 B.C. L.Rev. 785, 789; ABA Task Force on Mental Disability and the Death Penalty, Recommendation and Report on the Death Penalty and Persons with Mental Disabilities (2006) 30 Mental & Physical Disability L.Rep. 668.

[159] DPIC, *Ohio Bars Death Penalty for People with Severe Mental Illness* (Jan. 11, 2021) <https://deathpenaltyinfo.org/news/ohio-passes-bill-to-bar-death-penalty-for-people-with-severe-mental-illness> (as of Feb. 22, 2021).

[160] *People v. Mendoza* (2016) 62 Cal.4th 856, 909, quoting *People v. Hajek and Vo* (2014) 58 Cal.4th 1144, 1252); accord, *People v. Ghobrial* (2018) 5 Cal.5th 250, 275. The issue is pending in another case before the California Supreme Court, *People v. Steskal*, argued February 2, 2021, S122611.

- *People v. Houston* (2012) 54 Cal.4th 1186, 1230 (upholding death sentence of defendant with psychotic illness, insanity defense rejected).
- *People v. Blacksher* (2011) 52 Cal.4th 769, 849 (court upholds death sentence of defendant with paranoid schizophrenia and a history of psychiatric hospitalizations, defendant was found competent to stand trial and insanity defense was rejected).
- *People v. Blair* (2005) 36 Cal.4th 686, 714 (upholding death sentence despite evidence of defendant's history of psychiatric hospitalization and upholding findings of competency).
- *People v. Danks* (2004) 32 Cal.4th 269 (court upholds death sentence of defendant with paranoid schizophrenia and history of psychiatric hospitalizations; defendant found competent to stand trial after being medicated, sought to represent himself, and testified incoherently; court noted defendant was "extremely dangerous" even when medicated).[161]
- *People v. Farnam* (2002) 28 Cal.4th 107, 131 (upholding death sentence despite defendant's history of attempting suicide).
- *People v. Weaver* (2001) 26 Cal.4th 876, 937-939, 953 (upholding death sentence although defendant was diagnosed with schizophrenia and suffered from hallucinations and delusions and upholding findings of competency and sanity).
- *People v. Jones* (1997) 15 Cal.4th 119, 134-135, 139-151 (upholding death sentence although defendant was diagnosed with schizophrenia, had history of psychiatric hospitalizations, was administered antipsychotic medications that appeared to cause him to fall asleep at his trial and upholding findings of competency and sanity).
- *People v. Medina* (1995) 11 Cal.4th 694, 724, 732-733 (upholding death sentence despite the administration of antipsychotic medications and evidence of defendant's psychotic disorder and upholding findings of competency).

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[161] Three justices dissented from the denial of penalty phase relief, citing the defendant's serious mental illness. *People v. Danks, supra*, 32 Cal.4th 269, 321-322 (conc. & dis. opn. of Kennard, J.); *id.* at pp. 322-323 (conc. & dis. opn. of Moreno, J.).) Justice Kennard and Chief Justice George noted that "the defense presented compelling evidence that defendant, although not legally insane at the time of the offenses (citations), suffered from a mental illness that destroyed his capacity for rational thought," and was "comparable in severity to mental retardation." (*Id.* at pp. 321-322 (conc. & dis. opn. of Kennard, J.).

When a seriously mentally ill defendant wins a rare reversal on appeal, prosecutors often elect to pursue the death penalty again:

- *People v. Deere* (1985) 41 Cal.3d 353, 358 (defendant was suicidal), sub. opn. (1991) 53 Cal.3d 705.
- *People v. Halvorsen* (2007) 42 Cal.4th 379, 399, 402 & fn. 3 (defendant had paranoid delusions, was diagnosed with bipolar disorder, testified incoherently at his first trial, and made a 2½-hour rambling statement in lieu of testimony at his retrial), S190636, app. on remand pending.
- *People v. Johnson* (1988) 47 Cal.3d 576, 597-598 (defendant had history of psychiatric hospitalization), sub. opn. (2019) 8 Cal.5th 475, 488-491 (cataloging further evidence of defendant's serious mental illness).
- *People v. Lucero* (1988) 44 Cal.3d 1006, 1032 (defendant suffered from a serious mental illness), sub. opn. (2000) 23 Cal.4th 692.

C. People with Intellectual Disabilities Are Still on Death Row

In *Atkins v. Virginia* (2002) 536 U.S. 304, the United States Supreme Court held that executing people with mental retardation (now intellectual disability) violates the Eighth Amendment's prohibition on cruel and unusual punishment. Due to the shortage of qualified habeas counsel in California, discussed below, not all intellectually disabled defendants who were sentenced to death before *Atkins* was decided have even been identified, let alone obtained relief.[162]

Moreover, the *Atkins* decision left it largely to the states to define intellectual disability.[163] California's statute was recently amended to define "[i]ntellectual disability" as "the condition of significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested

[162] The California Supreme Court has held that postconviction *Atkins* claims "should be raised by petition for writ of habeas corpus proceedings." *In re Hawthorne* (2005) 35 Cal.4th 40, 47; accord § 1376, subd. (f). According to HCRC, of the 363 people on death row awaiting the appointment of counsel, 85 have been waiting for more than 20 years – that is, before *Atkins* was decided. HCRC Report, *supra*, at p. 9.

[163] This has generated "a great deal of controversy not only in defining the term, but also in creating the procedural structure for making the determination." Barger, *Avoiding Atkins v. Virginia: How States Are Circumventing Both the Letter and the Spirit of the Court's Mandate* (2008) 13 Berkeley J. Crim. L. 215, 215, 226.

before the end of the developmental period, as defined by clinical standards."[164] Clinical standards have recently changed to extend the "developmental period" from 18 to 22.[165]

This means that defendants who suffer traumatic brain injury or otherwise manifest intellectual or mental disability *after* the "developmental period" are not excluded from the death penalty, even though they may suffer from the same kind of impairments that led the high court to find intellectually disabled defendants categorically less culpable and therefore ineligible for the death penalty.[166]

The ABA's Task Force on Mental Disability and the Death Penalty, which recommended excluding seriously mentally ill people from death eligibility, also recommended that the mental disability exclusion "encompass dementia and traumatic brain injury, disabilities very similar to mental retardation in their impact on intellectual and adaptive functioning except that they always (in the case of dementia) or often (in the case of head injury) are manifested after age eighteen."[167] The American Psychological Association and the National Alliance of the Mentally Ill have taken the same position.[168]

Here, too, the California Supreme Court has rejected arguments that *Atkin*'s rationale extends to similar mental disabilities, holding that it is for the legislature

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[164] Cal. Pen. Code, § 1376, subd. (a)(1), Stats. 2020, c. 331 (A.B.2512), § 2, eff. Jan. 1, 2021. Prior to this amendment, California required intellectual disability to manifest by age 18. *In re Hawthorne* (2005) 35 Cal.4th 40, 48; accord, *In re Lewis* (2018) 4 Cal.5th 1185, 1191.

[165] On January 15, 2021, the American Association on Intellectual and Developmental Disabilities (AAIDD) issued its newest diagnostic manual for Intellectual Disability, which extended the age of onset from 18 to 22. (Schalock et al., Intellectual Disability: Definition, Classification and Systems Of Supports (AAIDD, 12th ed. 2021).)

[166] See *Atkins*, *supra,* 536 U.S. at pp. 318-319; Barger, *supra*, 13 Berkeley J. Crim. L. at p. 230.

[167] 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.

[168] Barger, *supra*, 13 Berkeley J. Crim. L. at p. 233.

to decide "the type and level of mental impairment" that "warrant a categorical exemption from the death penalty."[169]

D. The Death Penalty is Imposed on People who were Abused and Neglected as Children

The death penalty is also imposed too often on people who have been raised in extreme poverty and experienced horrific abuse and neglect as children.[170] Those who have been scarred by childhood abuse and neglect are not fairly labeled the "worst of the worst," particularly when the state itself failed to protect them from mistreatment.

In the last 25 years we have come to better understand the harm done by adverse childhood experiences. Scientific studies have documented that childhood abuse and neglect causes neurological damage that may in some cases lead to criminal behavior in adulthood.[171] More broadly, the Centers for Disease Control (CDC) and Kaiser Permanente have conducted a study of Adverse Childhood Experiences (ACEs) that is one of the largest investigations ever of the connection between childhood abuse and neglect and household challenges and later-life health

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[169] *People v. Boyce* (2014) 59 Cal.4th 672, 722, quoting *People v. Hajek & Vo, supra*, 58 Cal.4th at p. 1252. In *People v. Leonard* (2007) 40 Cal.4th 1370, 1428, the Court declined to address the constitutionality of the age 18 cut off on the ground that the factual record was insufficient and would have to be developed in habeas proceedings.

[170] See Channah & Blakinger, *What Lisa Montgomery Has In Common With Many On Death Row: Extensive Trauma*, The Marshall Project (Jan. 8, 2021) (linking to other sources) <https://www.themarshallproject.org/2021/01/08/what-lisa-montgomery-has-in-common-with-many-on-death-row-extensive-trauma> (as of Feb. 22, 2021); Haney, Criminality in Context (2020) pp. xv-xviii, 407-412; Office of the High Commissioner for Human Rights, *Death Penalty Disproportionately Affects the Poor, UN Rights Experts Warn, U.N. Press Release HR/22208* (Oct. 10, 2017) <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=22208&LangID=E> (as of Feb. 22, 2021); Haney, *The Social Context of Capital Murder: Social Histories and the Logic of Mitigation* (1995) 35 Santa Clara L.Rev. 547.

[171] See, e.g., Ling et al., *Biological Explanations of Criminal Behavior* (2019) 25 Psychology, Crime & Law 626, 626-640; Dudley, *Childhood Trauma and Its Effects: Implications for Police*, New Perspectives in Policing Bulletin (July 2015); Perry, Child Maltreatment: A Neurodevelopmental Perspective on the Role of Trauma and Neglect in Psychopathology, Child and Adolescent Psychopathology (Beauchaine & Hinshaw edits., 2008) p. 93; Heide & Solomon, *Biology, Childhood Trauma, and Murder: Rethinking Justice* (2006) 29 Internat. Law J. of Law and Psychiatry 220, 220-233.

and well-being. ACEs, are potentially traumatic events that occur in childhood (0-17 years). For example:

- experiencing violence, abuse, or neglect
- witnessing violence in the home or community
- having a family member attempt or die by suicide.[172]

ACEs also include aspects of the child's environment that can undermine their sense of safety, stability, and bonding, such as growing up in a household with:

- substance misuse
- mental health problems
- instability due to parental separation or household members being in jail or prison.[173]

The CDC-Kaiser Permanente study revealed that ACEs are strongly related to development of risk factors for disease and lack of well-being throughout life, including chronic health problems, mental illness, substance misuse in adulthood, and ultimately early death.[174] Negative outcomes associated with ACEs also include aggressive behavior and adult criminal involvement.[175]

Not surprisingly, incarcerated people "reported nearly four times as many adverse events in childhood as a normative adult male sample."[176] Eight of ten adverse childhood events were found at significantly higher levels among incarcerated people than in the general population.[177]

In a recent study, adverse childhood experiences "were specifically associated with adult incarceration even after controlling for sociodemographic and substance

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[172] Felitti et al, *Relationship of Childhood Abuse and Household Dysfunction to Many of the Leading Causes of Death in Adults: The Adverse Childhood Experiences (ACE) Study* (1998) 14 Am. J. of Preventive Med. 245, 245-258.

[173] *Ibid.*

[174] *Ibid.*

[175] Reavis et al., *Adverse Childhood Experiences and Adult Criminality: How Long Must We Live Before We Possess Our Own Lives?* (2013) 17 The Permanente J. 44, 44-48.

[176] *Ibid.*

[177] *Ibid.*

abuse problems."[178] Individuals with the most severe ACEs profile experience the highest risk of incarceration: risk increased approximately 35 percent for men and 10 percent for women.[179]

Adverse childhood experiences in the home are often exacerbated by poor treatment in juvenile institutions that actually "promote crime rather than deter it."[180] While child victimization receives considerable attention, "little such concern is extended to children once they have 'gotten in trouble,' despite the fact that they are often the very same children."[181] Studies and anecdotal evidence have shown that "[t]oo often in the lives of capital defendants juvenile institutionalization provides a kind of 'turning point,' an experience that helps them resolve the internal struggle over who to be – indeed, over who they can be – in a profoundly negative way."[182]

Adverse childhood experiences are critical mitigating evidence that can help jurors understand a defendant's background and lead them to exercise mercy.[183]

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[178] Roos et al., *Linking Typologies of Childhood Adversity to Adult Incarceration: Findings from a Nationally Representative Sample* (2016) 86 Am. J. of Orthopsychiatry 584, 591.

[179] *Id.* at page 589.

[180] Haney, *The Social Context of Capital Murder: Social Histories and the Logic of Mitigation* (1995) 35 Santa Clara L.Rev. 547, 575.

[181] *Id.* at p. 574.

[182] *Id.* at pp. 574-576.

[183] See *Porter v. McCollum* (2009) 558 U.S. 30, 41-42 (per curiam) (reasonable probability mitigating evidence – which included childhood history of physical abuse and limited schooling – would have lead decisionmakers at penalty phase to strike different balance); *Rompilla v. Beard* (2005) 545 U.S. 374, 390-393 (undiscovered mitigation – which included evidence that petitioner, who suffered from fetal alcohol syndrome caused by his often-absent mother, was reared without affection by severe alcoholics in isolated and filthy slum, observed violence between parents and father's bragging about infidelity, and was beaten, verbally abused, and locked in small, filthy dog pen by father – might well have influenced jury's appraisal of petitioner's culpability and thus undermined confidence in sentencing outcome); *Wiggins v. Smith* (2003) 539 U.S. 510, 535, 537 (had jury received mitigating evidence – "severe privation and abuse in the first six years of [petitioner's] life while in the custody of his alcoholic, absentee mother," followed by "physical torment, sexual molestation, and repeated rape during his subsequent years in foster care" – there was reasonable probability at least one juror would have struck different balance); *(Terry) Williams v. Taylor* (2000) 529 U.S. 362, 398 ("the graphic description of [petitioner's] childhood,

Conducting a competent mitigation investigation before trial often enables defense counsel to persuade the prosecution to forego the death penalty.[184] Unfortunately, as explained below, the quality of indigent defense in California remains uneven and, too often, trial counsel do not do a constitutionally adequate job of investigating and presenting mitigating evidence.

The case of Jesse Andrews III is illustrative. Mr. Andrews was convicted and sentenced to death in Los Angeles County by a jury that heard essentially none of his life story, which was defined by poverty, neglect, abandonment, racism, violence, torture, and abject institutional failure. Following a (rare) state court evidentiary hearing, the California Supreme Court described the evidence that trial counsel could have presented if they had investigated Andrews' life history: [185]

- Andrews' alcoholic parents abandoned him when he was a toddler. He was raised by his grandparents and an aunt and was especially close to his grandfather. When Andrews' grandfather died, Andrews lost most of the structure in his life, resulting in truancy, delinquency and eventual conviction, at age 14, for joyriding.
- Andrews was sent to Mt. Meigs Industrial School for Negro Children, an Alabama institution described by a juvenile probation officer "as 'by far, by far . . . the worst facility I have ever seen,' a 'slave camp for children' run by 'illiterate overseers.'"
- Andrews was preyed on sexually by older boys, "from whom no protection or separation was provided."

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filled with abuse and privation . . . might well have influenced the jury's appraisal of his moral culpability"); see also *Andrus v. Texas* (2020) 140 S.Ct. 1875, 1877, 1887 (per curiam) ("significant question" whether mitigation evidence – maternal drug addiction and dealing, prostitution, and prolonged absence, as well as time spent with violent drug addicts, necessity before adolescence to caretake four siblings, and juvenile incarceration that left petitioner suicidal – might have led at least one juror to strike different balance).

[184] Am. Bar Assoc., *American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (rev. 2003), Guidelines 10.7(A), 10.9.1 & commentary, reprinted in 31 Hofstra L.Rev. 913, 1023, 1041-1042 (hereafter ABA Guidelines).

[185] The following facts are from *In re Andrews* (2002) 28 Cal.4th 1234, 1242-1245; *id.* at p. 1268 (dis. opn. of Kennard, J.).

- Mt. Meigs provided no education. Instead, the children were forced to pick cotton and other crops. When Andrews and the other boys failed to pick their quota, the overseer beat them in a brutal and sexually demeaning manner.
- Just three months after his release from Mt. Meigs at age 16, Andrews was arrested for a robbery-murder in which he had served as the look-out. Andrews was convicted and spent the next 10 years in several Alabama prisons, described by the referee as "abysmal," characterized by severe overcrowding and rampant violence, sexual and otherwise. Andrews was raped repeatedly.
- Mental health experts would have testified that Andrews had a learning disorder, brain impairment and posttraumatic stress disorder as a result of his victimization in juvenile prison.
- Andrews also had a large extended family who would have testified to their love and support for him and the impact of his execution on them.

Despite their failure to find and present this evidence, the California Supreme Court ruled five to two that Andrews' counsel had ***not*** provided ineffective assistance of counsel and upheld his death sentence – a decision the Ninth Circuit Court of Appeals held – 17 years later – to be a patently unreasonable application of United States Supreme Court precedent.[186] Mr. Andrews' death sentence was finally vacated, 35 years after his trial and 40 years after the crime for which he was sentenced.

Unfortunately, Mr. Andrews' case is far from unique in either the severity of the trauma and abuse he experienced in his youth or in the lengthy path to finally obtain relief from his death sentence once the mitigating evidence and failures of trial counsel were brought to light.[187] For example:

- *Doe v. Ayers* (9th Cir. 2015) 782 F.3d. 425, 435-462 (defense counsel failed to investigate and present mitigating evidence that defendant was repeatedly raped in prison, experienced childhood abuse and neglect, and had mental health and substance abuse problems).
- *Stankewitz v. Wong* (9th Cir. 2012) 698 F.3d 1163, 1168, 1174 (because defense counsel failed to investigate or present mitigating evidence, jury

[186] *Andrews v. Davis* (9th Cir. 2019) 944 F.3d 1092, 1110 (en banc).

[187] Far from showing that the system works, the decades that it often takes for someone like Mr. Andrews to obtain reversal of his death sentence is further evidence of the dysfunction of California's death penalty, as discussed further below.

heard "next to nothing about [petitioner's] traumatic childhood" in extreme poverty as one of 10 children who were "highly neglected" by their alcoholic parents, exposed to domestic violence, and beaten with belts and electrical cords, leaving Stankewitz severely emotionally damaged).

- *Hamilton v. Ayers* (9th Cir. 2009) 583 F.3d 1100, 1131 (jury had no knowledge of the indisputably horrific treatment Hamilton and his siblings suffered at the hands of his mother, father, and various extended family members and did not hear that Hamilton had been diagnosed with mental health problems as early as age twelve).
- *Douglas v. Woodford* (9th Cir. 2003) 316 F.3d 1079, 1088 (counsel failed to discover and present evidence that defendant was abandoned as a child and entrusted to an abusive, alcoholic foster father who frequently kept him locked in a closet; rarely had enough food; and was beaten and raped in jail at the age of fifteen).
- *Karis v. Calderon* (9th Cir. 2002) 283 F.3d 1117, 1139 (failure to present any evidence of the substantial abuse suffered by defendant; available records showed that defendant's father and stepfather "viciously beat" him and his mother on a regular basis).
- *Caro v. Woodford* (9th Cir. 2002) 280 F.3d 1247, 1251, 1255 (defense counsel failed to investigate and present evidence that Caro – the child of farm laborers – suffered extensive brain damage as a result of chronic exposure to pesticides from in utero to adulthood, as well as severe physical, emotional, and psychological abuse as a child).

E. California Has Sentenced Innocent People to Death

Not only does California's death penalty system fail to condemn only the worst of the worst, but it has ensnared even the innocent. Since the reinstitution of the death penalty in California in 1977, five formerly death-sentenced men have been exonerated, all people of color: Ernest Graham was exonerated in 1981 after spending five years on death row; Troy Jones was exonerated in 1996 after 14 years on the row; Oscar Morris was exonerated in 2000 after 17 years; Patrick Croy was exonerated in 2005 after 26 years; and Vicente Benavides Figueroa was exonerated in 2018 after 25 years.[188]

[188] DPIC, *Innocence Database* (2021) <https://deathpenaltyinfo.org/policy-issues/innocence-database?filters%5Bstate%5D=California> (as of Feb. 22 2021).

Mr. Benavides' exoneration is the most recent in California.[189] Mr. Benavides was convicted and sentenced to death for sexually assaulting and murdering his girlfriend's 21-month-old daughter.[190] The state conceded, decades after his conviction, that the prosecution had introduced false forensic evidence at trial regarding the cause of the alleged sexual injuries to the child, injuries which were determined at the post-conviction hearing to be anatomically impossible.[191] Despite conceding that Mr. Benavides' convictions of the substantive sexual offences, special circumstance findings, and judgment of death must be vacated, the state urged the California Supreme Court to reduce his conviction from first to second degree murder; the court rejected that argument and vacated Mr. Figueroa's conviction in its entirety.[192]

False or misleading forensic evidence and government misconduct are far from the only causes of wrongful convictions. Eyewitness misidentification is the single greatest cause of wrongful convictions nationwide.[193] Junk science, false confessions, bad lawyering, and government informants (i.e., those who have a self-interested motive to testify for the prosecution) are also major factors contributing to wrongful convictions.[194]

A study of exonerations among defendants sentenced to death in the modern era estimated that about four percent of all people on death row are innocent.[195] That would translate to approximately 28 innocent people on death row in California, given the state's current death row population.[196]

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[189] *In re Figueroa* (2018) 4 Cal.5th 576, 579.

[190] *Ibid.*

[191] *Id.* at pp. 583-586.

[192] *Id.* at p. 579.

[193] West & Meterko, *Innocence Project: DNA Exonerations, 1989-2014: Review of Data and Findings From the First 25 Years* (2016) 79 Alb. L.Rev. 717, 720, 732.

[194] *Ibid.*

[195] Gross et al., *Rate of False Conviction of Criminal Defendants Who are Sentenced to Death* (2014) <https://www.pnas.org/content/pnas/111/20/7230.full.pdf> (as of Feb. 22, 2021).

[196] Cal. Dept. of Corrections and Rehabilitation, *Condemned Inmate List* (2021) <https://www.cdcr.ca.gov/capital-punishment/condemned-inmate-list-secure-request> (as of Feb. 22, 2021).

V. OTHER SYSTEMIC FLAWS CONTRIBUTE TO THE ARBITRARINESS OF CALIFORNIA'S DEATH PENALTY

The arbitrary and discriminatory application of California's death penalty law is also due to the poor quality of indigent defense and a statutory provision that gives the prosecution multiple chances to obtain a death verdict.

A. The Poor Quality of Indigent Defense

Twenty years ago, law professor Stephen Bright wrote that the death penalty in America is handed down "not for the worst crime, but for the worst lawyer."[197] "It is universally acknowledged that ineffective counsel is the primary reason so many defendants are sentenced to death."[198] Correcting this problem in individual cases is not easy. In order to demonstrate ineffective assistance of counsel post-trial, the condemned person must show both that counsel's performance fell below the standard of care of a professionally reasonable attorney, and that there is a reasonable likelihood of a different outcome but for counsel's deficient performance.[199] Further, since 1996 in order to obtain federal habeas relief, a petitioner must also show that a state court denial of such a claim was objectively unreasonable.[200]

Nevertheless, of 70 California death sentences reversed in federal court, over half (37)[201] were overturned on the basis of ineffective assistance of counsel, with by far the greatest number (31)[202] overturned due to counsel's failure to investigate and present mitigating evidence in the penalty phase. Additionally, the California Supreme Court has several times concluded that defense counsel's investigation of mitigating circumstances was inadequate, requiring reversal of the jury's determination of the penalty phase.[203] In fact, the leading cause of reversal of death

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[197] Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer* (1994) 103 Yale L.J. 1835.

[198] Mitchell & Haydt, Alarcón Advocacy Ctr., *California Votes 2016: An Analysis of the Competing Death Penalty Ballot Initiatives* (2016) 1 Loyola Law School Special Rep., p. 27.

[199] *Strickland v. Washington* (1984) 466 U.S. 668, 684, 691.

[200] 28 U.S.C. § 2254(d).

[201] HCRC data on file with OSPD.

[202] Data on file with OSPD.

[203] See, e.g., *In re Marquez (*1992) 1 Cal.4th 584; *In re Lucas* (2004) 33 Cal.4th 682.

judgments in California is "the failure of counsel to adequately investigate potential mitigating evidence."[204]

The overwhelming majority of men and women sentenced to death are indigent and were provided appointed trial counsel by the county. The high reversal rate for ineffective assistance of counsel is due to county and State unwillingness to adequately fund indigent capital defense at the trial level. Many counties use a problematic flat fee contract system for payment of non-public defender counsel in capital cases.[205] The fee structure in Riverside County incentivizes taking cases to trial, rather than negotiating a plea to a sentence less than death.[206] It also disincentivizes the "early investment in essential mitigation investigation, which . . . is widely considered to be the biggest driver for prosecutors deciding not to seek the death penalty."[207] Most of the "Riverside County death sentences reviewed on direct appeal between 2006 and 2015 involved the equivalent of one full day's worth or less of mitigation evidence, and two-thirds of the cases involved two days or less."[208] Some cases "had zero hours of mitigation presented."[209]

There are similar problems in other counties with large numbers of death penalty cases. In Kern County the typical presentation of defense mitigation evidence is less than 3 days.[210] In Orange County, the average defense mitigation presentation lasted 2.5 days.[211] In one Orange County case, defense counsel presented no mitigation evidence whatsoever.[212] In another case, the mitigation defense case was an hour.[213] In San Bernardino County, the average mitigation case lasted 1.2 days.[214] Most of the individuals on death row from Los Angeles County were represented at

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[204] CCFAJ Report, *supra*, at p. 129.

[205] *Id.* at pp. 125-126.

[206] FPP I, *supra*, at p. 33.

[207] *Ibid.*

[208] *Id.* at pp. 33-34.

[209] *Id.* at p. 34.

[210] *Id.* at p. 38.

[211] FPP II, *supra*, p. 42.

[212] *Ibid.*

[213] *Ibid.*

[214] *Id.* at p. 17.

trial by private counsel.[215] For those cases, the average defense mitigation presentation lasted only 2.4 days.[216] In contrast, the length of the mitigation case for the single death row defendant represented by the Los Angeles County public defender was 7 days.[217]

Many of the problems in indigent capital defense result from trial courts' repeated appointment of defense counsel with demonstrated records of incompetence.[218] In Los Angeles, of the 22 death penalty sentences imposed during the tenure of former District Attorney Jackie Lacey over a third were represented by counsel who "had prior or subsequent misconduct charges."[219]

The number of cases reversed thus far does not tell the whole story. Logically, given the 363 individuals who are still awaiting habeas counsel, there are dozens more individuals who would not be sitting on death row but for trial attorney ineffectiveness.[220]

Although the multiple problems with indigent defense counsel at trial have existed for decades, the State has failed to provide adequate resources for capital defense counsel. In 2008, the Commission found that the provisions for capital trial counsel for many counties did not meet the American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, which the United States Supreme Court and the California Supreme Court have long recognized as establishing norms for competent representation in death penalty cases.[221] The Commission recommended that "California counties provide adequate funding for the appointment and performance of trial counsel in death penalty cases

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[215] *Id.* at p. 30; American Civil Liberties Union, The California Death Penalty is Discriminatory, Unfair and Officially Suspended. So Why Does Jackie Lacey Continue to Use It? (2019) p. 3 (hereafter ACLU LA Report).

[216] FPP II, *supra*, at p. 30.

[217] *Ibid.*

[218] *Id.* at pp. 17, 42; FPP I, *supra*, at pp. 34, 38-39.

[219] ACLU LA Report, *supra*, at p. 2.

[220] See HCRC Report, *supra*, at p. 10 (reporting 363 individuals on death row without habeas counsel).

[221] CCFAJ Report, *supra*, at p. 130; see *Wiggins v. Smith, supra,* 539 U.S. at p. 524 (ABA Guidelines establish "standards to which we long have referred as 'guides to determining what is reasonable.'"); *In re Lucas*, *supra*, 33 Cal.4th at p. 725 (recognizing *Wiggins'* reliance on ABA Guidelines).

in full compliance with ABA [g]uidelines . . . ."[222] Nevertheless, as shown above, many California counties (including those most likely to sentence defendants to death) continue to appoint unqualified and poorly resourced counsel who are unprepared to take on the responsibilities of a capital case.

In his Executive Order declaring a moratorium on the use of the death penalty, Governor Newsom recognized that the death penalty is "unjustly and unfairly applied to people who cannot afford legal representation."[223] The State's failure to ensure constitutionally adequate counsel has contributed to the overproduction of death sentences. Without a system for competent indigent capital defense, poverty and the other arbitrary factors described elsewhere in this Paper, play an impermissible role in the administration of capital punishment in California.

B. Automatic Penalty Retrials

In most jurisdictions, when the jury cannot agree unanimously to impose a death sentence, the defendant receives a life sentence. In California, however, a penalty retrial is not only permitted, it is the statutory default; and if a second jury deadlocks, the prosecution is permitted to try yet again.[224] This provision contributes to the overproduction of death sentences in California, including its imposition on people the original jury did not agree were deserving of death.

Of the 28 states still permitting the use of capital punishment, only five — Alabama, Arizona, California, Kentucky, and Nevada[225] — authorize a penalty phase retrial before another jury if the initial jury deadlocks on penalty.[226] But California

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[222] CCFAJ Report, *supra*, at p. 131.

[223] 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).

[224] Cal. Pen. Code § 190.4, subd. (b). The provision giving the prosecution multiple opportunities to secure a death verdict was added by section 10 of Proposition 7, the 1978 initiative that expanded the death penalty.

[225] Ala. Code, § 13A-5-46, subd. (g); Ariz. Rev. Stat., § 13-752, subd. (K); Cal. Pen. Code § 190.4, subd. (b); *Skaggs v. Commonwealth* (Ky. 1985) 694 S.W.2d 672, 681 (holding of state high court that, in the absence of specifically controlling legislation, penalty phase retrials may go forward after original capital-sentencing juries deadlock); Nev. Rev. Stat., § 175.556, subd. (1).

[226] Indiana and Missouri permit a judge to impose a sentence of death following a jury deadlock on sentence. See Ind. Code, § 35-50-2-9, subd. (f) ("If a jury is unable to agree on a sentence recommendation after reasonable deliberations, the court shall

does not merely authorize a penalty retrial after a hung jury, it mandates one.[227] Only one other state, Arizona, mandates a penalty retrial, but in Arizona, if the second jury deadlocks, the judge imposes a sentence of life.[228] Alabama is the only other state allowing the prosecutor to retry the defendant multiple times when a retrial also ends in a hung jury.[229] Thus, California is the only state to afford the prosecution a penalty retrial as a matter of right after a first deadlocked jury at penalty and to authorize additional retrials if the prosecutor fails to obtain a unanimous verdict at a second or subsequent retrial.

The California Supreme Court has rejected challenges to the penalty retrial provisions based on the statute's outlier status, holding either that California's status in the extreme minority "does not, in and of itself, establish a violation of the Eighth Amendment"[230] or speculating that other states' decisions to prohibit multiple penalty retrials does not reflect a moral consensus, but is instead a "cost-benefit judgment[] about the value of continuing to allocate resources toward seeking the death penalty in a particular case."[231]

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discharge the jury and proceed as if the hearing had been to the court alone"); *State v. Barker* (Ind. 2004) 809 N.E.2d 312, 315-316; Mo. Rev. Stat., § 565.030, subd. (4).

[227] "If the trier of fact is a jury and has been unable to reach a unanimous verdict as to what the penalty shall be, the court shall dismiss the jury and *shall* order a new jury impaneled to try the issue as to what the penalty shall be." (Cal. Pen. Code, § 190.4, subd. (b), italics added.) California previously adhered to the majority rule prohibiting penalty phase retrials following hung juries. (*People v. Kimble* (1988) 44 Cal.3d 480, 511.) However, California is now "among the 'handful' of states that allows a penalty retrial following jury deadlock on penalty." (*People v. Taylor* (2010) 48 Cal.4th 574, 634.)

[228] Ariz. Rev. Stat., § 13-752, subd. (K).

[229] California's statute states, "If [the newly impaneled jury] is unable to reach a unanimous verdict as to what the penalty shall be, the court in its discretion shall either order a new jury or impose a punishment of confinement in state prison for a term of life without possibility of parole." (Cal. Pen. Code, § 190.4, subd. (b).) Alabama's statute reads: "If the jury is unable to reach a verdict recommending a sentence, or for other manifest necessity, the trial court may declare a mistrial of the sentence hearing. Such a mistrial shall not affect the conviction. After such a mistrial or mistrials another sentence hearing shall be conducted before another jury, selected according to the laws and rules governing the selection of a jury for the trial of a capital case." (Ala. Code § 13A-5-46, subd. (g).)

[230] *People v. Rhoades* (2014) 8 Cal.5th 393, 442.

[231] *People v. Trinh* (2014) 59 Cal.4th 216, 238.

In fact, most jurisdictions based their death penalty schemes on the Model Penal Code,[232] which required trial courts to impose a noncapital sentence if a jury could not agree on penalty.[233] Addressing California's penalty retrial provisions, the drafters wrote, "The fact that the Model Code does not permit this alternative is deliberate. One submission ought to be enough, and, if there is disagreement, the court should terminate the matter by imposing a sentence of imprisonment."[234]

Limiting the prosecution to one chance to obtain a death sentence is also appropriate because the prosecution enjoys the enormous advantage of a "death qualified" jury. Such jurors are more pro-prosecution and "significantly more in favor of the death penalty than jury pools in general."[235] Moreover, if a jury is unable to reach a unanimous verdict, it will not be discharged until the court has determined "there is no reasonable probability that the jury can agree."[236] If a death-qualified jury, presented with the state's best evidence for death and instructed on their duty to deliberate thoroughly and return a verdict, cannot reach a unanimous conclusion that the defendant should die, the juror's disagreement demonstrates that the prosecution failed to make a reliable case for death.

Eighty-three death sentences in California – or nearly eight percent of the 1,077 death sentences imposed in the modern era – have been imposed after the prosecution failed to persuade the first jury to return a sentence of death; some defendants went through two or more penalty phase trials before the prosecution was

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[232] See Covey, *supra,* 31 Hastings Const. L.Q. at pp. 207-209.

[233] Model Pen. Code, § 210.6, subd. (2) (withdrawn 2009).

[234] *Id.* at p. 150, fn. 126, citing former Cal. Pen. Code, § 190.1. The drafters were addressing California's pre-*Anderson* death penalty law, which provided that, in the event of a hung jury at penalty, the court may "either impose the punishment for life in lieu of ordering a new trial on the issue of penalty, or order a new jury impaneled to try the issue of penalty." Former Cal. Pen. Code, § 190.1 (Stats. 1957, ch. 1968, § 2, pp. 3509-3510). As discussed above, California's current law goes further, by making a penalty retrial the default when the jury hangs.

[235] Death Qualification, *supra,* at p. 2 and citations therein.

[236] Cal. Pen. Code, § 1140 ("Except as provided by law, the jury cannot be discharged after the cause is submitted to them until they have agreed upon their verdict . . . or unless, at the expiration of such time as the court may deem proper, it satisfactorily appears that there is no reasonable probability that the jury can agree").

able to obtain a unanimous death verdict.[237] Those defendants would have received life sentences in almost every other jurisdiction.

VI. THE DEATH PENALTY IS EXPENSIVE AND RIDDLED WITH ERROR

The death penalty is an enormously costly endeavor that yields no benefit for the taxpayers of California. Most of the death judgments the State has obtained and defended at great expense are ultimately reversed, and the lengthy delays in the process eliminate any legitimate penological purpose the sentence could serve.

A. Taxpayers Spend Billions on the Death Penalty

In their extensive analysis of California's capital punishment system published in 2011, Judge Arthur Alarcón [238]

At every level, from trial through appeal through post-conviction litigation, a capital case costs much more than a non-capital case. While it is difficult to ascertain the exact extra cost that the death penalty adds to a criminal justice system,[239]

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[237] See *People v. Richardson* (S198378, app. pending) (two mistrials, third penalty jury returned death verdict); *People v. Charles* (2015) 61 Cal.4th 308, 332 (defendant sentenced to death following four penalty trials, the first two juries hung, the death verdict of the third jury was set aside due to juror misconduct, and the fourth jury returned a verdict of death); *People v. Trinh* (2014) 59 Cal.4th 216, 223 (two hung juries, third penalty jury returned death verdict).

[238] Alarcón & Mitchell, *Executing the Will of the Voters? A Roadmap to Mend or End the California Legislature's Multi-Billion-Dollar Death Penalty Debacle* (2011) 44 Loyola L.A. L.Rev. S41, S46, (hereafter Roadmap).

[239] The difficulty of estimating the costs of the death penalty is due in part to the absence of reliable data, which is, in turn, due in part to the resistance of participants in the death penalty process to data collection. The Commission studied, among other things, the effectiveness of the death penalty in California. Striving to gather the information necessary to estimate the cost of the death penalty in California, the Commission concluded that "it is impossible to ascertain the precise costs of the administration of California's death penalty law at this time." (CCFAJ Report, *supra*, at p. 144.) The Commission recommended a comprehensive system of data collection to allow monitoring and analysis of cost information, administered by the state. The recommendation was ignored. For its Final Report, the Commission used educated but rough estimates of cost based, in part, on studies conducted in other states. (CCFAJ Report, *supra*, at pp. 144-145.)

studies exploring the fiscal impact have reported that an enormous amount of public funds have been spent, and continue to be spent, on capital cases.

At trial, most death penalty cases involve two court-appointed defense attorneys.[240] The inclusion of the separate, crucial penalty-phase portion of the trial necessitates increased investigation and supplemental services of multiple experts. Jury selection, which includes the process of death qualification, requires larger jury pools and significantly more time spent in jury selection. The trials themselves are considerably longer than non-capital murder trials. Clerical and administrative costs, including such additional burdens as the transcriptions of all proceedings,[241] are also increased.

The Commission, in 2008, estimated that the death penalty allegation easily adds $500,000 to the cost of a murder trial, admitting that this was "a very conservative estimate."[242] In 1993, a U.C. Berkeley School of Public Policy researcher estimated the difference to be $1.27 million.[243] Judge Alarcón and Professor Mitchell put the number at roughly 1 million dollars per capital trial.[244]

If the trial results in a death penalty, the increased cost carries forward to the appeal and the state habeas proceedings. Again, precision is difficult, but the California Supreme Court's payments to court-appointed appellate attorneys, coupled with the budget of the California Habeas Corpus Resource Center, runs well over $30 million annually.[245] Significant portions of the resources of the Office of the

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[240] California law favors two counsel in capital trial cases pursuant to Penal Code § 987(d) and *Keenan v. Superior Court* (1982) 31 Cal.3d 424. The American Bar Association views at least two qualified defense attorneys as mandatory. (See ABA Guidelines, *supra*, Guideline 4.1.A.1., 31 Hofstra L.Rev. at p. 952.)

[241] California Penal Code section 190.9 requires transcription of all proceedings in a capital trial case, something not required in other felony cases. The cost of transcript preparation "is significant, especially when the average death penalty trial [reporters'] transcript runs in excess of 9,000 pages." (Roadmap, *supra*, 44 Loyola L.A. L.Rev. at p. S78.)

[242] CCFAJ Report, *supra*, at p. 145.

[243] Roadmap, *supra*, 44 Loyola L.A. L.Rev. at p. S74.

[244] Roadmap, *supra*, 44 Loyola L.A. L.Rev. at p. S79.

[245] In 2009, the budget for payments to court-appointed counsel in criminal cases by the California Supreme Court (almost all of this total going to capital cases) was, according to the Roadmap study article, $15,406,000. (Roadmap, *supra*, 44 Loyola L.A. L.Rev. at pp. S85-S86.) The Habeas Corpus Resource Center Budget for FY 20-21 is

State Public Defender and the California Attorney General's Office are also devoted to capital appeals and state habeas corpus proceedings. The Commission estimated that "at least 54.4 million [per year] is currently devoted to post-trial review of death cases in California."[246] The Roadmap study estimated the cumulative impact of the cost of automatic appeals and state habeas corpus proceedings at $925 million during the period 1985-2010.[247]

State funding is only part of the equation. Federal law mandates that indigent persons under sentence of death receive court-appointed attorneys for their federal habeas corpus proceedings.[248] Federal habeas cases involve extensive investigation, litigation and, many times, evidentiary hearings. The authors of the Roadmap study were able to learn that, of the 194 California capital federal habeas cases closed prior to 2010, funding for court-appointed counsel, investigation, expert witnesses, and other expenses averaged $ 635,000 per case.[249] Added to these expenditures are the costs of the Capital Habeas Units in the Federal Defender offices for the Eastern and Central Districts, and the administrative costs in both the District Courts and the Ninth Circuit. The Roadmap authors estimated that over $ 775 million in federal funds had been spent on California death penalty cases from the reinstitution of the death penalty in the 1970s through 2010.[250]

The Commission estimated, in 2008, that the total added cost of a death penalty system to the taxpayers was $ 137.7 million per year.[251] Summarizing the situation in 2010, a decade of dollars ago, Judge Alarcón and Professor Mitchell, noting that roughly 4 billion dollars had been spent on the death penalty in California, concluded that capital punishment was "a multibillion-dollar fraud on California taxpayers."[252] The District Attorney of Los Angeles has recently concluded

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$16,846,000. (Cal. Dept. of Finance, 2020-21 State Budget: 0250 Judicial Branch (2020) <http://ebudget.ca.gov/budget/publication/#/e/2020-21/Department/0250> (as of Feb. 12, 2021).

[246] CCFAJ Report, *supra*, at p. 146.

[247] Roadmap, *supra*, 44 Loyola L.A. L.Rev. at pp. S79, S88.

[248] 28 U.S.C. § 3599(a)(2)

[249] Roadmap, *supra*, 44 Loyola L.A. L.Rev. at p. S94

[250] Roadmap, *supra*, 44 Loyola L.A. L.Rev. at pp. S98-S99.

[251] CCFAJ Report, *supra*, at p. 146.

[252] Roadmap, *supra*, 44 Loyola L.A. L.Rev. at p. S46. One point made quite persuasively in the Roadmap study article is the important observation that the

that the death penalty "makes no fiscal sense from the prospective of public safety" because the enormous sums spent on capital punishment "are better spent on programs that improve the quality of life and safety of the . . . community."[253]

B. Most Death Judgments Do Not Survive Review[254]

The majority of death sentences in the United States are eventually reversed.[255] The stage of the review process in which reversals most often occur varies by state.[256] In California, another feature of our dysfunctional system is that most reversals occur only after a case has reached federal court. This means that California expends enormous resources litigating capital cases, often for decades, with only a minority of those death sentences ultimately withstanding review.

Since Chief Justice Rose Bird and two other justices lost their seats on the California Supreme Court in 1986, after being portrayed as too soft on the death penalty, the Court has affirmed capital cases at one of the highest rates in the country, at nearly 90 percent.[257] As a result, most capital cases in California proceed

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California ballot initiatives concerning the death penalty that the voters approved were characterized by misleading fiscal designations. The Legislative Analyst estimation of the costs of the initiatives was laughably incorrect. Again and again, the information on the ballot initiatives described the additional costs as minor or unknown. Thus, the electorate was not provided "with a clear and honest picture of . . . the cumulative cost of implementing the death penalty in California." Consequently: "California voters who voted in favor of . . . death penalty initiatives were not informed of the cost of enforcing these initiatives." Roadmap, *supra*, 44 Loyola L.A. L.Rev. at p. S160.

[253] Los Angeles County District Attorney, Special Directive 20-11 (Dec. 7, 2020) p. 2 <https://da.lacounty.gov/sites/default/files/pdf/SPECIAL-DIRECTIVE-20-11.pdf> (as of Feb. 22, 2021).

[254] Figures in this section are from HCRC data on file with, and updated by, OSPD.

[255] The most common outcome following a death sentence reviewed between 1973 and 2013 was reversal of the sentence on appeal. (Deadly Justice, *supra*, at p. 139.) In a national study of capital cases decided between 1973 and 1995, James Liebman and his colleagues determined that 68% of death cases were reversed. (See Liebman et al., *Capital Attrition: Error Rates in Capital Cases, 1973–1995* (2000) 78 Tex. L.Rev. 1839, 1850.)

[256] Deadly Justice, *supra*, at pp. 139-155.

[257] Deadly Justice, *supra*, at p.151 (California has lowest reversal rate of any jurisdiction other than the federal government, among those with more than 40 death

to collateral review (petitions for habeas corpus in state and federal court) where cases must be fully reinvestigated, consuming enormous resources. In turn, the California Supreme Court, and more recently, superior courts, reverse very few cases on habeas review. Thus, most capital cases proceed to federal court where a majority of petitioners are granted relief on the same claims that were denied in state court.

Meaningful review of California capital cases takes an average of 25 years or more, longer than in any other death penalty state,[258] and is very expensive. In the end, 83 percent of all cases that have reached final disposition have been reversed.[259] Of those who were resentenced after obtaining relief, 69 percent were resentenced to life without the possibility of parole or less.[260]

1. The Reversal Rate of Capital Sentences in California

Direct Appeals. Since 1978, 1,077 death judgments have been imposed in California.[261] The California Supreme Court has decided 748 direct appeals.[262] Of those, the court has reversed 126 death judgments or 17 percent at either the guilt phase (39 cases) or the penalty phase (87 cases).

State Habeas Petitions. The California Supreme Court has decided 802 of the 1,001 petitions[263] for a writ of habeas corpus filed by capitally sentenced persons

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sentences between 1973 and 2014); CCFAJ Report, *supra*, at pp. 120-121, n. 21, citing Uelmen, *Review of Death Penalty Judgments By the Supreme Courts of California: A Tale of Two Courts* (1989) 23 Loyola L.A. L.Rev. 237; Bright & Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases* (1995) 75 B.U. L.Rev. 759, 761.

[258] Deadly Justice, *supra*, at p.160; see HCRC Report, *supra*, at pp. 11-13; CCFAJ Report, *supra,* at p. 125.

[259] Based on data from HCRC on file with OSPD, 261 cases have progressed to a final disposition in either state or federal court. Of those cases, 217 resulted in grants of relief at either the guilt or penalty phase for a total reversal rate of 83%.

[260] Of the 196 people who were resentenced after obtaining relief, 135 were resentenced to LWOP or less. A number of cases are still pending resentencing.

[261] This number includes people who have had more than one death judgment imposed.

[262] The court dismissed an additional 66 cases either as moot or due to the death of the appellant.

[263] This number includes more than one petition for multiple defendants.

since 1978.[264] The court granted 29 petitions and five more were granted as the result of a stipulation for a non-death sentence for a total reversal rate of 4 percent. Eight petitioners (23.5 percent) were granted guilt phase relief and 26 petitioners were granted penalty phase relief (76.5 percent).

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Collectively, the 160 grants of relief in a total of 1,550 final direct appeals and habeas proceedings equals a reversal rate of just over 10 percent by the California Supreme Court. Put another way, of the 1,077 death judgments imposed in California, 160 (15 percent) to date have been reversed by the California Supreme Court. The low reversal rate in state court means that most California capital cases proceed to federal court, incurring further expense.

Federal Habeas Petitions. In federal court, 118 California capital cases have progressed to final judgment.[265] A federal court granted relief in 70 cases equaling a 59 percent reversal rate.[266] The court granted guilt phase relief in 24 cases and penalty relief in 46 cases.

2. Most defendants who obtain relief are resentenced to life

State Court. Of the 126 direct appeal cases in which the California Supreme Court granted relief, there is resentencing information for 117. Of these, 47 defendants (40 percent) initially sentenced to die were resentenced to death. Seventy defendants (60 percent) were resentenced to a term of life without parole or less. This includes three defendants who were subsequently acquitted, and three more whose cases were dismissed.

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[264] The court dismissed an additional 67 petitions either as moot or due to the death of the petitioner.

[265] This number includes two separate death judgments counted as a single denial of relief for Dean Carter.

[266] This number includes cases of clients who were eventually resentenced to death and have appeals currently pending. The reversal rate has declined since the Commission reported in 2008 that the reversal rate in federal court was 70 percent. (CCFAJ Report, *supra*, at p. 115.) The decrease is likely attributable, *inter alia*, to application of the Antiterrorist and Effective Death Penalty Act of 1996. (See Tabak, *Part VI: Corrections and Sentencing Chapter 17, Capital Punishment* in The State of Criminal Justice, (Am. Bar Assoc. edit., 2020) pp. 257-258.)

Of 34 habeas relief grants,[267] four people were resentenced to death. Of those four new death sentences, one person is awaiting retrial after his conviction was reversed in a second habeas proceeding.[268] Twenty-five other people were resentenced to life without parole or less. Two people were exonerated and never recharged.[269] Thus, of the 31 petitioners for whom resentencing information is available, 27 or 87 percent, were resentenced to life without the possibility of parole or less.

Federal Court. Of the 70 petitioners granted relief in federal court, resentencing information is available for 50: 39 of these or 78 percent were resentenced to life without parole or less, and 11 petitioners or 22 percent were resentenced to death.

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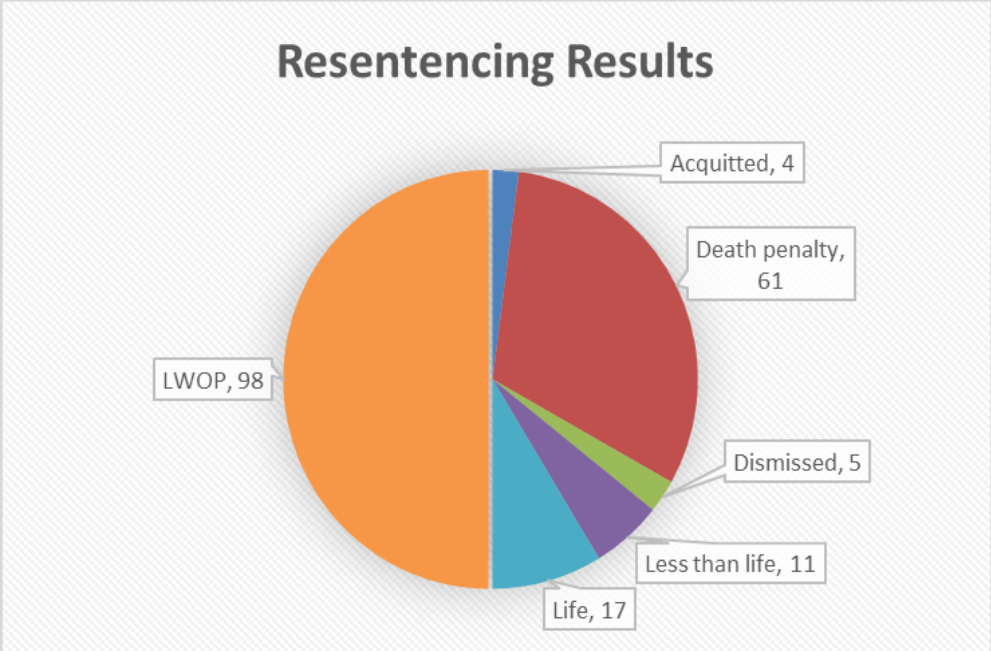
Collectively, of the 196 people who have been resentenced following a grant of relief in state or federal court, 135 or 69 percent were resentenced to life without the possibility of parole or less.



[267] This number includes one petitioner whose two petitions were consolidated and granted. These counted as two grants of relief.

[268] See *In re Gay* (2020) 8 Cal.5th 1059. The state is no longer seeking a death sentence. <https://losangeles.cbslocal.com/2021/01/14/prosecutors-drop-death-penalty-bid-accused-cop-killer-retrial-kenneth-earl-gay/.>

[269] See section IV.E above.

This figure does not mean the system is working. Most of these reversals were obtained only after decades of costly litigation. Many people died before final resolution of their cases.[270] Moreover, as discussed below, due to a severe shortage of counsel, many California cases that suffer from the same flaws are in indefinite limbo.

VII. THE DELAY AND DYSFUNCTION OF CALIFORNIA'S DEATH PENALTY DEPRIVES IT OF ANY LEGITIMATE PENOLOGICAL PURPOSE

The dysfunctional administration of the death penalty in California has created another form of intolerable arbitrariness. As District Judge Carney explained in 2014, "systemic delay has made [each individual death row prisoner's] 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*."[271] These delays are primarily the result of "a human capital problem in the courts: there simply are not enough judges or lawyers" to handle the volume of capital cases generated in California.[272]

Since Judge Carney's analysis in 2014, 47 more people have been sentenced to death in California.[273] That represents a decline in death sentencing that has finally diminished the backlog of cases awaiting the appointment of appellate counsel to

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[270] Among people on California's death row, 149 have died of causes other than execution since 1978, including an estimated 12 people on death row who died of COVID-19 in the last year. < https://www.cdcr.ca.gov/capital-punishment/condemned-inmates-who-have-died-since-1978/> (as of Mar. 16, 2021); Fagone & Cassidy, *California executions on hold, but coronavirus killing San Quentin inmates*, S.F. Chronicle (Aug. 10, 2020) < https://www.sfchronicle.com/crime/article/California-halted-executions-in-2019-Now-15470648.php> (as of Mar. 16, 2021).

[271] *Jones v. Chappell* (C.D. Cal. 2014) 31 F.Supp.3d 1050, 1053, original italics, revd. *sub nom*. *Jones v. Davis* (9th Cir. 2015) 806 F.3d 538, 543; see also Roadmap, *supra*, 44 Loyola L.A. L.Rev. S41.

[272] Colón, *Capital Crime: How California's Administration of the Death Penalty Violates the Eighth Amendment* (2009) 97 Cal. L.Rev. 1377, 1393.

[273] HCRC Report, *supra*, at p. 8.

17.[274] But the other delays Judge Carney described are worse than ever and have no prospect of improving.

Proposition 66, passed in 2016, promised to "mend not end" California's death penalty, by speeding up appeals and saving money.[275] It has done neither. In fact, Proposition 66 has further slowed the post-conviction process.

Proposition 66 shifted responsibility for appointment of counsel to superior courts and promised to expand the pool of habeas counsel to eliminate the backlog of cases awaiting counsel.[276] It did not, however, provide any funds to pay counsel appointed under its aegis. Thus far, only three attorneys have been placed on the roster of attorneys eligible for habeas appointments under the new system.[277] Since Proposition 66 was passed, there has not been a single new appointment of habeas corpus counsel.[278]

Moreover, by shifting responsibility for adjudicating habeas cases to the superior court, Proposition 66 created an additional level of review: either party may appeal an adverse ruling to the state court of appeal, where new counsel must be appointed. But there is currently no mechanism to pay these attorneys. Consequently, there are now 19 petitioners awaiting appointment of habeas corpus counsel in the California Courts of Appeal.[279]

At the end of 2020, there were 363 people awaiting appointment of habeas counsel – approximately the same number as in 2016 – including 123 people whose death judgments have already been affirmed on direct appeal.[280]

Justices of the California Supreme Court have repeatedly expressed frustration with the intractable delay and dysfunction in California's death penalty

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[274] *Ibid.*

[275] See Cal. Sec. of State, Elections Division, Voter Information Guide: Argument in Favor of Proposition 66 (Nov. 8, 2016) p. 108 <https://vig.cdn.sos.ca.gov/2016/general/en/pdf/complete-vig.pdf> (as of Feb. 22, 2021).

[276] *Ibid.*

[277] HCRC Report, *supra*, at p. 25.

[278] HCRC Report, *supra*, at p. 10 & fn. 3.

[279] *Id.* at pp. 10-11.

[280] *Id.* at p. 9.

system.[281] But the Court has thus far rejected Judge Carney's view that California's death penalty is unconstitutional because, as administered, it serves no legitimate penological purpose: "the execution of a death sentence is so infrequent, and the delays preceding it so extraordinary, that the death penalty is deprived of any deterrent or retributive effect it might once have had."[282]

CONCLUSION

In *McGautha v. California* (1971) 402 U.S. 183, 204, the United States Supreme Court expressed great skepticism about the Model Penal Code's death penalty provisions, observing that "[t]o identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability." The failure of the modern death penalty has demonstrated the truth of this observation.

The death penalty as administered in California is tainted by racial discrimination and applied arbitrarily based on geography. Far from being reserved for the worst offenders, the death penalty is imposed too often on young offenders, particularly youth of color, on the severely mentally ill and intellectually disabled, and on those who have been raised in the most deprived and abusive circumstances. California taxpayers spend millions imposing and then defending these flawed death judgments – most of which are reversed after decades of litigation.

The death penalty as administered in California serves no penological purpose. It has, indeed, become "nothing more than the purposeless and needless imposition of pain and suffering."[283] Not only are the monetary costs of the death penalty astronomical, but the uncertainty and delay take an enormous emotional toll on

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[281] *People v. Potts* (2019) 6 Cal.5th 1012, 1063-1065 (conc. opn. of Liu, J.) (citing remarks of current and former Chief Justices).

[282] *Jones v. Chappell, supra*, 31 F.Supp.3d at p. 1063; see *People v. Seumanu* (2015) 61 Cal.4th 1293, 1375 (rejecting "*Jones* claim" that delays in implementing the death penalty under California law have rendered that penalty impermissibly arbitrary, on record before the Court).

[283] *Enmund v. Florida* (1982) 458 U.S. 782, 798, quoting *Coker v. Georgia* (1977) 433 U.S. 584, 592.

victims' families. People incarcerated on death row in turn are subjected "to decades of especially severe, dehumanizing conditions of confinement."[284]

There are some things the legislature could do to ameliorate the problems described in this Paper, but they would be band-aids on a gaping wound. Many of the possible remedies – creating an exception for the mentally ill or making the Racial Justice Act retroactive – would require significant resources to implement. Public defender offices already lack the staff and funding to adequately assist clients and former clients with other remedial statutes enacted by the legislature. As discussed above, there is a severe shortage of attorneys to handle current capital post-conviction cases. Well-intentioned changes in the law, without addressing the death penalty itself, could actually exacerbate the shortage of legal resources.

Abolishing the death penalty, in contrast, would allow all the resources currently spent on the death penalty to be redirected to other unmet needs in the criminal justice system and to address the inequities that fuel it.

The time for half measures is past. Abolition is the only solution.

[284] *Glossip v. Gross, supra*, 576 U.S. at p. 925 (dis. opn. of Breyer, J.), quoting *Johnson v. Bredesen* (2009) 558 U.S. 1067, 1069 (Stevens, J., statement respecting denial of certiorari).