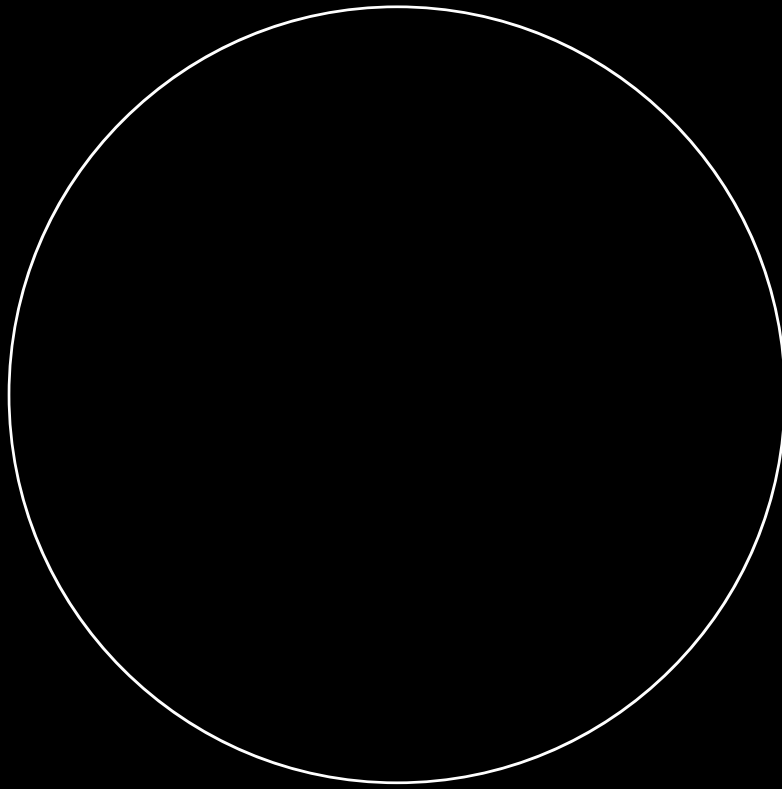


DEATH PENALTY REPORT

Committee on  
Revision of  
the Penal Code



- 03** Executive Summary
- 05** Recommendations
- 08** Introduction and Background
- 34** Information about the Committee on Revision of the Penal Code
- 37** Appendix of Data Sources and Methodology

# Table of Contents

# Executive Summary

## Executive Summary

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

After a thorough examination, the Committee has determined that the death penalty as created and enforced in California has not and cannot ensure justice and fairness for all Californians.

More than forty years of experience have shown that the death penalty is the opposite of a simple and rational scheme. It has become so complicated and costly that it takes decades for cases to be fully resolved and it is imposed so arbitrarily – and in such a discriminatory fashion – that it cannot be called rational, fair, or constitutional. Hundreds of California death sentences adjudicated in state and federal courts have been reversed or otherwise thrown out as unconstitutional while only 33 people are currently eligible for execution.

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

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

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

# Recommendations

## Recommendations

### Repeal the death penalty

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

### Reduce the size of death row

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

#### Clemency

The Governor should use his executive clemency power to reduce the size of death row by commuting death sentences. Though no California governor has granted clemency to a condemned person since the death penalty's return to California in 1977, multiple governors in other states have broadly granted clemency to people on death row, even while the death penalty remained in their states.<sup>1</sup> The California Supreme Court, which must separately approve clemency for anyone who has a prior felony conviction, should also promptly adjudicate clemency petitions presented to the Court.<sup>2</sup>

#### Settle pending post-conviction cases

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

#### Recall and resentencing in death penalty cases

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

#### Legislative reforms

##### 1. Reform the felony-murder special circumstance

Current law allows people to be sentenced to death even if they did not personally kill or intend anyone to die. This was not always the case: as originally enacted, California's death penalty could not be imposed on accomplices unless they had an intent to kill.<sup>5</sup> In 1990, voters approved Proposition 115, which permitted a death sentence or life without the possibility of parole for an accomplice to a felony who did not personally kill nor intend for anyone to die, if the person acted with reckless indifference and was a major participant in the felony offense where someone was killed.<sup>6</sup>

The Legislature should reverse the expansion of the felony-murder special circumstance enacted through Proposition 115 and should provide retroactive relief to those currently serving sentences based on this provision.<sup>7</sup>

<sup>1</sup> Death Penalty Information Center, *List of Clemencies Since 1976: Notable Grants of Clemency*.

<sup>2</sup> When a candidate for clemency has a felony conviction from a separate proceeding, a majority of the California Supreme Court must also approve the clemency. California Constitution, Article V, § 8(a). At least 68% of people on death row have prior felony convictions and would need California Supreme Court approval for sentence commutation from the Governor. Data provided by CDCR Office of Research as of July 31, 2021.

<sup>3</sup> See Samuel Weissovitz, *The California Attorney General's Constitutional Authority Over Criminal Justice Reform During the Covid-19 Pandemic*, SCOCA Blog, Apr. 21, 2020. See also Am. Bar Assn., *Criminal Justice Standards for the Prosecution Function*, Standard 3-8.5 (model ethical rule for post-conviction review directs prosecutors to "consider potential negotiated dispositions or other remedies, if the prosecutor and the prosecutor's office reasonably conclude that the interests of justice are thereby served").

<sup>4</sup> Penal Code § 1170(d)(1). For most capital cases, a judge may only convert a death sentence into a life without parole sentence. But for any death penalty case in which the offense occurred before June 5, 1990, the judge may also dismiss the special circumstances and impose a sentence of 25 years to life with parole, or another sentence depending on the specific enhancements and charges proven. This is because on June 5, 1990, the voters passed Proposition 115, which created Penal Code § 1385.1 and removed from judges the discretion to dismiss special circumstances after they have been found true.

<sup>5</sup> *People v. Anderson*, 43 Cal.3d 1104, 1147 (1987).

<sup>6</sup> Penal Code § 190.2(d).

<sup>7</sup> Senate Bill 300 (Cortese), introduced in the Legislature in 2021, is one example of this type of Legislative reform. This bill requires a two-thirds vote to pass in the Legislature because it amends Penal Code sections created by Proposition 115.

**2. *Judicial dismissal of special circumstances***

Current law allows judges to dismiss charges and enhancements in almost any case.<sup>8</sup> But when “special circumstances” are charged, making the case one where a death or life without parole sentence can be imposed, a judge cannot dismiss these allegations after they have been found true by a jury or admitted by the defendant.<sup>9</sup> This was not always the case: this limitation was also imposed through Proposition 115.

The Legislature should restore to judges the power to dismiss special circumstances in all cases.<sup>10</sup>

**3. *Make the California Racial Justice Act of 2020 retroactive***

In 2020, the Legislature enacted the Racial Justice Act to eliminate racial bias and racially discriminatory practices in the criminal legal system, including both capital and non-capital cases.<sup>11</sup> But the Racial Justice Act only applies prospectively and does not apply to cases adjudicated prior to January 1, 2021.

The Legislature should make the Racial Justice Act retroactive.<sup>12</sup>

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

More than three decades ago, the United States Supreme Court held that incompetent people cannot be executed.<sup>13</sup> Nevertheless, there are at least 6 people on California’s death row who may be permanently incompetent and, if they are, could not be executed.<sup>14</sup> Current law provides no clear process to remove these people from death row.

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

<sup>8</sup> Penal Code § 1385.

<sup>9</sup> Penal Code § 1385.1.

<sup>10</sup> Two bills that would accomplish this goal were introduced in the Legislature in 2021, Assembly Bill 1224 (Levine 2021), and SB 300 (Cortese 2021). AB 1224 was not successful while SB 300 continues to move through the legislative process. Both required a two-thirds vote to pass the Legislature because they amend Penal Code sections created by Proposition 115.

<sup>11</sup> Assembly Bill No. 2542 (2019–2020 Reg. Sess.) (creating Penal Code § 745).

<sup>12</sup> Assembly Bill 256 (Kaira), introduced in 2021, would make the Racial Justice Act retroactive and continues to move through the legislative process.

<sup>13</sup> *Ford v. Wainwright*, 477 U.S. 399 (1986).

<sup>14</sup> The cases are cited in Part VII below.

# Analysis and Data



## Analysis and Data

### I. INTRODUCTION AND BACKGROUND

California has the largest population of condemned people in the country.<sup>15</sup> Currently, 697 people are on death row.<sup>16</sup> More than 1,000 people have been sentenced to death since 1978 in California,<sup>17</sup> but no executions have occurred in the last 15 years. Only 13 executions have taken place since reinstatement of the death penalty in 1978.<sup>18</sup> During that time, 235 death sentences have been reversed as unconstitutional or otherwise improper.<sup>19</sup>

More than half the people on death row are awaiting appointment of post-conviction counsel. The appellate and post-conviction litigation process is almost unfathomably long and costly. It now averages more than 30 years for people convicted of capital offenses to exhaust their appeals.<sup>20</sup> California has spent more than 4 billion tax dollars on the death penalty since it was reinstated in 1977.<sup>21</sup> Only 33 people have completed post-conviction review of their case and are currently eligible for execution.<sup>22</sup>

Meanwhile, over the past decade, California voters have narrowly supported the death penalty in three propositions on the ballot in 2012 and 2016.<sup>23</sup> California has tried to make the death penalty system work. The state has enacted statutes and constitutional provisions to prioritize death penalty cases, to expedite record review and to provide victims with speedy resolution of cases.<sup>24</sup> The state funds two state agencies and contracts with a third agency to provide defense services to the condemned.<sup>25</sup> At the federal level, the Anti-Terrorism and Effective Death Penalty Act was enacted in 1996 in an effort to expedite review of death penalty cases in federal court.<sup>26</sup>

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

At the same time, 5 people — all men of color — on death row have been found innocent and exonerated.<sup>27</sup> And decades of research have shown disturbing racial disparities in who is sentenced to death.<sup>28</sup> People of color currently make up 68% of death row.<sup>29</sup> At least a third of people currently condemned to death have been diagnosed with serious mental illness and 6 of them may be permanently incompetent.<sup>30</sup> The death penalty is also not used uniformly in California: a handful of counties account for the majority of the recent death sentences imposed in the state.<sup>31</sup>

Against this convoluted and conflicted backdrop, the Committee undertook its analysis of the current state of the death penalty. The Committee conducted a lengthy hearing in March 2021 and heard from academic experts about the history and current application of California's death penalty.<sup>32</sup> Committee staff also consulted extensively with practitioners and other experts from across California and collected relevant data. This report reviews the extensive literature on California's death penalty, including new studies and data not previously available.

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

15 Death Penalty Information Center, *Death Row* (next largest death row is Florida's with 347 people).

16 CDCR, *Condemned Inmate List* (as of September 3, 2021). This list is posted monthly by the California Department of Corrections and Rehabilitations and appears to include people whose death sentences were reversed in post-conviction proceedings and whose cases remain unresolved. CDCR's public list also does not include one person who is listed as condemned in his individual inmate record. According to the Habeas Corpus Resource Center, which is required by California Rule of Court 4.56(c) to maintain a list of people subject to a judgment of death, the number of people under sentence of death in California is 677 as of September 8, 2021.

17 Office of the State Public Defender, *California's Broken Death Penalty*, March 2021, 58.

18 CDCR, *Inmates Executed 1978 to Present*.

19 This information comes from the Office of the State Public Defender, *California's Broken Death Penalty*, March 2021, 58–59, as well as supplemental information from the Office of the State Public Defender and the Habeas Corpus Resource Center provided in September 2021.

20 Habeas Corpus Resource Center, *Annual Report 2020*, at 9–13 (2020) (*HCRC Report*).

21 Judge Arthur L. Alarcon and Paula M. Mitchell, *Executing the Will of the Voters?: A Roadmap to Mend or End the California Legislature's Multi-Billion Dollar Death Penalty Debacle*, 44 Loy. L.A. L. REV. 541 (2011).

22 Information provided by the Office of the State Public Defender.

23 Proposition 34, Abolition of the Death Penalty Initiative, failed with 48% of the vote in 2012. See California Secretary of State, *Statement of Vote*, General Election, November 6, 2012, 13; Proposition 62, Repeal of the Death Penalty failed with 47% of the vote in 2016. See California Secretary of State, *Statement of Vote*, General Election, November 8, 2016, 12; Proposition 66, Death Penalty Procedures, passed with 51% of the vote. California Secretary of State, *Statement of Vote*, General Election, November 8, 2016, 12.

24 See Penal Code §§ 190.6, 190.8; Cal. Const. Art. 1, § 28(a)(6).

25 The Habeas Corpus Resource Center is solely dedicated to death penalty work. The Office of the State Public Defender was solely dedicated to death penalty work until July 1, 2020, when it expanded to also provide training and technical assistance to county indigent defense providers. The California Appellate Project is a non-profit that is under contract with the Judicial Council of California to provide assistance to attorneys appointed to represent individuals on death row.

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

27 Death Penalty Information Center, *Innocence Database*.

28 Research is discussed in Part V below.

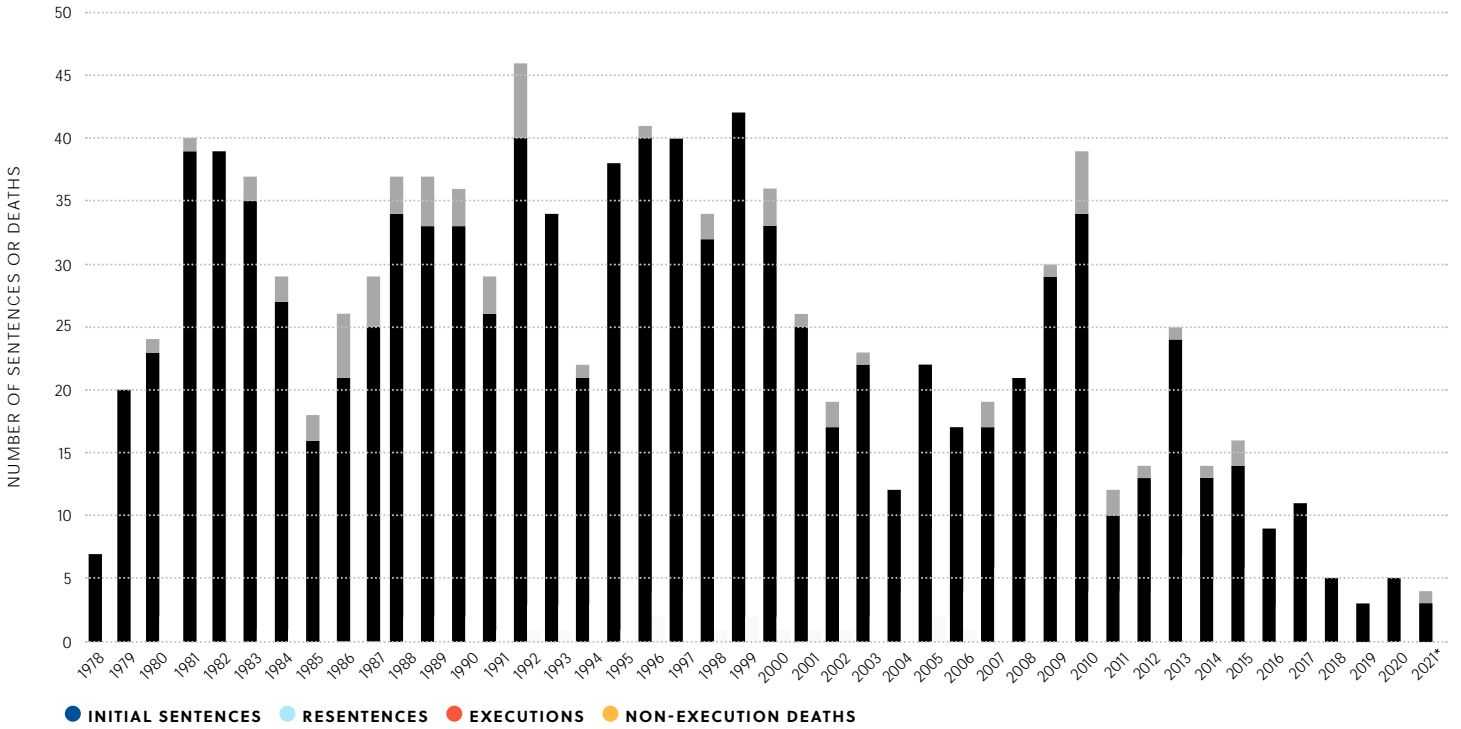
29 Analysis of data provided by CDCR Office of Research.

30 See discussion in Part VII below.

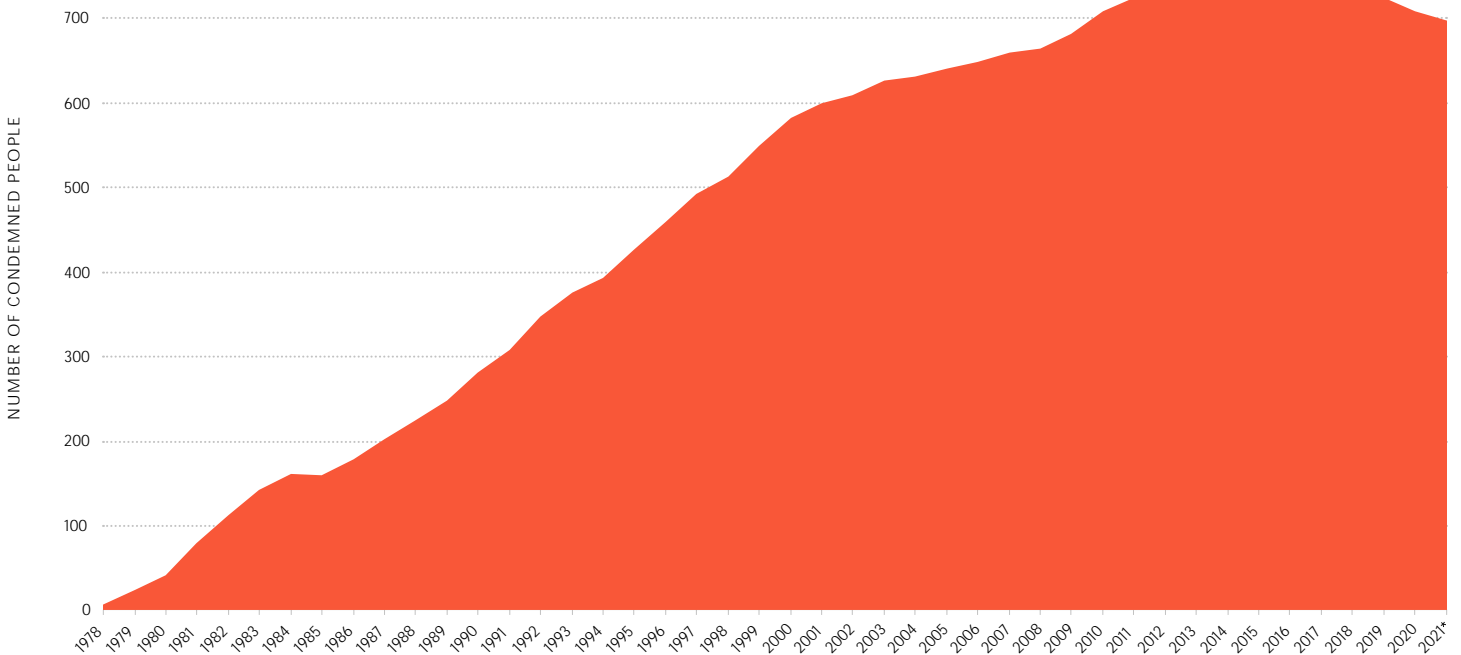
31 From 2015–2020, six counties — Los Angeles, Riverside, Orange, Kern, San Bernardino and Tulare — imposed 89% of the death sentences in the state. See California Department of Justice, *Homicide in California* reports from 2015–2020, Table 36.

32 Video of the meeting is available at the Committee's website.

**FIGURE 1: DEATH SENTENCES, EXECUTIONS, AND NON-EXECUTION DEATHS IN CALIFORNIA (1978–2021)**



**FIGURE 2: TOTAL NUMBER OF CONDEMNED PEOPLE AT END OF YEAR**



\*Data as of September 3, 2021 Sources: See Appendix.

## II. RECENT DEVELOPMENTS IN THE ADMINISTRATION OF THE DEATH PENALTY

The Committee's report is the first comprehensive examination of the death penalty in California by a state agency or organization since 2008. That 2008 report, by the California Commission on the Fair Administration of Justice, conducted an exhaustive review of the state's death penalty system and concluded it was dysfunctional. The Commission on the Fair Administration of Justice identified three ways to address the dysfunction: (1) dramatically increase funding for the death penalty system, (2) narrow the scope of the death penalty or (3) repeal the death penalty altogether.<sup>33</sup> California did none of these things.

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

- In 2009, the American Law Institute, the nation's most prominent law reform body, voted to remove the death penalty from its Model Penal Code. The Model Penal Code's death penalty scheme had been a national basis for death penalty statutes and had been approved by the United States Supreme Court. As The New York Times put it, the American Law Institute "pronounced its project a failure and walked away from it."<sup>34</sup>
- In 2014, a federal judge found that California's death penalty was unconstitutional because of long delays in executing people.<sup>35</sup> That legal decision was reversed, but only on procedural grounds, and the issue has not since been addressed in federal court or at the California Supreme Court.<sup>36</sup>
- In 2016, California voters approved Proposition 66, which aimed to reduce costs, provide more attorneys for people on death row and speed up executions.<sup>37</sup> But more than four years later, costs have increased, just as many people on death row remain in need of post-conviction lawyers and delays in cases have continued to grow. In 2008, the capital case post-conviction review process took an average of 22 years.<sup>38</sup> Today, it's more than 30 years.<sup>39</sup> The death penalty costs taxpayers \$150 million a year.<sup>40</sup>
- In 2018, Vincente Benavides Figueroa became the fifth person on California's modern death row to be exonerated. The California Supreme Court determined that Figueroa's convictions were based on false evidence of sexual assault.<sup>41</sup>
- In 2019, Governor Gavin Newsom declared a moratorium on executions in California. The Governor explained that "California's death penalty system is unfair, unjust, wasteful, protracted and does not make our state safer."<sup>42</sup> The Governor also noted, "death sentences are unevenly and unfairly applied to people of color, people with mental disabilities, and people who cannot afford costly legal representation."<sup>43</sup>

<sup>33</sup> California Commission on the Fair Administration of Justice, *Final Report, Death Penalty* at 112–182 (2008) (CCFAJ Report).

<sup>34</sup> Adam Liptak, *Group Gives Up Death Penalty Work*, *New York Times*, Jan. 11, 2010.

<sup>35</sup> *Jones v. Chappell*, 31 F. Supp.3d 1050, 1053 (C.D. Cal. 2014).

<sup>36</sup> *Jones v. Davis*, 806 F.3d 538, 543 (9th Cir. 2015).

<sup>37</sup> Voter Information Guide for 2016, General Election, 108–09 (2016).

<sup>38</sup> CCFAJ Report at 123.

<sup>39</sup> HCRC Report at 10–13.

<sup>40</sup> Voter Information Guide for 2016, General Election, 81 (2016).

(Legislative Analyst's Office analysis of Proposition 62).

<sup>41</sup> *In re Figueroa*, 4 Cal.5th 576, 588–89 (2018).

<sup>42</sup> Governor's Exec. Order N-09-19 (Mar. 13, 2019).

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

- In 2020, Governor Newsom took the unprecedented step of filing an amicus brief at the California Supreme Court to argue that the death penalty has been applied in an unconstitutional and racially-biased manner.<sup>44</sup>
- In 2021, Rob Bonta was appointed California Attorney General by Governor Newsom. Attorney General Bonta reiterated his opposition to the death penalty after his appointment: “I think the death penalty is inhumane. It does not deter. Studies show it’s long had a disparate impact on defendants of color, especially when the victim is white.”<sup>45</sup> California’s last three Attorneys General expressed similar reservations about the death penalty while continuing to defend it in court.<sup>46</sup>
- In addition to the state-wide moratorium on executions, District Attorneys in three major California jurisdictions — Los Angeles, San Francisco and Santa Clara Counties — have recently declared they will not seek the death penalty in any case and will work to resentence people now on death row.<sup>47</sup> These District Attorneys — as well as the District Attorneys from San Joaquin and Contra Costa counties — have also recently told the California Supreme Court that the death penalty as currently administered does not meet constitutional standards.<sup>48</sup> As a result, the majority of Californians live in a county where the elected District Attorney does not support California’s current death penalty.
- A group of nearly 100 current and former elected prosecutors, Attorneys General, and law enforcement leaders, including the current District Attorneys of Contra Costa, San Francisco, Santa Clara and Los Angeles Counties, recently stated: “[m]any have tried for over forty years to make America’s death penalty system just. Yet the reality is that our nation’s use of this sanction cannot be repaired, and it should be ended.”<sup>49</sup>
- New death sentences have declined dramatically over the past decade: In 2010, 34 death sentences were imposed statewide.<sup>50</sup> In 2020, there were 5 new death sentences.<sup>51</sup> So far in 2021, 3 new death sentences have been imposed.<sup>52</sup>
- California’s most recent execution was 15 years ago. Exits from death row have exceeded new death sentences every year since 2017, when the death row population peaked at 746.<sup>53</sup> Since 1980, 156 people condemned to death have died of natural and non-execution causes, including 19 in 2020.<sup>54</sup> As of September 3, 2021, there are 697 people on death row.<sup>55</sup>
- In 2021, Virginia became the first Southern state to repeal the death penalty<sup>56</sup> and the federal government under President Joseph Biden imposed a moratorium on executions.<sup>57</sup> Now, 23 states do not have a death penalty and two other states (in addition to California), as well as the federal government, have moratoriums on executing people.<sup>58</sup> As a result, a majority of states in the United States — as well as the majority of nations<sup>59</sup> — do not have the death penalty in law or practice.

Finally, last year, the nation was forced to briefly confront the reality of what a regularly-operating death penalty looks like. In the final months of President Donald Trump’s

44 Brief Of Amicus Curiae The Honorable Gavin Newsom In Support Of Defendant And Appellant In *People v. McDaniel*, No. S171393.

45 Bob Egelko, *California Attorney General Rob Bonta Sees State Moving Away From Death Penalty*, San Francisco Chronicle, May 17, 2021.

46 *Id.*

47 San Francisco District Attorney’s Office, Press Release, July 7, 2020; Los Angeles District Attorney’s Office, Special Directive 2011, Dec. 7, 2020; Robert Salonga, *Exclusive: Santa Clara DA Abandoning Death Penalty Pursuit in All Cases*, Mercury News, July 21, 2020.

48 Death Penalty Information Center, *California Governor, 6 District Attorneys File Briefs Saying State’s Death Penalty is Arbitrary and ‘Infected by Racism’*, October 28, 2020; Brief Amici Curiae of Six Present or Former District Attorneys in *People v. McDaniel*, No. S171393.

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

50 California Department of Justice, *Homicide in California 2020*, Table 35.

51 *Id.*

52 CDCR, *Condemned Inmate List*. Several months pass between a jury recommendation of death and final imposition of sentence. The number of death sentences in 2021 likely is partly a result of the limitations on conducting jury trials during the COVID-19 pandemic in 2020.

53 See NAACP Legal Defense and Educational Fund, Inc., *Death Row U.S.A. Reports for 2017–2020*.

54 CDCR, *Condemned Inmates Who Have Died Since 1978* (September 22, 2021).

55 CDCR, *Condemned Inmate List* (September 3, 2021).

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

57 Memorandum of the Attorney General, *Moratorium on Federal Executions Pending Review of Policies and Procedures*, July 1, 2021.

58 Death Penalty Information Center, *State by State* (with 2021 selected as display year).

59 Death Penalty Information Center, *International*.

administration, the federal government executed 13 people over a six-month period.<sup>60</sup> The executions continued despite important legal questions unresolved in unsigned, late-night orders from the United States Supreme Court.<sup>61</sup> Justice Sonia Sotomayor decried this “unprecedented, breakneck timetable of executions.”<sup>62</sup> If California adopted the same pace of executions – an average of one every two weeks – it would take more than 25 years to clear death row.

### III. LEGAL AND HISTORICAL BACKGROUND

#### A. History of California’s modern death penalty law.

California has had the death penalty since its founding.<sup>63</sup> Between 1930 and 1969, California executed 292 people.<sup>64</sup> But in 1972, the California Supreme Court struck down the death penalty as a violation of the state constitution’s prohibition against cruel or unusual punishment: “We have concluded that capital punishment is impermissibly cruel. It degrades and dehumanizes all who participate in its processes. It is unnecessary to any legitimate goal of the state and is incompatible with the dignity of man and the judicial process.”<sup>65</sup>

The California Supreme Court’s ruling was short-lived. Nine months later, voters approved Proposition 17 to amend the California Constitution to explicitly allow capital punishment.<sup>66</sup>

But the death penalty did not immediately return to California. Four months before Proposition 17 took effect, the United States Supreme Court ruled in *Furman v. Georgia* that the death penalty as then administered violated the United States Constitution’s prohibition against cruel and unusual punishment.<sup>67</sup> The crux of the ruling lay in the plurality’s conclusion that the death penalty had been applied in an arbitrary manner, summarized in the oft-quoted statement of Justice Potter Stewart that the death penalty is cruel and unusual “in the same way that being struck by lightning is cruel and unusual.”<sup>68</sup>

The *Furman* decision invited states to enact new laws narrowing who deserved the ultimate punishment of death. The states proceeded in two ways: some, including California,<sup>69</sup> adopted statutes that required a death sentence in specific circumstances and others adopted the discretionary death penalty statute proposed by the American Law Institute in its Model Penal Code, which let jurors decide in a separate penalty proceeding whether death was appropriate.<sup>70</sup>

Four years after the *Furman* ruling, the United States Supreme Court approved a discretionary statute in 1976 and America’s “modern” death penalty era began.<sup>71</sup>

In 1977, the California Legislature replaced the mandatory death penalty statute – which had been invalidated by the California Supreme Court<sup>72</sup> – with one modeled on the Model Penal Code approved by the United States Supreme Court.<sup>73</sup> Then-Governor Jerry Brown vetoed the bill, but the Legislature overrode his veto, marking the death penalty’s official return to California.<sup>74</sup>

The following year, California voters approved a ballot initiative to expand the death penalty. The initiative was dubbed the “Briggs Initiative” after its proponent Senator

60 James Romoser, *Over Sharp Dissents, Court Intervenes To Allow Federal Government To Execute 13th Person In Six Months*, SCOTUSblog, Jan. 16, 2021.

61 *Id.*

62 *United States v. Higgs*, 592 U.S. \_\_\_ (2021) (Sotomayor, dis. opn.).

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

64 United States Department of Justice, *Capital Punishment 1977*, Table 2.

65 *People v. Anderson*, 6 Cal.3d 628, 656 (1972). The California Supreme Court’s decision came eight months after the United States Supreme Court had upheld the California death penalty in *McGautha v. California*, 402 U.S. 183 (1971).

66 California Proposition 17 (1972).

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

68 *Id.* at 309 (concurring opinion of Justice Stewart).

69 Stats. 1973, ch. 719, pp. 1297–1302.

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

71 *Gregg v. Georgia*, 428 U.S. 153, 193–195 (1976) (joint opinion of Justices Stewart, Powell and Stevens).

72 *Rockwell v. Superior Court*, 18 Cal.3d 420, 445 (1976).

73 See *People v. Frierson*, 25 Cal.3d 142, 174–76 (1979) (describing SB 155).

74 Wallace Turner, *California Legislature Overrides Veto of Death Penalty*, *New York Times*, Aug. 12, 1977.

John Briggs and officially identified as Proposition 7.<sup>75</sup> The initiative expanded the scope of California's death penalty to effectively encompass nearly all homicides.<sup>76</sup> As described in the voter materials, the initiative would "give every Californian the protection of the nation's toughest, most effective death penalty law" that would "apply to every murderer."<sup>77</sup>

In the years that followed, California's death penalty statute was expanded even further.<sup>78</sup> For example, subsequent amendments expanded the law to allow a sentence of death or life in prison without parole even if the defendant did not kill or intend to kill, and removed a judge's discretion to dismiss special circumstances, making life without parole the mandatory minimum punishment for anyone convicted of first-degree murder with special circumstances.<sup>79</sup>

In 2016, voters approved Proposition 66 to "speed up" the review of death penalty judgments in an effort to "fix" the system.<sup>80</sup> As described below, four years after the passage of Proposition 66, the pace of litigation in death penalty cases has only slowed further.

### B. California's modern death penalty process.

In California, a case becomes a potential death penalty case when the district attorney charges murder with special circumstances, which carries only two possible punishments: death or life imprisonment without the possibility of parole.<sup>81</sup>

Death penalty trials have two parts: a guilt phase and a punishment phase. The guilt phase is similar to any murder trial with the additional requirement that the prosecution must prove the alleged special circumstances,<sup>82</sup> such as committing the murder for financial gain<sup>83</sup> or the victim being a police officer.<sup>84</sup> The punishment phase is unlike other criminal trials. During the punishment phase, the prosecution presents aggravating evidence — why the defendant should be executed — and the defense presents mitigating evidence — why the defendant should receive a life sentence for his or her crime(s).<sup>85</sup> The jury is asked to weigh the aggravating and mitigating evidence and determine if death or life without parole is the appropriate punishment.<sup>86</sup> If the jury chooses life without parole, the judge must impose that sentence; the judge has no discretion to impose a sentence of death and no discretion to impose a lesser sentence of life imprisonment with the possibility of parole.<sup>87</sup> But if the jury chooses death, the judge retains the discretion to choose life without parole or may impose the death sentence.<sup>88</sup>

Following imposition of a death sentence, the post-conviction process begins. This process has three parts. First, the California Constitution requires an automatic, direct appeal in all death penalty cases to the California Supreme Court.<sup>89</sup> The direct appeal considers legal challenges to the death sentence based solely on evidence and argument that was presented at the defendant's trial. In recent times, death penalty cases have accounted for about a quarter the California Supreme Court's work.<sup>90</sup>

Second, in addition to the direct appeal, a person under sentence of death will also pursue a habeas corpus challenge in state court.<sup>91</sup> The state habeas corpus challenge considers evidence that was not available or presented during trial.<sup>92</sup>

Third, following the completion of review of the death judgement in state court, the person sentenced to death can file a habeas corpus challenge in federal court.

<sup>75</sup> Some supporters of this voter initiative — including the people who ran the campaign and wrote the language of the law — now support repealing the death penalty. See Adam Nagourney, *Seeking an End to an Execution Law They Once Championed*, New York Times, April 6, 2012.

<sup>76</sup> Steven F. Shatz and Nina Rivkind, *The California Death Penalty Scheme: Requiem for Furman?*, 72 N.Y.U. L.Rev. 1283, 1310 & n.154 (1997).

<sup>77</sup> Voter Information Guide for 1978, General Election, 34 (1978) (Argument in Favor of Proposition 7).

<sup>78</sup> Catherine M. Grosso, et al., *Death by Stereotype: Race, Ethnicity, and California's Failure to Implement Furman's Narrowing Requirement*, 66 UCLA L.Rev. 1394, 1406 (2019).

<sup>79</sup> Proposition 115 (1990). Proposition 115 overrode the California Supreme Court opinions in *Carlos v. Superior Court*, 35 Cal. 3d 131 (1983), and *People v. Anderson*, 43 Cal. 3d 1104 (1987). Other initiatives added more special circumstances — killing a juror, "car-jacking," "drive-by-shootings," and "gang related" murders — and expanded the definitions of kidnapping and arson under the felony-murder special circumstance. Proposition 195 (1996); Proposition 196 (1996); Proposition 21 (2000).

<sup>80</sup> Proposition 66 passed with 51% of the vote. California Secretary of State, *Statement of Vote*, General Election, November 8, 2016, 12.

<sup>81</sup> Penal Code §§ 190, 190.2.

<sup>82</sup> Penal Code § 190.1.

<sup>83</sup> Penal Code § 190.2(a)(1).

<sup>84</sup> Penal Code § 190.2(a)(7).

<sup>85</sup> Penal Code §§ 190.3, 190.4.

<sup>86</sup> *Id.*

<sup>87</sup> Penal Code § 190.4(e); Penal Code § 1385.1.

<sup>88</sup> Penal Code § 190.4(e).

<sup>89</sup> Cal. Constitution Art. IV § 11.

<sup>90</sup> Jeannine Bell, *Setting Precedent, An Interview with Justice Mariano-Florentino Cuéllar*, Contexts, October 25, 2021; Editorial Board, *Chief Justice Tani Cantil-Sakauye Holds Courts*, Sacramento Bee, March 13, 2016; David E. Inger, *Chief Justice Cantil-Sakauye Discusses State of Courts*, At the Lectern, Jan. 19, 2015.

<sup>91</sup> Penal Code § 1473.

<sup>92</sup> California law had previously required all habeas petitions in death penalty cases to be filed at the California Supreme Court. Proposition 66 shifted these cases to the Superior Courts, though the Supreme Court retains discretion to keep cases previously filed there. Penal Code § 1509.

The purpose of this challenge is to determine if the state court correctly resolved legal issues based on the U.S. Constitution. These proceedings are governed by the Anti-Terrorism and Effective Death Penalty Act (AEDPA), passed by Congress in 1996 with the goal of increasing the speed of federal review of death penalty cases.<sup>93</sup> Obtaining reversal of a death judgment in federal court is extremely difficult.<sup>94</sup>

### C. Most death sentences are eventually overturned by courts.

Despite extra safeguards at trial and a difficult standard of post-conviction review, most sentences of death ultimately are reversed in California and throughout the United States.<sup>95</sup> Of more than 1,000 death sentences imposed in California since 1978, only 50 people have completed the post-conviction review process.<sup>96</sup> Eleven of those people have been executed and 6 have died of natural causes, leaving only 33 people currently eligible for execution.<sup>97</sup> Far more – 235 people – have had their death judgments reversed.<sup>98</sup>

Of these reversed cases, 165 people obtained relief in state court.<sup>99</sup> Although the California Supreme Court affirms 90% of the death penalty cases it decides,<sup>100</sup> California death sentences are frequently reversed in federal court after decades of litigation expenditures in the state courts. Federal courts have granted relief in 70 of the 119 California capital cases that have final federal judgments – a reversal rate of 59%.<sup>101</sup>

As explained by Sean Kennedy, Executive Director of the Center for Juvenile Law and Policy at Loyola Law School, who presented to the Committee in March, “federal judges have been more willing to find that an error may have been prejudicial, specifically at the penalty phase, because of the understanding that a wide variety of mitigators can appeal to at least one juror sitting on the penalty phase and change the verdict.”<sup>102</sup> Most of the people who obtained relief in state or federal court were resentenced to life without parole or less.<sup>103</sup>

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

Following the execution of Clarence Ray Allen in 2006, a federal district court concluded that California’s lethal-injection protocol could cause “pain so extreme that it offends the Eighth Amendment.”<sup>104</sup> This ruling resulted in a court-imposed moratorium on executions while the state devised a new execution protocol.

Shortly after taking office in 2019, Governor Newsom issued an order imposing an executive moratorium on all executions, stating “California’s death penalty system is unfair, unjust, wasteful, protracted and does not make our state safer.”<sup>105</sup> The Governor also noted, “death sentences are unevenly and unfairly applied to people of color, people with mental disabilities, and people who cannot afford costly legal representation.”<sup>106</sup> In addition to granting a reprieve to all individuals on death row, the Governor ordered the death chamber dismantled and halted all steps to devise a new method of execution.<sup>107</sup>

In light of the Governor’s moratorium, the parties settled the court challenge to California’s execution protocol, though the case will automatically be reinstated should Governor Newsom’s moratorium be lifted.<sup>108</sup>

### E. Most states do not have the death penalty in practice or effect.

At its height in 2004, the death penalty was law in the United States in all but 12 states.<sup>109</sup> Since 2004, the death penalty has been overturned – either through legislative repeal or

93 See Ken Armstrong, *Death By Deadline: Part One*, The Marshall Project, Nov. 15, 2014 (section titled “Passing habeas reform”).

94 See 28 U.S.C. § 2254(d) (relief is only available if state court decision “was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.”). See also Radley Balko, *Opinion: Joe Biden Fought This Destructive Law. 25 Years Later He Can Help Repeal It*, Washington Post, April 27, 2021 (“This pernicious, dizzyingly complicated law created a minefield of procedural barriers and deadlines that, if not scrupulously followed, prohibit federal courts from reviewing the merits of state convictions.”)

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

96 Information provided by the Office of the State Public Defender.

97 *Id.* Though only 11 people have been executed after completing the post-conviction process, the total number of people executed in California since reinstatement of the death penalty is 13 because 2 individuals waived their appeals and volunteered for execution. See Death Penalty Information Center, *Execution Volunteers*.

98 This information comes from the Office of the State Public Defender, *California’s Broken Death Penalty*, March 2021, 58–59, as well as supplemental information from the Office of the State Public Defender and the Habeas Corpus Resource Center provided in September 2021.

99 *Id.* at 62–63. The California Supreme Court has reversed death sentences 128 times in 759 direct appeals. Forty of the reversals were related to guilt-phase issues and 88 were related to penalty phase issues. Thirty-seven state habeas corpus petitions have been granted, including 12 on guilt-phase issues and 25 on penalty issues.

100 *California’s Broken Death Penalty* at 59. Almost half of these reversals (59) occurred between 1979 and 1986, when the California Supreme Court reversed 92% of the death penalty cases it reviewed. See CCFJA Report at 120–21, n.21 (2008). In 1986, three California Supreme Court justices lost reelection in a campaign “dominated by the death penalty.” Stephen B. Bright and Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. Rev. 759, 761 (1995). Since that time, the California Supreme Court has a 100% reversal rate of death penalty cases. See CCFJA Report, at 120–21, n. 21.

101 *California’s Broken Death Penalty* at 58–59.

102 Committee on Revision of the Penal Code, Meeting on Mar. 25, 2021, Part 1, 0:40:22–0:42:07.

103 *Id.* See also *California’s Broken Death Penalty* at 60 (69% of people who were resentenced received a non-death sentence).

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

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

106 *Id.*

107 *Id.*

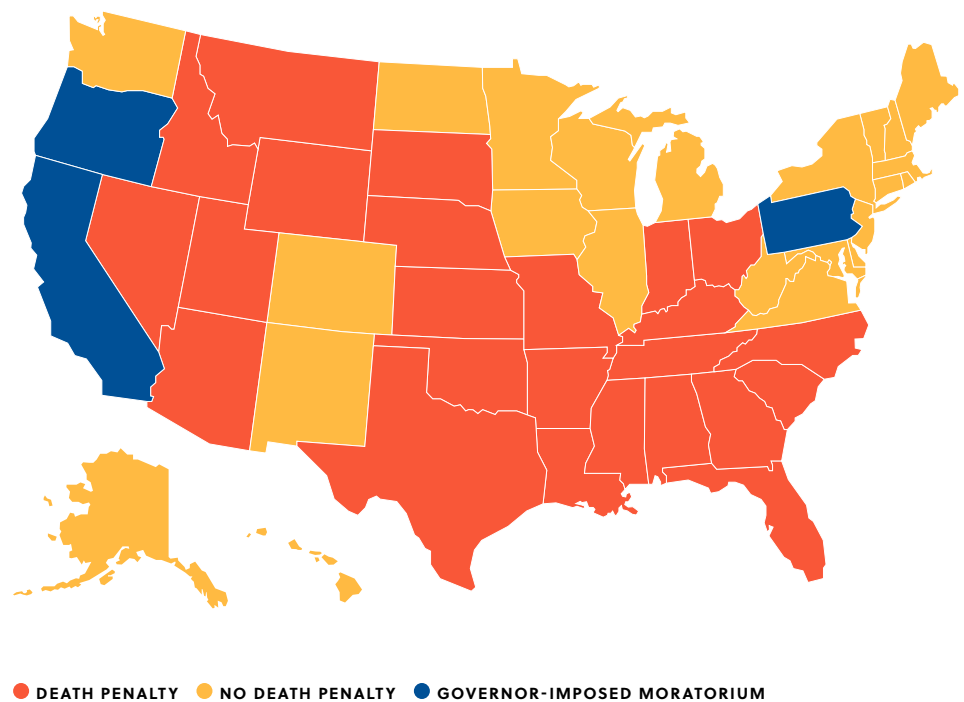
108 *Morales v. Diaz*, 3:06-cv-00219-RS (N.D. Cal. Jul. 24, 2020), ECF No. 755.

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

through decisions of the state’s highest court – in 11 additional states.<sup>110</sup> In March 2021, Virginia became the 23rd – and first Southern – state to eliminate the death penalty.<sup>111</sup> In addition, beyond California, the governors of Oregon and Pennsylvania have placed a moratorium on executions, making 26 states that do not have the death penalty in law or effect.<sup>112</sup> Another 14 states have not carried out an execution in five years.<sup>113</sup>

In total, 39 states have not carried out an execution for five years or do not have the death penalty in law. Additionally, the United States Attorney General recently announced a moratorium on federal executions, citing “arbitrariness in [the death penalty’s] application, disparate impact on people of color, and the troubling number of exonerations in capital and other serious cases.”<sup>114</sup>

**FIGURE 3: DEATH PENALTY STATUS BY STATE**



Source: Death Penalty Information Center.

<sup>110</sup> *Id.*

<sup>111</sup> Whitney Evans, *Virginia Governor Signs Law Abolishing The Death Penalty, A 1st In The South*, NPR, Mar. 24, 2021.

<sup>112</sup> Death Penalty Information Center, *State by State*.

<sup>113</sup> Death Penalty Information Center, *States With No Recent Executions*.

<sup>114</sup> Memorandum of Attorney General Merrick Garland, *Moratorium on Federal Executions Pending Review of Policies and Procedures*, July 1, 2021.

<sup>115</sup> The American Law Institute, *Model Penal Code: Committee on Revision of the Penal Code*, Meeting on Mar. 25, 2021, Part 1, 0:11:00–0:11:35.

<sup>116</sup> Committee on Revision of the Penal Code, Meeting on Mar. 25, 2021, Part 1, 0:16:09–0:16:39.

In 2009, the Model Penal Code Committee at the American Law Institute voted to withdraw the model capital statute on which the California capital statute and those of many other states are based, finding that there are “institutional and structural obstacles to ensuring a minimally adequate system for administering capital punishment.”<sup>115</sup> As noted by Committee panelist Carol Steiker, co-director of the Criminal Justice Policy Program at Harvard Law School, this was the first change made to the Model Penal Code since its promulgation in 1962.<sup>116</sup>



Internationally, the death penalty is used in only a small minority of countries.<sup>117</sup> Several international treaties and covenants either restrict or prohibit use of the death penalty.<sup>118</sup> The vast majority of executions are carried out by China, Iran, Saudi Arabia, Iraq and Egypt.<sup>119</sup>

#### **IV. LEGAL PROBLEMS WITH CALIFORNIA'S DEATH PENALTY**

California's death penalty system has several legal infirmities that set it apart from other states with capital punishment.

##### **A. California's death penalty applies to almost any murder.**

As discussed above, under controlling authority from the United States Supreme Court, death penalty statutes must limit death eligibility to those most culpable for committing the gravest murders. Yet California's death penalty statute fails to meaningfully narrow death eligibility because nearly all homicides fit under one or more special circumstance. The most recent research shows that 95% of all first-degree murder convictions and 59% of all second-degree murder and voluntary manslaughter convictions were technically death eligible.<sup>120</sup> Other research made similar findings.<sup>121</sup>

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

California juries are not required to unanimously agree on aggravating factors during penalty phase deliberations of a death penalty trial.<sup>122</sup> They also are not required to find beyond a reasonable doubt that aggravating factors outweigh mitigating factors or that death is the appropriate punishment.<sup>123</sup> As a result, individual jurors could have different assessments of the truth or weight of the aggravating and mitigating factors. And some jurors might vote for death, despite lingering concerns consistent with reasonable doubt as to the appropriate punishment.

The California Supreme Court opined at length about these issues in a recent opinion.<sup>124</sup> Though unanimously rejecting that death sentences should be reversed for these reasons, the Court noted that the Attorney General had acknowledged that requiring jury unanimity and findings beyond a reasonable doubt "would improve our system of capital punishment and make it even more reliable."<sup>125</sup>

In the same case, Governor Newsom took the unprecedented step of filing an amicus brief urging the Court to require unanimity and findings beyond a reasonable doubt for juries making penalty phase decisions to help remove "the intolerable influence of racial bias."<sup>126</sup> The Governor noted that "[n]ationally and in California, non-unanimous verdicts have been intended to entrench White jurors' control of deliberations."<sup>127</sup> An amicus brief on behalf of the District Attorneys for the counties of Los Angeles, San Joaquin, Contra Costa, Santa Clara and San Francisco was filed in the same case, arguing that the failure to instruct on unanimity and to require findings beyond a reasonable doubt amplifies the arbitrariness in application of California's death penalty.<sup>128</sup>

<sup>117</sup> Death Penalty Information Center, *International*.

<sup>118</sup> Amnesty International, *Death Penalty*.

<sup>119</sup> *Id.*

<sup>120</sup> David C. Baldus, et al., Furman at 45: *Constitutional Challenges from California's Failure to (Again) Narrow Death Eligibility*, 16(4) J. Emp. Legal Studies 693, 707–724 (2019) (study of thousands of California convictions for first-degree murder, second-degree murder and voluntary manslaughter with offense dates between January 1978 and June 2002 concluded that 95% of all first-degree murder convictions were death-eligible, the highest eligibility rate in the country. Of the death-eligible cases, only 4.3% resulted in a death sentence).

<sup>121</sup> Steven F. Shatz and Naomi R. Shatz, *Chivalry Is Not Dead: Murder, Gender and the Death Penalty*, 27 Berkeley J. Gender L. & Just. 64, 93 (2012) (study of all first-degree murder convictions from 2003–2005 found that 84.6% of convictions were death-eligible but that death sentences were imposed in only 5.5% of cases); Steven F. Shatz and Nina Rivkind, *The California Death Penalty Scheme: Requiem for Furman?*, 72 N.Y.U. L. Rev. 1283, 1332–43 (1997) (study sampled appellate first-degree murder cases from 1988–1992 and found that 84% of first-degree murder convictions were factually death-eligible but that death sentences were imposed in only 9.6% of the cases).

<sup>122</sup> *People v. McDaniel*, 12 Cal. 5th 97, 2021 WL 3779752, \*23–\*27 (Cal. Aug. 26, 2021).

<sup>123</sup> *Id.* at \*28–\*32.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at \*23.

<sup>126</sup> Brief Of Amicus Curiae The Honorable Gavin Newsom In Support Of Defendant And Appellant in *People v. McDaniels*, No. S171393, 76.

<sup>127</sup> *Id.* at 22.

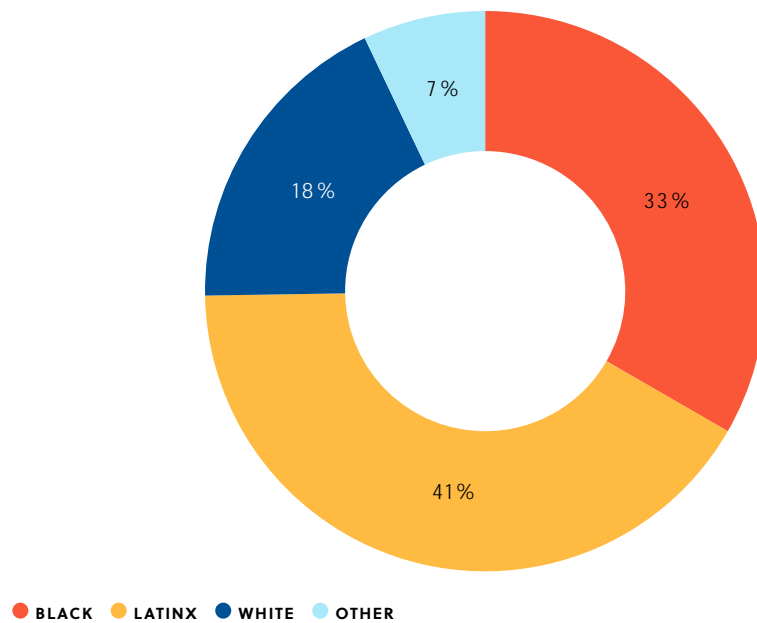
<sup>128</sup> Brief Amici Curiae of Six Present or Former District Attorneys in *People v. McDaniel*, No. S171393.







**FIGURE 4: NEW DEATH SENTENCES IMPOSED IN CALIFORNIA BY RACE OF DEFENDANT (2010–2020)**



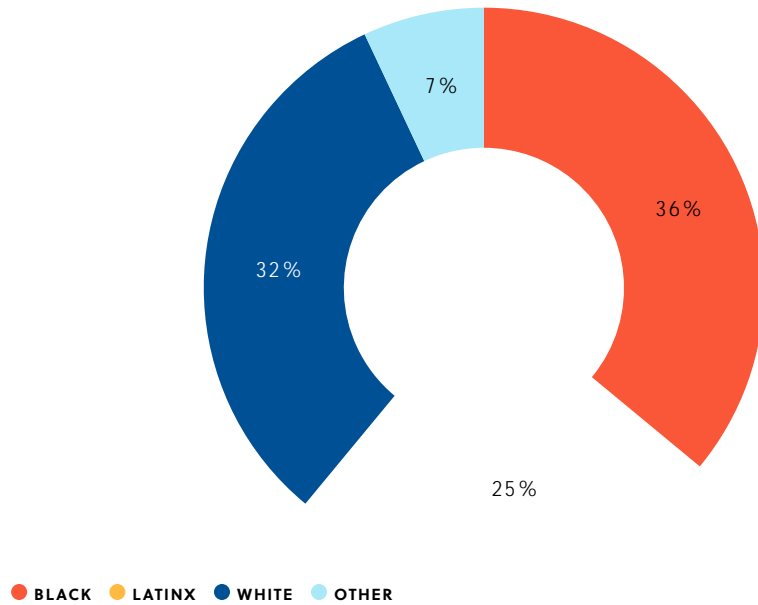
Source: California Department of Justice, *Homicide in California* reports from 2010–2020, Table 36.

- In Orange County, 77% of the people sentenced to death were people of color. Black people made up 2% of the county population during this time but accounted for 31% of the 13 new death sentences. From 2010–2015, Orange County’s capital sentencing rate was 5.4 times the rest of the state per 100 homicides.<sup>167</sup> During the same time, 90% of the individuals sentenced to death in the county were people of color.<sup>168</sup> Of the 60 people on death row who were sentenced in Orange County, 62% are people of color.
- In Kern County, 63% of people sentenced to death were people of color. Black people made up 6% of the county population during this time but they accounted for 25% of the 8 new death sentences. Of the 27 people currently on death row who were sentenced in Kern County, 48% are people of color.
- In San Bernardino County, 50% of people sentenced to death were people of color. Black people made up 9% of the county population during this time but accounted for 38% of the 8 new death sentences. Of the 39 people on death row who were sentenced in San Bernardino County, 62% are people of color.

<sup>167</sup> Fair Punishment Project, *Too Broken to Fix Part II: An In-depth Look at America’s Outlier Death Penalty Counties*, 39 (2016).

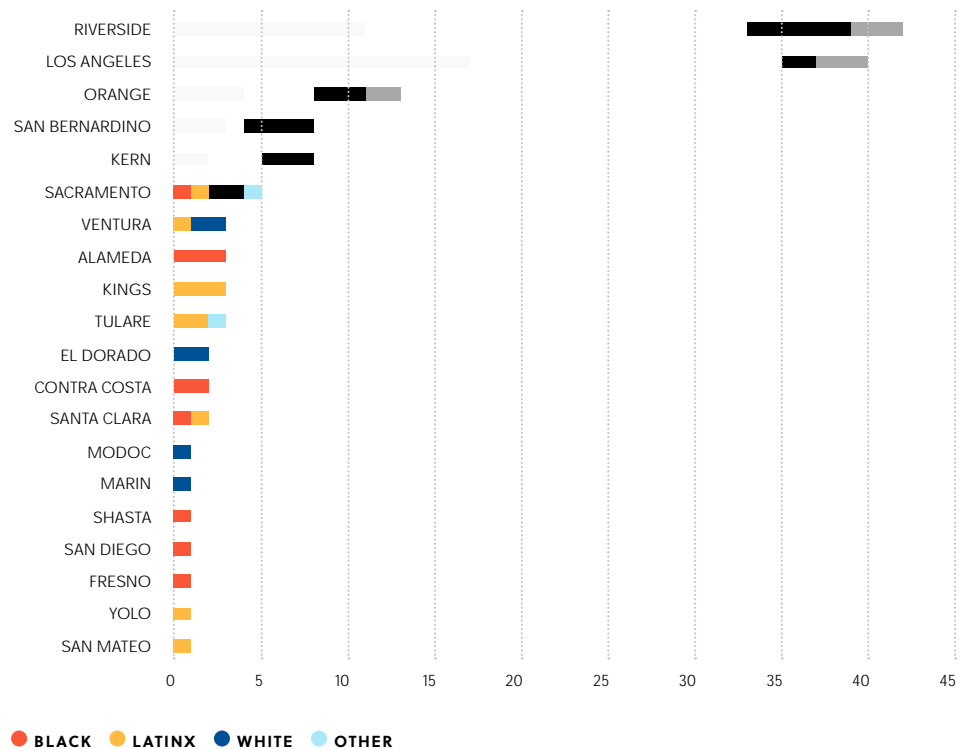
<sup>168</sup> *Id.* at 43.

**FIGURE 5: RACIAL DEMOGRAPHICS OF CALIFORNIA'S DEATH ROW**



Source: Analysis of data provided by CDCR Office of Research.

**FIGURE 6: DEMOGRAPHICS OF NEW DEATH SENTENCES IMPOSED IN CALIFORNIA BY COUNTY (2010–2020)**



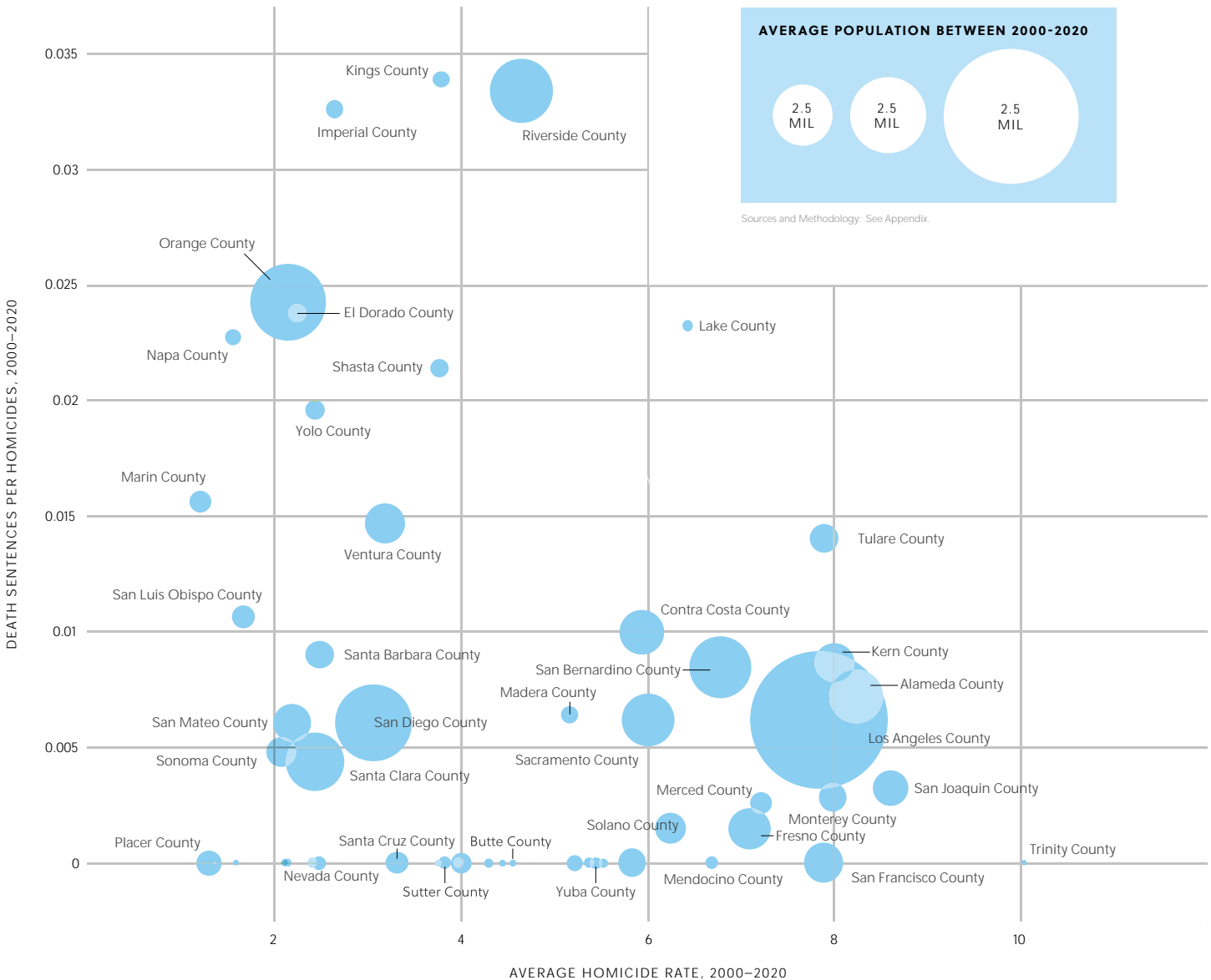
Source: California Department of Justice, *Homicide in California* reports from 2010–2020, Table 36.







FIGURE 8: DEATH PENALTY USAGE RATE COMPARED TO HOMICIDE RATE



One California county – Riverside – sentences people to death so frequently that it has become a national outlier. In 2015, Riverside County sentenced more people to death than every other state in the country, except for Florida and California itself.<sup>188</sup> In 2017, three counties accounted for 31% of new death sentences in the entire United States: Clark County in Nevada, Maricopa County in Arizona and Riverside County.<sup>189</sup> In 2020, Riverside County was responsible for three of the five death sentences in California.<sup>190</sup>

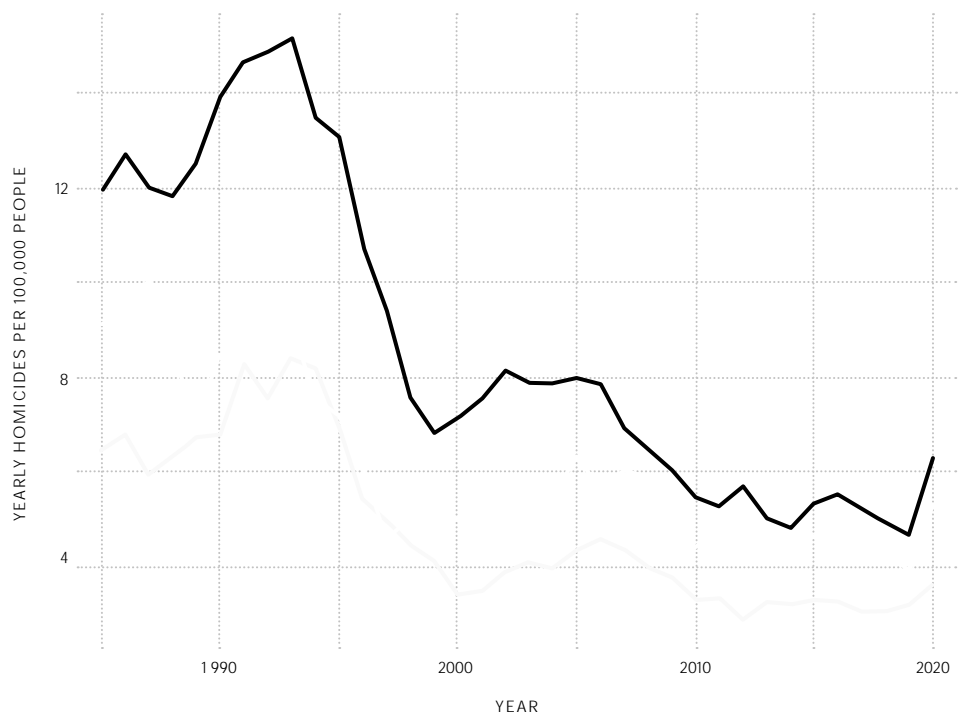
The geographic disparities in death sentencing cannot be explained by some counties having higher homicide rates. As Figure 8 shows, counties with high homicide rates are not the ones that use the death penalty the most, and counties with very similar homicide rates differ in their usage of the death penalty. For example, Santa Clara County and Orange County both have homicide rates around 2.5 per 100,000

188 Fair Punishment Project, *Too Broken to Fix: Part I: An In-Depth Look at America's Outlier Death Penalty Counties*, 31 (2016).  
 189 Death Penalty Information Center, *DPIC Year End Report: New Death Sentences Demonstrate Increasing Geographic Isolation*, Dec. 15, 2017.  
 190 Analysis of data provided by CDCR Office of Research.

residents but have varied greatly in their application of the death penalty over the past two decades.

As shown in Figure 9, homicide rates have fallen at similar rates over the past 30 years both in counties that use the death penalty more frequently than others and in counties that do not use it all.

**FIGURE 9: CHANGES IN HOMICIDE RATES GROUPED BY DEATH PENALTY USAGE**

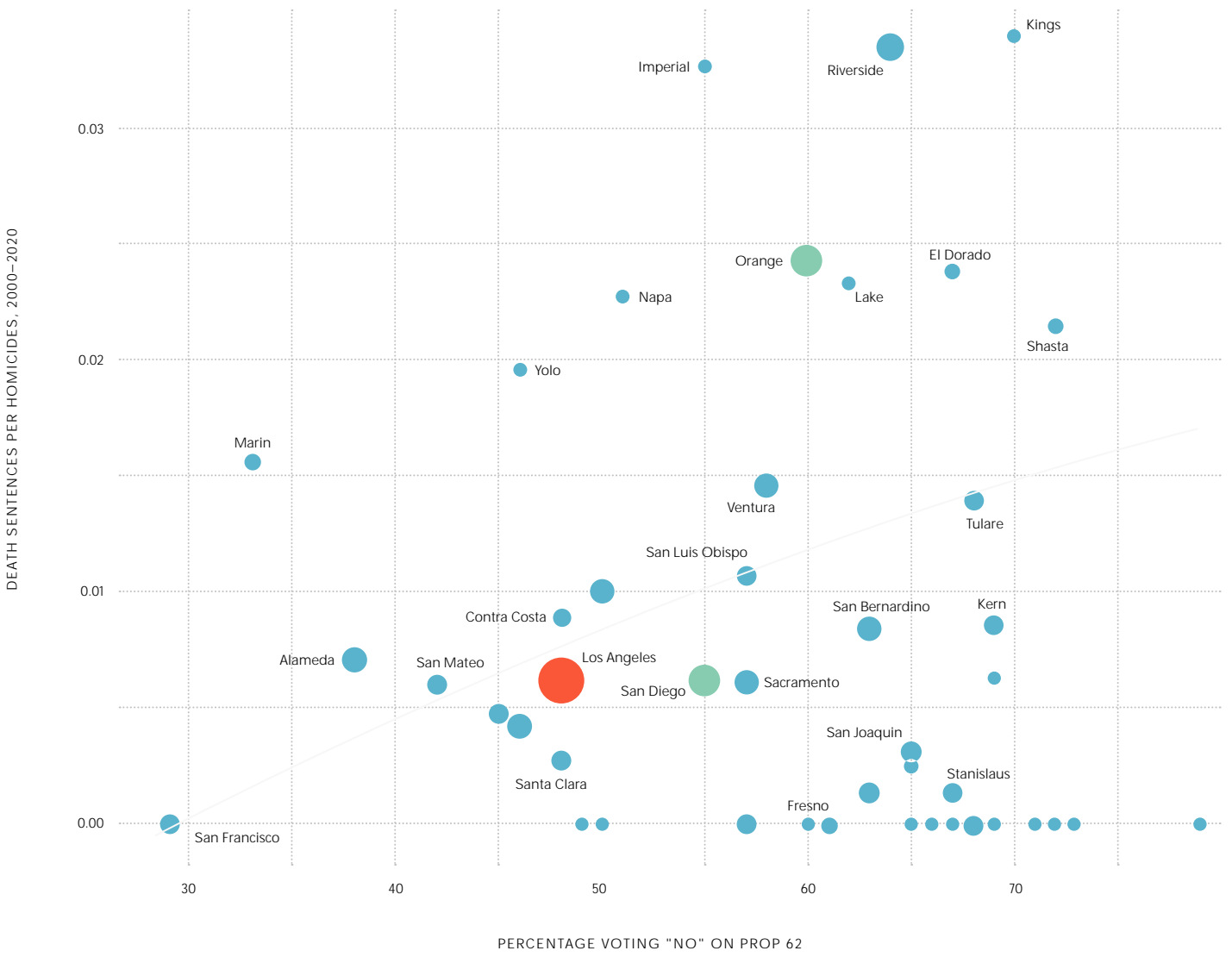


LIKELIHOOD OF DEATH SENTENCE PENALTY ● HIGHER ● LOWER ● NONE

Sources and Methodology: See Appendix.

While a county's homicide rate does not explain its death penalty usage, other factors not related to crime may. Unsurprisingly, there is a correlation between support for the death penalty in a county and usage. In counties where the population more heavily favors the death penalty, more people are sentenced to death per homicide. As shown in Figure 10, California counties with a higher percentage of votes against abolishing the death penalty – “No” votes on Proposition 62 in 2016 – have a higher rate of death penalty sentences per homicide.

FIGURE 10: SUPPORT FOR PROPOSITION 62 AND DEATH SENTENCES



AVERAGE POPULATION BETWEEN 2000-2020    ● 2.5 MILLION    ● 5 MILLION    ● 7.5 MILLION

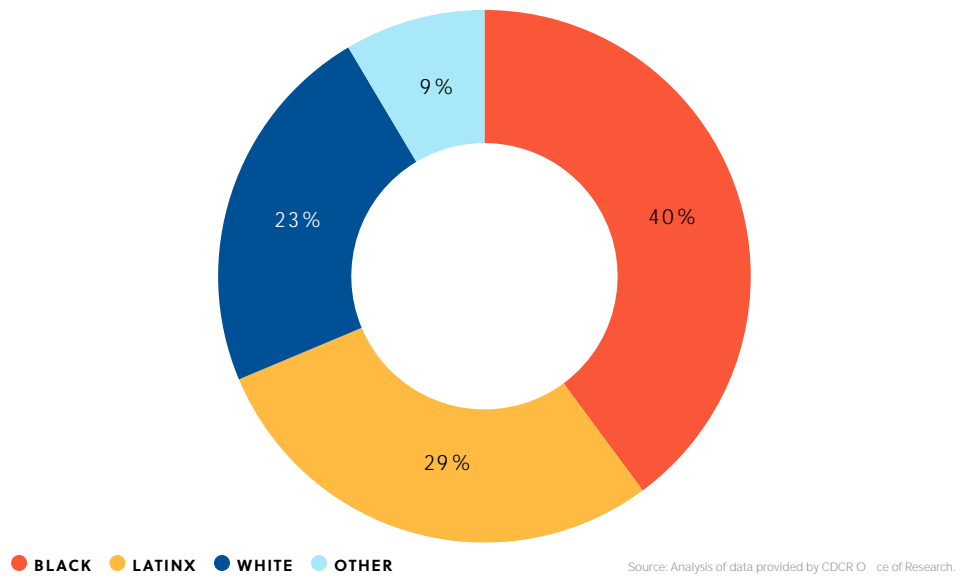
Sources and Methodology: See Appendix.



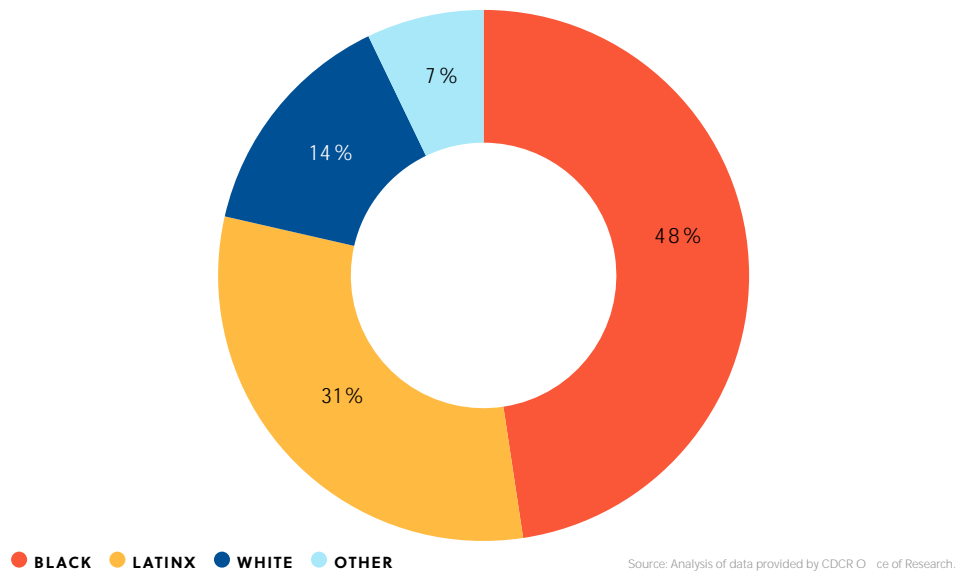


Racial disparities are especially pronounced in young people sentenced to death. While 68% of all people on death row are people of color, the percentage jumps to 77% for people who were 25 or younger at the time of their offense, and to 86% for people who were 18 at the time of their offense.<sup>212</sup>

**FIGURE 12: RACIAL DEMOGRAPHICS OF PEOPLE ON DEATH ROW WHO WERE 25 OR YOUNGER AT THE TIME OF THEIR OFFENSE**



**FIGURE 13: RACIAL DEMOGRAPHICS OF PEOPLE ON DEATH ROW WHO WERE 18 AT THE TIME OF THEIR OFFENSE**



<sup>212</sup> This data, as well as that used in the following two figures, was provided by CDCR Office of Research in September 2021.



represent people sentenced to death in their federal habeas proceedings, which has been estimated to cost the federal government more than \$775 million for California death penalty cases from the 1970s through 2010.<sup>234</sup>

Finally, it costs at least tens of millions of dollars more each year to house people on death row compared to a non-death row prison setting.<sup>235</sup> Though Proposition 66 gave the California Department of Corrections and Rehabilitation authority to move people off death row, only 64 individuals have been transferred to other prisons pursuant to Proposition 66.<sup>236</sup>

### **B. People on death row wait decades to complete post-conviction review.**

A person sentenced to death in California can expect to wait more than 30 years before their case moves through all phases of post-conviction review.<sup>237</sup>

While the proponents of Proposition 66 promised to speed up cases by modifying the state habeas process, the average time it takes for a capital case to proceed from a sentence of death to final resolution of habeas proceedings has continued to increase. In 2020, the average time from sentencing to resolution of the state habeas proceedings had increased to 20 years,<sup>238</sup> up from 17 years in 2015,<sup>239</sup> and 12 years in 2008.<sup>240</sup> Completing the federal habeas review process adds additional time.<sup>241</sup>

As of December 2020, the average time on death row for the 29 people who have exhausted their appeals was 33.8 years.<sup>242</sup> The four people who most recently exhausted all their state and federal appeals took between 29 and 32 years to do so.<sup>243</sup>

The main reason for these delays is a lack of qualified attorneys to handle state habeas corpus proceedings. On average, it takes 20 years for state habeas counsel to be appointed after someone is sentenced to death.<sup>244</sup> There are 363 death-sentenced people awaiting initial appointment of counsel for state habeas litigation, more than half of all people sentenced to death in California.<sup>245</sup> Eighty-five people on death row have been waiting for appointment of habeas counsel for more than 20 years.<sup>246</sup>

### **C. Proposition 66 has slowed down post-conviction proceedings.**

Despite arguments by proponents of Proposition 66 that the measure would “speed up” death penalty appeals,<sup>247</sup> its attempt to set a five-year deadline for completing state appeals was invalidated by the California Supreme Court<sup>248</sup> and other changes it made to the law have actually slowed down post-conviction proceedings.

First, by requiring that Superior Courts process habeas cases in the first instance, Proposition 66 created an additional level of review: either side may appeal the habeas decision of the Superior Court and new counsel must then be appointed in the Court of Appeals.<sup>249</sup> Because no method of paying new counsel was created with Proposition 66, 19 cases are currently stayed in the Court of Appeal waiting to have habeas counsel appointed.<sup>250</sup>

Next, under Proposition 66, Superior Courts are now in charge of appointing habeas counsel instead of the California Supreme Court.<sup>251</sup> But no new habeas cases have been assigned since the passage of Proposition 66 and only three new attorneys have been included in the pool of qualified capital habeas counsel.<sup>252</sup> At the end of 2020, the same

234 *Death Penalty Debacle*, at S98–S99.

235 Voter Information Guide for 2016, General Election, 81 (2016) (Legislative Analyst’s Office analysis of Proposition 62). See also Judge Arthur L. Alarcon and Paula M. Mitchell, *Costs of Capital Punishment in California: Will Voters Choose Reform This November?*, 46 *Loy. L.A. L. Rev.* S1, S4, n.3 (2012) (discussing study showing at least \$40,000 more per person); CCFJA Report at 146 (\$90,000 per year).

236 Information provided on July 27, 2021, by CDCR Division of Adult Institutions.

237 HCRC Report at 11–13 (noting among other delays that it takes an average of 20 years to appoint counsel for state habeas corpus proceedings, an average of four years for decisions in state habeas corpus cases after briefing is completed, and another 10 years for federal review). See also *California’s Broken Death Penalty* at 58.

238 HCRC Report at 11.

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

240 CCFJA Report at 123.

241 HCRC Report at 12–13 (federal review takes at least 10 years).

242 HCRC Report at 13.

243 *Carter v. Broomfield*, 141 S. Ct. 1398 (Feb. 22, 2021) (denying certiorari where death sentences were imposed in 1990 and 1991); *Staten v. Davis*, 141 S. Ct. 1502 (March 1, 2021) (denying certiorari where death sentence was imposed in 1992); *Berryman v. Davis*, 2021 WL 1951885 (Mem.) (May 17, 2021) (denying certiorari where death sentence was imposed in 1988); *Kipp v. Davis*, 2021 WL 4508035 (Oct. 4, 2021) (denying certiorari where death sentence was imposed in 1989).

244 HCRC Report at 10.

245 *Id.*

246 HCRC Report at 9. To address this problem, the Commission on the Fair Administration of Justice recommended in 2008 that California fund an expansion of the HCRC from 34 to 150 lawyers and increase the budget by 500%. CCFJA Report at 135. This recommendation has never been adopted and HCRC continues to employ the same number of attorneys 13 years later.

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

248 *Briggs v. Brown*, 3 Cal.5th 808, 859 (2017) (deadline was not mandatory requirement but “an exhortation to the parties and the courts to handle cases as expeditiously as is consistent with the fair and principled administration of justice”).

249 Penal Code § 1509.1(a); Cal. Rule of Court 8.391(a)(3).

250 HCRC Report at 10–11.

251 Government Code § 68662.

252 HCRC Report at 10 n. 3, 25.





# Information about the Committee on Revision of the Penal Code

## Information about the Committee on Revision of the Penal Code

### INFORMATION ABOUT THE COMMITTEE ON REVISION OF THE PENAL CODE

The Committee on Revision of the Penal Code was established in 2020 to study the Penal Code and make recommendations to simplify and rationalize criminal law in California.<sup>266</sup>

### MEMBERS OF THE COMMITTEE AND OTHER PERSONNEL

The following persons were members of the Committee when this report was approved:

*Chair*

Michael Romano

*Legislative Members*

Senator Nancy Skinner

Assemblymember Alex Lee

*Gubernatorial Appointees*

Hon. Peter Espinoza

Hon. Carlos Moreno

Priscilla Ocen

The following persons are on the Committee's legal staff:

Thomas M. Nosewicz

*Legal Director*

Rick Owen

*Staff Attorney*

The following persons provided substantial support for the Committee's legal work for this report:

Lara Hoffman

Natasha Minsker

The following persons are staff of the California Law Revision Commission and provide managerial and administrative support for the Committee:

Brian Hebert

*Executive Director*

Barbara Gaal

*Chief Deputy Director*

Debora Larrabee

*Chief of Administrative Services*

Data analysis in this report was performed by OpenLattice, Inc., with assistance from Steven Raphael for Figures 8, 9, and 10. This report was copy edited by Marissa Internicola and designed by Taylor Le.

#### **COMMITTEE PANELISTS**

The following persons appeared as panelists before the Committee on March 25, 2021 (in alphabetical order):

Sean Kennedy

*Executive Director, Center for Juvenile Law and Policy, Loyola Law School*

Elisabeth Semel

*Director, UC Berkeley Death Penalty Clinic*

Steven Shatz

*Professor Emeritus, University of San Francisco School of Law*

Carol Steiker

*Co-Director, Criminal Justice Policy Program at Harvard Law School*

Jordan Steiker

*Director, University of Texas at Austin School of Law Capital Punishment Center*

Dr. Sherod Thaxton

*Professor of Law, UCLA School of Law*

Dr. George Woods

*President, International Academy of Law and Mental Health*

#### **ACKNOWLEDGMENTS**

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# Appendix of Data Sources and Methodology

## Appendix of Data Sources and Methodology

### APPENDIX OF DATA SOURCES AND METHODOLOGY

#### Figure 1 and 2 Sources:

*Executions:* CDCR, *Inmates Executed 1978 to Present*.

*Non-execution deaths:* CDCR, *Condemned Inmates Who Have Died Since 1978* (as of September 22, 2021).

*Initial sentences:* California Department of Justice, *Homicide in California*, Table 35 (2020). People with multiple sentences in the same county in the same year are counted once. New death sentences imposed in 2021 are based on data from CDCR.

*Resentences:* For 1978–2002, California Department of Justice, *Homicide in California*, Table 24 (2002). For 2003–2021, Data provided by Habeas Corpus Resource Center.

*Total number of condemned people at end of year:* For 1978–2011, California Department of Justice, *Homicide in California*, Table 35 (2011). For 2012–2019, NAACP Legal Defense and Educational Fund, Inc., *Death Row U.S.A.* reports. For 2020, Habeas Corpus Resource Center, *Annual Report 2020*, 8. For 2021, CDCR, *Condemned Inmate List* (as of September 3, 2021).

#### Figure 8 Methodology:

To make this scatterplot, we find the total number of death penalty sentences per county between 2000–2020 and divide that value over the number of total homicides per county between 2000–2020. The average homicide rate is found by taking the average of the total homicides per year over the population of that year between 2000–2020.

For the purposes of visualization, Colusa county (average population 20,824 people, fourteen total murders in 2000–2020, and two death penalty sentences) and Modoc county (average population 9,291, thirteen total murders between 2000–2020, and one death sentence) have been removed from the sample. This is due to the low total murders between 2000–2020 compared to other counties in California, causing the ratio of total murders and death penalties to be significantly higher than other counties. Given the low number of homicides, we are unable to draw concrete conclusions from these two counties.

#### Figure 9 Methodology:

To make this graphic, we find the total number of death penalty sentences per county between 2000–2020 and divide that value over the number of total homicides per county between 2000–2020. We define this as the propensity of a county to impose death penalty sentences. Then, we divide the counties into three groups of propensities: no propensity (between 2000–2020, the county has not sentenced anyone to death), lower propensity, and higher propensity (between 2000–2020, the county was less likely or more likely to sentence someone to death).

compared to other counties in California). The cut-off between the lower and higher likelihood is based on the median calculated propensity, excluding counties without any death sentences. We take the average of the homicide rate between the three groups, weighted by population of the county by year to get the homicide rate by year.

The higher propensity counties are Contra Costa, Marin, Yolo Ventura, Tulare, Napa, Orange, El Dorado, Shasta, Lake, Imperial, Riverside, Kings, Modoc, San Luis Obispo, and Colusa. The lower propensity counties are Fresno, Kern, Stanislaus, Merced, Monterey, San Joaquin, Sonoma, Santa Clara, San Mateo, San Diego, Los Angeles, Madera, Sacramento, Alameda, San Bernardino, and Santa Barbara.

#### **Figure 10 Methodology:**

To make this scatterplot, we find the number of death penalty sentences per county between 2000–2020 and divide that value over the number of total homicides per county between 2000–2020. We then create a scatterplot based on Proposition 62 “No” votes and the death penalty propensity. To show the overall trend of the relationship between Proposition 62 “No” votes and death penalty propensity, we include a quadratic trend line, weighted by the population of each county.

#### **Figures 8, 9, and 10 Sources:**

*Homicide rate:* Homicide data is from California Department of Justice’s OpenJustice data set. County population data is from U.S. Census Bureau.

*Death penalty sentences imposed:* Data provided by the Habeas Corpus Resource Center. This data includes all death sentences imposed per county per year, including resentences.

*Proposition 62 voting data:* California Secretary of State, *Statement of Vote*, General Election, November 8, 2016, 71–73.